No. _____

In The
Supreme Court of the United States

JERIEL EDWARDS,

Petitioner,

v.

STEVEN HARMON ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Scott v. Harris*, 550 U.S. 372, 380 (2007), this Court held that when a summary-judgment record includes video evidence, a court should not adopt a nonmovant's version of facts that is "blatantly contradicted by the record, so that no reasonable jury could believe it."

Petitioner sued police officers who participated in his arrest after he was found in his stationary car, intoxicated. His § 1983 suit alleged officers used excessive force when they forced petitioner to the ground, pressed on his head and back, punched and tased him, struck him with a flashlight, and placed him in a neck restraint designed to interrupt blood flow to his brain.

The officers moved for summary judgment, asserting qualified immunity and introducing evidence including one officer's bodycam video. In opposition, petitioner relied on that video to argue that genuine disputes of material fact required resolution by a jury. *See* FED. R. CIV. P. 56(c)(1). The Tenth Circuit affirmed the district court's summary judgment, stating that petitioner's failure to submit his own evidence influenced its analysis.

The question presented is:

Does *Scott v. Harris* alter, or merely implement, traditional summary-judgment requirements—especially when a nonmovant § 1983 plaintiff relies on movants' video evidence to oppose summary judgment?

PARTIES TO THE PROCEEDINGS

Petitioner Jeriel Edwards was the plaintiff in the United States District Court for the Eastern District of Oklahoma and appellant in the United States Court of Appeals for the Tenth Circuit.

Respondents Greg Foreman, Steven Harmon, Bobby Lee, and Dillon Swaim were defendants in the district court and appellees in the Tenth Circuit. City of Muskogee, Oklahoma, was a defendant in the district court.[1] An additional officer, Steven Warrior, initially was a defendant in the district court but was dropped from petitioner's Second Amended Complaint prior to the district court's summary-judgment ruling and was not a party in the Tenth Circuit.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Edwards v. Harmon, et al.*, No. CIV-18-347-SPS (E.D. Okla.) (Opinion and Order granting summary judgment issued December 16, 2019) (Pet. App. 16a-43a);
- *Edwards v. City of Muskogee, Okla., et al.*, No. 20-7000 (10th Cir.) (Order and Judgment affirming summary judgment, issued January 5, 2021) (Pet. App. 1a-15a).

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[1] The Tenth Circuit included City of Muskogee in its caption, but the district court granted the city's motion to dismiss prior to ruling on summary judgment, Pet. App. 17a n.1, and petitioner did not challenge that dismissal on appeal.

RELATED PROCEEDINGS—Continued

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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OPINIONS BELOW

The Tenth Circuit's opinion (Pet. App. 1a) is reported at 841 F. App'x 79. The Eastern District of Oklahoma's opinion (Pet. App. 16a) is available at 2019 WL 6841980.

JURISDICTION

The court of appeals entered judgment on January 5, 2021. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL, STATUTORY, AND FEDERAL-RULES PROVISIONS INVOLVED

The Fourth Amendment provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

The Seventh Amendment provides, in relevant part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved[.]" U.S. CONST. amend. VII.

Section 1983 provides, in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]" 42 U.S.C. § 1983.

Federal Rule of Civil Procedure 56 provides in relevant part:

> (a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.
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> . . . .
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> (c) PROCEDURES.
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> (1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
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> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including

> those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

FED. R. CIV. P. 56(a), (c)(1).

STATEMENT

This case arises from an encounter between petitioner, a Black male, and a group of police officers who participated in petitioner's arrest after he was found intoxicated in his stationary car in the driveway exit of a Wendy's restaurant. Petitioner was suspected of the non-violent offense of driving under the influence and does not contest that he was intoxicated. No party disputes that petitioner was disoriented and had difficulty understanding commands when confronted by officers. It is also undisputed that officers forced petitioner to the ground on his stomach with pressure on his back and that petitioner was repeatedly punched, tased, struck with a flashlight, placed in a neck restraint designed to interrupt blood flow to his brain, and suffered a broken nose during the encounter.

I. PETITIONER'S ENCOUNTER WITH POLICE

The record includes bodycam video from respondent Foreman, the first officer to arrive at the scene, and it is the lower courts' improper summary-judgment analysis of this video evidence that is at issue in this petition. The complete video is available at https://youtu.be/rdyFt9MkPpU?t=1, and starting points for segments are hyperlinked as indicated below.

Officer Foreman encounters petitioner sitting in his car, recognizes petitioner as Jeriel Edwards, and comments on petitioner's inability to comprehend directions **(Video.00:37-04:59)**.[2] On October 25, 2016, shortly after 10:00 p.m., petitioner was sitting in his car in the driveway behind a Wendy's restaurant in Muskogee, Oklahoma, when Foreman approached. Pet. App. 2a, 18a. Foreman had been

[2] In support of summary judgment, respondents submitted Foreman's bodycam video (Exhibit 6, CA10.App.111) and also created a "transcript" of the video (Exhibit 7, CA10.App.113-17) that selectively omitted audible words and added commentary characterizing respondents' and petitioner's actions, sometimes replacing spoken words with broad descriptions of events. *See generally* CA10.App.113-21; *see also*, *e.g.*, *id.* at 117 (labeling petitioner's response to commands to put his hands behind his back—"I can't do it," or possibly "I didn't do it"—with a blanket "(Unintelligible response)" (05:37)); *id*. at 119 (replacing 52 seconds of spoken words and sounds—including an officer saying, "Put him out"—with: "Another responding officer, Lieutenant Booby [sic] Lee, arrives at the scene and applies a lateral vascular neck restraint on Mr. Edwards" (07:31-08:23)); *id.* (omitting an officer's statement that: "If he'll fight, we'll get the dog" (08:49-51)). Video quotations in this petition are from the actual video, cited as "Video.[timestamp]."

flagged down in his patrol car moments before by a concerned citizen who reported a car stopped "almost in the road" for roughly an hour in a nearby Wendy's exit. Pet. App. 2a; Video.00:42-00:55. The citizen had gone over to the driver-side occupant and "stopped to ask if he's alright," reporting: "Man he is out of it." Video.00:47-00:50.

Foreman turns into the Wendy's parking lot and drives toward the car stopped in the rear exit. Pet. App. 2a. Having parked behind petitioner's car, Foreman approaches the open driver's side window, shines a flashlight inside, and says, "Hey," attempting to get petitioner's attention. Video.01:48-02:04. Petitioner looks up slowly, failing to respond as Foreman asks several times, "How's it going?" and "How ya doin'?" Video.02:04-02:20. Foreman asks for identification, Video.02:19, and as petitioner gestures but does not respond, Foreman asks twice, "Can you talk?" Video.02:20-02:33. After Foreman's request for identification, petitioner begins looking through his pockets and around his seat. Video.02:33-02:46. Foreman does not ask petitioner to stop reaching into his pockets or around the driver's seat and does not express concern or make any other statements while observing petitioner's actions. *See id.* Foreman just tells petitioner to "go ahead and put your car in park," an instruction Foreman immediately has to repeat when petitioner does not do so. Video.02:46-02:50.

As petitioner continues fumbling about, Foreman asks, "How much you had to smoke tonight?"

Video.02:54-02:56. Petitioner mumbles something and Foreman has to ask again twice for petitioner to put the car in park before petitioner complies. Video.02:55-03:13. Foreman asks once more whether petitioner has identification, and as petitioner responds "yeah," Foreman appears to recognize petitioner: "Are you Jeriel? Jeriel Edwards?" Video.03:13-03:22. Foreman then radios, asking for someone to "check a Jeriel Edwards." Video.03:25-3:30.[3]

Foreman does not express concern, make new requests, or back away from the car window after recognizing petitioner. *See* Video.03:30-03:49. Foreman watches petitioner continue to reach into his pockets and around the car until petitioner locates his wallet in a cargo pocket on his pants leg. *See id.* At that point, Foreman instructs petitioner to keep his hands out of his pockets as petitioner pulls out the wallet, hands identification to Foreman, and Foreman asks again how much petitioner has smoked that night. Video.03:49-04:04. Petitioner mumbles responses Foreman does not understand, and Foreman asks him to exit the vehicle. Video.04:04-4:24.

With the car door open, petitioner continues to fumble in his pockets and around as Foreman keeps instructing him to keep his hands out of his pockets and unbuckle his seatbelt. Video.04:24-4:40. Petitioner

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[3] State records submitted with respondents' summary-judgment motion (Exhibit 10) reflected that petitioner had encountered City of Muskogee law enforcement in the past and had prior convictions—all for non-violent, drug-possession offenses. *See* CA10.App.149-50.

instead shows Foreman his wallet and his empty hands as Foreman repeats his request that petitioner unbuckle his seatbelt. *Id.* At the same time, Foreman tells petitioner to put his wallet "on the console," and petitioner instead tries again to show Foreman his wallet and his empty hands. Video.04:40-4:53. Foreman remarks, "You can't even understand directions." Video.04:51-04:59.

In case reports and booking materials after petitioner is in custody, Foreman explains that he believed petitioner was on PCP based on petitioner's behavior, and Foreman had decided to arrest him for driving under the influence, Pet. App. 3a; CA10.App.136, a non-violent offense. Foreman's post-arrest paperwork describes petitioner as "slow to move," says petitioner "couldn't talk" and was "unable to sign" forms, and he "had a spaced out look on his face." CA10.App.129, 136.

Circumstances quickly take a turn for the worse when Officer Harmon arrives, grabs petitioner, and petitioner is forced to the ground **(Video.05:03-06:24).** As petitioner responds to Foreman's request to slowly exit the vehicle and begins to turn to face his car, a second officer, respondent Harmon, intervenes, grabs petitioner, and the encounter takes on a very different quality. *See* Video.04:52-05:18. Foreman and Harmon tell petitioner to put his hands behind his back, and Foreman holds one hand while Harmon holds petitioner's head, pushing him against the car door. Video.05:12-05:19. Petitioner asks, "What are you

doing?" and Foreman calls for backup. Video.05:13-05:17.

Within seconds of Harmon's arrival and physical interaction with petitioner, things escalate. Foreman yells for petitioner to get on the ground, and the bodycam video gets jumpy and distorted as petitioner is forced to the pavement on his hands. Video.05:18-05:30. An officer's hands are visible on petitioner's sweatshirt, which is pulled toward petitioner's hands. Video.05:25-05:26. For 59 seconds, the video shows only fragments of what is happening. Video.05:24-06:23. There are occasional glimpses of petitioner's shoulders and hands, which are outstretched by his head as he is facing the pavement, with neither his torso nor the officers' bodies on camera. *See id.* At one point, when Foreman and Harmon repeat commands for petitioner to put his hands behind his back, petitioner exclaims, "I can't do it!" or possibly, "I didn't do it!" Video.05:37-05:38.

Shortly thereafter, the video closes in on three of the officers' four hands, which are pressing petitioner's back and the back of his head toward the pavement; petitioner's shirt and sweatshirt are twisted around his shoulders, arms, and head as Foreman and Harmon continue to tell him to put his hands behind his back. Video.05:39-05:45. Petitioner can be heard asking, at least eight times, "Why are you punching me?" and "Why are you punching me, sir?" Video.05:45-06:20. But, again, neither his torso nor the officers are fully visible. *Id.* And as the officers are heard off camera repeatedly telling petitioner to put

his hands behind his back, petitioner slurs in response, "My hands behind my back." Video.05:56-05:59. As hands dart in and out of the frame and petitioner's sweatshirt appears to remain twisted around his head and upper torso, the officers tell petitioner to stop resisting, and petitioner protests, "I ain't resisting!" Video.06:19-6:23.

***Foreman tases petitioner and the video gets jumpy* (Video.06:24-07:03).** As petitioner is on the ground, now facing up, Foreman deploys his taser against petitioner's exposed upper back, and petitioner cries out, "Hey!" Video.06:24-6:28. Foreman again orders petitioner to put his hands behind his back as Harmon's hands are seen grabbing the front of petitioner's sweatshirt, which has been pulled forward and wrapped around petitioner's arms. Video.06:28-6:29. Foreman applies the taser's connecting wires to petitioner's leg. Video.06:32-06:34. As Harmon lifts petitioner up by his sweatshirt, petitioner exclaims, "My hands behind my back!" Video.06:28-06:30. Staples from the taser are visible, hanging from petitioner's exposed back as petitioner repeats, "My hands behind my back!" Video.06:36-06:38.

At that same moment, an officer's hands can be seen on top of petitioner's shoulder and outstretched arm, which is covered by the sweatshirt that got pulled over petitioner's head during the interaction. *Id.* As petitioner continues saying, "My hands behind my back," he attempts to stand up, and the video again gets jumpy, with petitioner and the officers only intermittently and partially visible. Video.06:40-6:54.

As the officers appear to force petitioner back to the ground, multiple grunts are heard but very little seen as petitioner twice asks why the officers are doing this to him. Video.06:46-07:08.

Additional officers appear on the video and Officer Lee locks his arms around petitioner's neck to interrupt blood flow to petitioner's brain **(Video.07:08-09:06).** After petitioner appears to be back on the ground, Foreman can be heard saying "stop resisting," with petitioner responding, "I'm not resisting." Video.07:08-7:28. One of the officers can be seen striking at petitioner's body two times, but the contact is unclear. Video.07:19-07:22. An officer's flashlight can be seen raised above and moving toward petitioner, Video.07:27-29, and Foreman then yells, "Let go of me," Video.07:29-07:30, but the video does not clearly show where the flashlight made contact or what contact prompted Foreman's command. Video.07:26-7:31.

Seconds later, the camera briefly settles on petitioner, seated, slumped with an officer's hand pressing down and forward on the back of petitioner's neck. Video.07:35-07:39. The video grows jumpy again, but petitioner can be seen in that same slumped position. Video.07:48-08:02. An officer's voice says, "Put him out," Video.08:02-08:04, and then respondent Lee's arms lock around petitioner's neck, and Lee's hands cover petitioner's nose and mouth. Video.08:03-08:10. Multiple officers converge and handcuff petitioner. Video.08:16-09:08. A jumble of arms and heads pop in and out of the frame,

and grunting can be heard in the background as officers tell petitioner to "Relax." Video.08:16-09:06. An unseen officer says, "If he'll fight, we'll get the dog," Video.08:49-08:51, but as the camera pulls back from the scrum petitioner's legs can be seen outstretched on the ground, motionless. Video.08:50-08:52.

***Aftermath* (Video.09:11-10:25).** After petitioner is cuffed and lying against the pavement, officers begin to back away. Video.09:11-09:30. An officer crouches over petitioner's face-down body and leans his knee and hand on petitioner's unmoving shoulder and back for 33 seconds as officers discuss whether anybody needs EMS. Video.09:39-10:03; Pet. App. 22a. Foreman and another officer say EMS should be called for petitioner. Video.09:45-09:50. Petitioner was admitted to the hospital because he "had become 'unresponsive,'" and it was confirmed that petitioner suffered a broken nose during the encounter. Pet. App. 8a.

II. PROCEDURAL BACKGROUND

Petitioner sued respondents under 42 U.S.C. § 1983, alleging they unreasonably used excessive force during his arrest in violation of the Fourth Amendment. Pet. App. 2a, 16a. Respondents moved for summary judgment, asserting qualified immunity. Pet. App. 16a.

A. Parties' Contentions On Summary Judgment

In support of summary judgment, respondents submitted Foreman's bodycam video, a "transcript" including characterizations of parties' actions that respondents created from the video, affidavits, case-report materials, and state-court records associated with charges brought against petitioner in connection with his October 16, 2016 arrest. *See* Pet. App. 2a n.1.[4] Respondents argued that petitioner did not follow their commands to put his hands behind his back and resisted officers' attempts to cuff him. Pet. App. 19a-20a. They claimed petitioner was very strong, Pet. App. 20a; CA10.App.136, and that they were aware that PCP, which they suspected petitioner ingested, could cause "excited delirium" and cause an individual to flee. Pet. App. 20a. But respondents did not argue that petitioner actually tried to flee at any point in the encounter. *See generally* CA10.App. And they did not contest that respondent Harmon punched petitioner three times in the ribs, an officer hit petitioner with a flashlight, respondent Foreman

[4] Petitioner was charged with Driving Under the Influence of drugs and possession of PCP and Xanax (felonies) and misdemeanor resisting arrest. Pet. App. 22a. He pleaded "no contest" to those charges. Pet. App. 26a. Although respondents argued that petitioner had instead pleaded "guilty" and was therefore collaterally estopped from suing them for excessive force, the district court rejected respondents' estoppel argument as a matter of fact (Pet. App. 26a) and of law (Pet. App. 24a-26a). The district court expressly found that petitioner pleaded "no contest" to all charges, including the misdemeanor resisting-arrest charge. Pet. App. 26a; *see also* Pet. App. 8a n.4.

tased petitioner, and respondent Lee placed petitioner in a neck restraint designed to cut off oxygen flow to petitioner's brain. *See* Pet. App. 33a.[5] Nor did they contest that petitioner emerged from the encounter with a broken nose and was unresponsive upon arrival at the hospital. Pet. App. 8a.

Petitioner's opposition to summary judgment argued that respondents' compilation of "uncontroverted statements" based on Foreman's bodycam video was "for the most part misleading and false." Pet. App. 44a-45a. Going through those video-derived statements one by one, petitioner identified fourteen disputes. *See* Pet. App. 45a-48a.

In particular, petitioner emphasized that the video creates a critical, material dispute as to whether he refused to comply with commands and resisted officers or had attempted to comply, albeit slowly due to intoxication, and was prevented from placing his hands behind his back because officers threw him to the ground, pulled his shirt over his head and arms, and pushed him forward onto his hands on the pavement. Pet. App. 46a-47a, 57a-60a. Petitioner claimed the video shows that any resistance from

[5] Respondents characterized Lee's locking his hands on petitioner's neck as a "lateral vascular neck restraint," Pet. App. 33a, whereas petitioner argued that it was a "chokehold." Pet. App. 47a. Petitioner also argued that the claimed "neck restraint" is "widely criticized and controversial" and its safety disputed as a "material fact." Pet. App. 47a-48a. Lee's affidavit acknowledged the controversial history of the "bi-lateral neck restraint" he employed and confirmed that it "momentarily disrupts the carotid blood flow to the brain." CA10.App.106.

him occurred only after officers "became physically aggressive" once respondent Harmon arrived, and whatever resistance occurred "was minor and a natural response to being thrown to the ground." *See* Pet. App. 59a-61a.

B. The District Court Grants Summary Judgment.

In its summary-judgment opinion, the district court summarized the parties' disputed assertions based on the video. Pet. App. 18a-22a. When it discussed the three factors for analyzing Fourth Amendment excessive-force claims set forth in *Graham v. Connor*, 490 U.S. 386, 396 (1989), the district court concluded that the first *Graham* factor, severity of the crime, "weighs slightly in favor" of petitioner. Pet. App. 36a. Although petitioner's encounter with respondents occurred while he was being "arrested for several drug-related felonies," and felonies are more serious, the district court emphasized that all of the drug offenses were non-violent. *Id.*

But the court granted summary judgment after concluding that the second factor, immediacy of harm, and the third factor, resistance, weighed in respondents' favor. Pet. App. 36a-38a. In determining that the force used was reasonable, the district court focused on petitioner's intoxication, confusion, and resistance in some form without analyzing what a reasonable juror could conclude from the video about the parties' extensive disputes over respondents' and

petitioner's actions during the encounter. *See* Pet. App. 36a-40a. The court also held that, even if the force had been unreasonable, the officers would be entitled to qualified immunity because the law was not clearly established that respondents' uses of force were unconstitutional in the circumstances presented. *See* Pet. App. 40a-43a.

C. The Tenth Circuit Affirms.

On appeal, the Tenth Circuit affirmed, holding that respondents' uses of force were not unreasonable under *Graham*. Pet. App. 14a-15a. The opinion includes a "Background" facts section that exclusively cites respondent-generated exhibits submitted in support of their motion for summary judgment. *See* Pet. App. 2a-9a (citing Appendix pages corresponding to affidavits from respondents Foreman, Lee, and Harmon, case reports from Foreman and Lee, and the respondent-created "transcript" of the video that omits some audible words and includes characterizations of parties' actions).

Although the Tenth Circuit explained that it also relied on respondents' bodycam-video exhibit along with respondents' other exhibits in "recounting background facts," Pet. App. 2a n.1, the "Background" section of the opinion does not describe or refer to any portions of the video. *See generally* Pet. App. 1a-9a. And it does not mention the genuine disputes of material fact petitioner catalogued in opposing summary judgment *based on respondents' video exhibit*. *See id.* 1a-15a, 44a-48a.

Despite the permissibility of a nonmovant using a movant's evidence to identify factual disputes in opposing summary judgment, *see* FED. R. CIV. P. 56(c)(1), the Tenth Circuit emphasized that petitioner "submitted no evidence" of his own. Pet. App. 1a n.1. And the court then cited that absence of independent evidence as a reason to alter summary-judgment norms. *See id.* The court acknowledged that facts, at the summary-judgment stage, usually are viewed in the light most favorable to the nonmovant, and "we ordinarily accept the plaintiff's version of the facts" when "determining whether qualified immunity applies." Pet. App. 2a n.1 (quoting *Redmond v. Crowther*, 882 F.3d 927, 935 (10th Cir. 2018)). But the court stated that it would not accept petitioner's version of the facts to the extent it conflicted with respondents' summary-judgment submissions. Pet. App. 2a n.1 ("In opposing summary judgment in the district court, Edwards submitted no evidence. Thus, to the extent Edwards asserts a factual version that conflicts with this universe of evidence, we do not adopt his version."). The result was a "Background" section citing solely to, and mirroring, respondents' written evidence—ignoring petitioner's version of events based on respondents' *video* evidence. *See generally* Pet. App. 1a-15a.

In support of its approach, the court cited circuit precedent reflecting the rule from *Scott v. Harris*, 550 U.S. 372 (2007), that, when the record includes a video, a court should not adopt a plaintiff's version of the facts that is "blatantly contradicted by the record,

so that no reasonable jury could believe it." *See* Pet. App. 2a n.1 (citing *Redmond*, 882 F.3d at 935). Because the court stated that it would disregard petitioner's video-based version of facts to the extent it conflicted with respondents' "universe of evidence" supporting their motion for summary judgment, Pet. App. 2a n.1, the court essentially adopted respondents' written version of facts. And it aligned its inferences from the video with respondents' written narrative. *See id.* 2a n.1, 13a. The court dismissed petitioner's video-based disputes and stated that petitioner's version of facts "conflicts" with the record without drawing any inferences from the video in his favor. Pet. App. 2a n.1, 13a-14a.

SUMMARY OF ARGUMENT

At a moment in history when videos of citizens' interactions with police are at the forefront of national discourse, there is an urgent need for this Court to clarify the proper standard governing video evidence used to support or oppose a motion for summary judgment in a civil-rights case under § 1983. Widespread inconsistency and confusion exists among lower courts as to whether *Scott v. Harris* licenses courts to interpret video evidence at the summary-judgment stage to decide which party's version of events a video best supports, or instead requires that courts, consistent with traditional summary-judgment rules, put aside their interpretations of what a video shows, draw inferences from video evidence in a

nonmovant's favor, and evaluate only whether a reasonable jury could adopt the nonmovant's version of events. A civil-rights plaintiff's path to a jury may depend—as it did for petitioner—on inferences from video evidence. And too many courts, like the court below, are blocking that path through analyses that cannot be squared with this Court's summary-judgment jurisprudence or Federal Rule of Civil Procedure 56(c)(1).

In *Scott*, this Court directed courts to reject a plaintiff's version of the facts on summary judgment if it "blatantly contradicted the record, so that no reasonable jury could believe it." 550 U.S. at 380. In the succeeding 14 years, courts have used this direction—and a reference in *Scott* to viewing facts "in the light of the videotape"—to justify judicial factfinding. And the Tenth Circuit's analysis below adds an additional, improper twist, penalizing petitioner for "submit[ing] no evidence," *see* Pet. App. 2a n.1, when petitioner instead relied on respondents' video evidence in the record to demonstrate genuine disputes of material fact—something Rule 56(c)(1) expressly allows. While some courts have followed the correct procedure of drawing all inferences from video evidence in the nonmovant's favor and asking whether any reasonable jury could find for the nonmovant, misapplication of *Scott* is widespread and continuing, showing no sign of being resolved without this Court's intervention.

Given the increasing prevalence of video evidence of civilian-police disputes, including bodycam, dashcam, and bystander recordings, it is essential to preserve plaintiffs' rights to have genuine, material fact disputes based on video evidence—like disputes based on other types of evidence—interpreted by a jury of their peers. This Court should grant the petition and clarify the proper standard for analyzing video evidence in a summary-judgment record.

REASONS TO GRANT THE PETITION

I. THE TENTH CIRCUIT'S IMPROPER SUMMARY-JUDGMENT ANALYSIS REFLECTS WIDESPREAD CONFUSION AND INCONSISTENCY AMONG COURTS OF APPEALS AS TO WHETHER *SCOTT V. HARRIS* ALTERED SUMMARY-JUDGMENT RULES WHEN A § 1983 PLAINTIFF RELIES ON VIDEO EVIDENCE TO ESTABLISH MATERIAL FACT DISPUTES.

A. The Tenth Circuit's Approach Cannot Be Reconciled With *Scott v. Harris*, *Tolan v. Cotton*, Or Federal Rule Of Civil Procedure 56(c)(1).

The Tenth Circuit's casual disregard of both petitioner's version of facts and his identification of genuine disputes of material fact based on respondents' video evidence cannot be reconciled with traditional summary-judgment requirements that protect a nonmovant's jury-trial rights. Even

in qualified-immunity cases, traditional summary-judgment standards apply. *See Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam). When deciding a case "under either prong" of qualified immunity, "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Id.* But that is exactly what happened below. As in *Tolan*, the Tenth Circuit "failed to view the evidence at summary judgment in the light most favorable to [petitioner] with respect to the central facts of this case" and improperly "resolved disputed issues in favor of the moving party." *See id.* at 657.

As *Scott* made clear, a court's obligation to draw inferences in the nonmovant's favor is not excused when the evidence is a video. That requirement applies unless a nonmovant's version of the facts is "blatantly contradicted by the record, *so that no reasonable jury could believe it*." 550 U.S. at 380 (emphasis added). Thus, even "[i]n qualified immunity cases," applying summary-judgment rules "usually means adopting . . . the plaintiff's version of the facts." *Id.* at 378. Far from changing traditional summary-judgment rules when a case involves video evidence, *Scott* implemented traditional standards applicable in all cases. *See id.* at 378-80; *see also Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986) (explaining that on summary judgment courts must ask "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law"); FED. R. CIV. P. 56(a) (stating that

summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law").

Nothing supports the Tenth Circuit's jettisoning that traditional standard because "Edwards submitted no evidence" of his own, Pet. App. 2a n.1, and relied, instead, on the video evidence submitted by respondents. To the contrary, Rule 56(c)(1) precludes the Tenth Circuit's approach, expressly authorizing a nonmovant to assert that facts are genuinely disputed by "citing to particular parts of materials in the record," FED. R. CIV. P. 56(c)(1)—precisely what petitioner did in opposing summary judgment. *See* Pet. App. 45a-48a, 56a-64a.

The Tenth Circuit shirked its obligation to consider petitioner's video-based assertions of disputed facts and determine whether a reasonable jury could believe them. *See Scott*, 550 U.S. at 380. The court instead derived its "Background" facts from respondents' affidavits, case reports, and a selective and interpretative "transcript" respondents created. *See* Pet. App. 1a-9a; *supra* note 2; *infra* Part III (both discussing transcript distortions). The court below drew inferences in *respondents'* favor in pronouncing what the video showed, rejecting any version asserted by petitioner that "conflicts" with respondents' narrative. *See* Pet. App. 2a n.1, 12a-13a.

In multiple respects, therefore, the Tenth Circuit's analysis conflicts with *Scott*, *Tolan*, and Rule 56 itself. And it is part of a disturbing trend among the courts of appeals to change summary-judgment norms when the record includes video evidence—a rapidly increasing reality, especially in excessive-force cases. *See infra* Part II.B. This Court's guidance is essential to clarify that video evidence, like any other summary-judgment evidence, must be viewed in the light most favorable to the nonmovant—irrespective of which party introduced the video into the summary-judgment record—and courts must adopt the nonmovant's version of events unless "blatantly contradicted by the record, *so that no reasonable jury could believe it*." *Scott*, 550 U.S. at 380 (emphasis added).

B. The Tenth Circuit's Approach Exemplifies Confusion And Inconsistency Among Lower Courts Post-*Scott* When § 1983 Plaintiffs Rely On Video Evidence To Oppose Assertions Of Qualified Immunity.

In the 14 years since *Scott* was decided, too many courts, including the court below, have viewed *Scott* as a license to distort the Rule 56 inquiry into a factfinding mission to decide which version of events a video reflects, instead of asking whether video evidence is susceptible to different interpretations such that a reasonable jury *could*—not *would*—adopt the nonmovant's version. *Cf. id.* In particular, courts

have glommed onto *Scott*'s "blatantly contradicted" language, eliminating the critical qualifier that "blatantly contradicted" does not mean merely "conflicts" with movants' evidence, as the court below stated, Pet. App. 2a n.1, but means "blatantly contradicted . . . so that no reasonable jury could believe it." 550 U.S. at 380; *see* Tobias Barrington Wolff, Scott v. Harris *and the Future of Summary Judgment*, 15 NEV. L.J. 1351, 1365 (2015) ("Some lower federal courts, taking direction from *Scott*, have introduced a new component to their summary judgment analysis: a 'blatantly contradicts' test that operates prior to, rather than as an interpretation of, the deferential presumption that the non-moving party is supposed to receive." (citing district-court examples)). Although "[s]ubsequent statements by the Court make clear that *Scott* has not worked an instantaneous revolution," Wolff, *supra*, at 1353, 1366-67 (pointing to *Plumhoff v. Rickard*, 572 U.S. 765 (2014), and *Tolan*, 572 U.S. 650), "developments in the lower federal courts reveal that the uncertainty introduced by the opinion is already eroding this core feature of the summary judgment standard." *Id.* at 1353.

In *Scott*, this Court did not adopt the plaintiff-nonmovant's version of facts because it was "so utterly discredited by the record that no reasonably jury could have believed him," 550 U.S. at 380, and in that circumstance viewed facts "in the light depicted by the videotape." *Id.* at 381. Just as courts have distorted *Scott*'s "blatantly contradicted" language, so too have

courts taken the "in the light of the videotape" phrase as a freestanding license to interpret video evidence rather than draw inferences from the video in the nonmovant's favor and ask whether a reasonable jury could believe the nonmovant's version of events based on the video. *See, e.g.*, *Guerra v. Bellino*, 703 F. App'x 312, 316 (5th Cir. 2017) (per curiam) (acknowledging, in excessive-force case, that facts "usually" are viewed in the nonmovant's favor but stating: "When a videotape of the incident exists, though, we view 'the facts in the light depicted by the videotape.'" (quoting *Scott*, 550 U.S. at 380-81)); *id.* at 319 (Graves, J., dissenting) (disputing majority's characterization of the video and criticizing majority for reversing denial of summary judgment to officer without asking whether a reasonable jury could believe plaintiff's version of events when "the video is inconclusive regarding whether [plaintiff] was rushing at [officer] or instead was fleeing from him, albeit at an angle, and posed no reasonable threat").

Courts' use of *Scott* as a license to ratchet down or even eliminate presumptions favoring nonmovants is especially dangerous because it is not always easy to diagnose and therefore particularly difficult to challenge. Too often it is left to concurring and dissenting judges to call out a majority's departure from the traditional rule requiring all factual inferences from the summary-judgment record to be drawn in the nonmovant's favor—even when the record includes video evidence. *See, e.g.*, *Rudlaff v. Gillispie*, 791 F.3d 638, 644-45 (6th Cir. 2015) (Donald,

J., concurring in the judgment) ("[T]he majority overreads *Scott*, which stands only for the proposition that a court need not accept a plaintiff's version of the facts if it is 'blatantly contradicted by [a videotape], so that no reasonable jury could believe it.'. . . . [O]nly where an 'unambiguous video recording' indicates that there is no triable issue should the traditional weighing of inferences in favor of the non-moving party give way to video evidence." (internal citations omitted)); *see also*, *e.g.*, *Kohorst v. Smith*, 968 F.3d 871, 880-82 (8th Cir. 2020) (Kelly, J., concurring in part and dissenting in part) (faulting majority for not drawing inferences from bodycam video in excessive-force claimant's favor when a reasonable jury could conclude video showed: apparently intoxicated excessive-force claimant's "movements were slow and he had difficulty articulating words or sentences"; encounter was relatively calm at start then escalated by officer; claimant eventually complied with repeated requests to keep hands out of pockets; and claimant's arm movement when producing his wallet could be viewed as "significantly less than 'jerk[ing]'" or "*de minimis* or inconsequential" resistance); *Poole v. City of Shreveport*, 691 F.3d 624, 637 nn.2-3, 640 n.9 (5th Cir. 2012) (Elrod, J., concurring in part and dissenting in part) (criticizing majority for not viewing the video in the light most favorable to the nonmovant in deciding, for example, that defendants did not know plaintiff was injured while he was screaming that his arm had been broken and that plaintiff "climbed" on a truck's fifth wheel rather than falling onto it when tased).

To be sure, some opinions have recognized that *Scott* did not invite free-ranging judicial factfinding when parties present competing narratives derived from video evidence in a summary-judgment record. As the Sixth Circuit noted, "[t]he blatantly contradictory standard is a difficult one to meet and requires opposing evidence that is largely irrefutable, as shown in *Scott v. Harris*." *Amerson v. Waterford Twp.*, 562 F. App'x 484, 489 (6th Cir. 2014) (reversing summary judgment); *see also Ortiz v. Vizcarra*, 773 F. App'x 450, 451 n.2 (9th Cir. 2019) (holding that genuine, material fact disputes barred interlocutory appeal of partial denial of qualified immunity and criticizing dissent for "recit[ing] the inferences its author draws from video recordings of the incident" when, "unlike in *Scott v. Harris*, [plaintiff's] version of the facts is neither 'blatantly contradicted' nor 'utterly discredited' by video evidence" (quoting *Scott*, 550 U.S. at 378-81) (citation omitted)); *Hanson v. Madison Cty. Detention Ctr.*, 736 F. App'x 521, 536 (6th Cir. 2018) ("[A] few inconsistencies" between plaintiff's version of events and video evidence "fail to discredit [plaintiff's] *entire* version of events" or negate fact-dispute obstacles to summary judgment (internal quotation marks and citation omitted)).

Other circuits also have recognized that the presence of video evidence in the summary-judgment record does not alter obligations to let juries resolve material fact disputes. *See*, *e.g.*, *Bradshaw v. City of New York*, No. 20-308, 2021 WL 1170874, at *1-2 (2d Cir. Mar. 21, 2021) (reversing summary judgment

based on qualified immunity on one of three excessive-force claims when video could not be reconciled with plaintiff's version of events on two claims but, as to third claim alleging a finger injury, plaintiff's hands were obscured at points such that the court "cannot say with the requisite degree of certainty that [plaintiff]'s factual assertion is, as a matter of law, something that no rational jury could accept"); *Michael v. Trevena*, 899 F.3d 528, 533 n.2 (8th Cir. 2018) (noting, over a dissent, that material factual disputes precluded summary judgment for officers on false-arrest claim where reasonable jurors could disagree whether video supports the plaintiff's or officers' version of events and even the panel did not agree); *Collender v. City of Brea*, 605 F. App'x 624, 629 (9th Cir. 2015) (affirming denial of summary judgment based on qualified immunity concerning excessive-force claim when parties disputed whether deceased arrestee reached into his pocket during arrest, and video evidence "does not clearly show [his] hand movement just prior to the shooting"; "Contrary to the approach taken by the dissent, this disputed fact must be construed in the light most favorable to [estate plaintiffs]" (citing *Tolan*, 572 U.S. at 657)).

The Sixth Circuit's analysis in *Rowlery v. Genesee County* models what should happen when a court confronts video evidence at the summary-judgment stage. *See* 641 F. App'x 471, 476-78 (6th Cir. 2016). Rather than choosing between parties' conflicting versions of events surrounding a detainee's excessive-force claim, the court identified time-stamped moments

when the district court properly determined that disputes for a jury remained as to the extent of resistance and reasonableness of force applied while taking a detainee to a cell. *Id.* (dismissing deputies' appeal for lack of jurisdiction after confirming genuine fact disputes).

For example, when deputy-defendants argued that the detainee resisted by moving his arms and legs and withholding his hands, and the video confirmed their version of events by showing "some movement" of detainee's arms and legs during the takedown, the court stepped back to consider whether the video was susceptible to other interpretations, as the district court had found. *Id.* at 477-78. The Sixth Circuit stated that "this movement may not have indicated to the deputies that [the detainee] was resisting" but instead "that they had caused [detainee's] arms and legs to move by pushing against him as they took him down to the floor and handcuffed him." *Id.* at 477 (citing video timestamps). Thus, "the video of some movement of [detainee's] arms and legs during the takedown process did not objectively eliminate the possibility that there was no need or justification for the application of force." *Id.* Additionally, the video did not disprove the detainee's allegation that a deputy punched him after he was handcuffed. *Id.* at 478. Although the video did not show a punch, the court concluded that deputies periodically obscured the detainee, and "[t]he video therefore does not blatantly contradict the district court's conclusion

that [a deputy] may have punched [the detainee] after he had been handcuffed." *Id.*

Other circuits also have some opinions that properly apply summary-judgment requirements to video evidence. *See, e.g.*, *McCue v. City of Bangor*, 838 F.3d 55, 63 (1st Cir. 2016) (dismissing appeal after determining material fact disputes existed despite video's consistency with officer's story that plaintiff resisted for all but one minute; "Viewed in the light most favorable to the plaintiff, [plaintiff's] noises and slight movements after the 2:22 mark—and even his squeezing of [defendant's] hand—'may not constitute resistance at all, but rather a futile attempt to breathe while suffering from physiological distress'" (citation omitted)); *Sakoc v. Carlson*, 656 F. App'x 573, 576-77 (2d Cir. 2016) (summary order) (reversing summary judgment for officer on false-arrest claim because, "[c]rediting [arrestee's] version of the disputed facts, and evaluating the video and transcript in the light most favorable to her, the jury could conclude that [the officer] unreasonably exaggerated the minimal flaws in [arrestee's] performance on the field sobriety tests" to justify arrest for impaired driving). Even the Tenth Circuit, at times, has acknowledged the proper standard despite its failure to do so in petitioner's case. *See Emmett v. Armstrong*, 973 F.3d 1127, 1135 (10th Cir. 2020) ("[B]ecause this matter is presented on a summary judgment by Officer Armstrong, we have to view the video in the light most favorable to Emmett.").

The problem is that there is no consistency within or among the circuits when it comes to video evidence, especially in the excessive-force context. Errors in lower courts may at times seem idiosyncratic, but they also are prevalent. And the stakes are too high—especially in excessive-force cases—to let the inconsistent treatment of video evidence at summary judgment continue unaddressed.

Percolation will not resolve ongoing confusion and inconsistency within and among the lower courts. Fourteen years have passed since *Scott* was decided, and entrenched mistreatment of video evidence still occurs with regularity. This problem will not fix itself. And as the nation reckons with police accountability and increasingly turns to video evidence from bodycams, dashcams, and bystander recordings, it has never been more urgent to provide guidance as to whether parties' reliance on video evidence in the summary-judgment record alters the analysis courts must conduct or requires courts to pause, draw inferences in the light most favorable to the nonmovant, and ensure that a nonmovant's asserted facts are not disregarded unless the record—including video evidence—is such that no reasonable jury could accept them.

II. THIS CASE PROVIDES AN EXCELLENT VEHICLE TO ADDRESS AN IMPORTANT QUESTION REGARDING LOWER COURTS' MISTREATMENT OF VIDEO SUMMARY-JUDGMENT EVIDENCE AT A MOMENT IN HISTORY WHEN VIDEOS OF CITIZENS' INTERACTIONS WITH POLICE ARE AT THE FOREFRONT OF NATIONAL DISCOURSE.

A. Adherence To Summary-Judgment Requirements Is Essential To Protect The Jury Rights Of Nonmovants Who Rely On Video Evidence To Identify Genuine Disputes Of Material Fact.

Faithfully enforcing the traditional summary-judgment rule is necessary to preserve a civil litigant's constitutional right to a jury trial. *See* U.S. CONST. amend. VII. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255. And "the purpose of the [summary-judgment] rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Sartor v. Ark. Nat. Gas Corp.*, 321 U.S. 620, 627 (1944).

Video evidence is no different than other evidence that must be filtered and processed through a jury's "experiences, expectations, values, and beliefs." Brian H. Bornstein & Edie Greene, *Jury Decision Making: Implications For and From Psychology*, 20 CURRENT DIRECTIONS PSYCH. SCI. 63, 64-65 (2011). When viewing video evidence, "[r]easonable people can look at the same video and see different things." Martin

Schwartz, *Analysis of Videotape Evidence in Police Misconduct Cases* (pt. 1), 25 TOURO L. REV. 857, 863 (2009). These varying perspectives and beliefs underlie the very right to a jury of one's peers. For without these characteristics, juries would not be "a body truly representative of the community." *See Smith v. Texas*, 311 U.S. 128, 130 (1940). The mere existence of a video capturing aspects of an incident does not override the fundamental need for a jury to assess and draw inferences and conclusions from evidence when parties present conflicting versions of events, each of which a reasonable jury could believe.

The court below usurped the jury's role, not only in deciding what the video shows, but in aligning inferences from the video with the *movants'* narrative. *See* Part I.A.[6] That departure from

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[6] Aligning video evidence with the movant's narrative is especially problematic when the nonmovant cannot testify for whatever reason—particularly when that reason is that the nonmovant was killed by police during an encounter. Courts generally accept that in such cases they "may not simply accept what may be a self-serving account by the police officer." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir.1994); *see Flythe v. Dist. of Columbia*, 791 F.3d 13, 20 (D.C. Cir. 2015) (collecting cases). But when such cases also include a videotape, courts may inadvertently—or deliberately—align the video with the version of events offered by the only party still able to testify. *See, e.g.*, *Prosper v. Martin*, 989 F.3d 1242, 1245, 1251-52 (11th Cir. 2021) ("Ordinarily, we would be required" to adopt estate plaintiff's version of facts, but because it is based on "a blurry surveillance video" that "gives a different impression," the court, without attempting to draw inferences in the estate plaintiff's favor, took a different approach: "We must therefore take the facts as told by

summary-judgment norms defeated the protection of the jury-trial right that Rule 56 was intended to assure. *See* Ilana Harmati, *Procedural History: The Development of Summary Judgment as Rule 56*, 5 N.Y.U. J. L. & LIBERTY 173, 201-02 (2010) (describing how "the majority of the Advisory Committee [to the Federal Rules of Civil Procedure] did not budge on the jury trial issue—which they viewed as threatening a vital, constitutionally protected right" when considering summary judgment).

As Judge Higginson recently observed, dissenting from the Fifth Circuit's reversal of a denial of summary judgment in a videotaped, "fact-laden, extended, and brutal police-citizen encounter," there are costs not only to plaintiffs, but also to officers and society more broadly when video-based factual disputes about excessive-force claims are prematurely taken from a jury. *See Tucker v. City of Shreveport*, No. 19-30247, 2021 WL 1973562, at *13 (5th Cir. May 18, 2021) (Higginson, J., dissenting). "[C]areful resolution properly comes, and constitutionally must come, from citizen peer jurors," he explained. *Id.* at *14. Their "fair assessment is vital as much for fellow citizens like [plaintiff] and public trust, as it is for the police who respond to situational threats with professional restraint and seek to be distinguished from the few who do not, whose misconduct is maliciously unrestrained." *Id.* To ensure that Rule 56 continues to preserve jury access when genuine disputes of

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the only living eyewitness of those two minutes—Defendant Martin").

material fact exist, the Court should grant the petition and provide guidance on the proper treatment of video evidence in a summary-judgment record.

B. This Case Provides An Excellent Vehicle To Clarify The Proper Summary-Judgment Standard Governing Video Evidence, Which Plays An Increasingly Prevalent And Critical Role In Civil-Rights Litigation.

Amidst a national reckoning on issues of racial justice and police accountability, police-civilian encounters are being documented like never before, by bodycams, dashcams, and bystander videos. And these videos often drive the narrative when encounters lead to litigation, as exemplified in Derek Chauvin's April 2021 criminal trial for the murder of George Floyd. Petitioner, like many § 1983 plaintiffs alleging excessive force, relied on video evidence to create his path to a jury. *See* Pet. App. 44a-48a. But the Tenth Circuit's distortion of summary-judgment rules deprived him of the chance to have a jury of his peers determine whose version of events the video evidence favored. This case thus provides a clear vehicle to give courts badly needed guidance on dealing with video evidence at the summary-judgment stage.

Mistreatment of video evidence at summary judgment is an urgent and important problem that warrants this Court's attention. Within just a few weeks this past April, there were multiple instances

of nationwide attention to videos involving uses of force, often deadly. For example, police-worn bodycam footage captured the shooting of Dante Wright by an officer who yelled "taser" then expressed shock upon realizing she had instead fired her gun. Nicholas Bogel-Burroughs & Julie Bosman, *The Minnesota Officer Who Killed Daunte Wright Was Charged With Manslaughter*, N.Y. TIMES (Apr. 14, 2021), https://www.nytimes.com/2021/04/14/us/kim-potter-charged-daunte-wright.html?action=click&module=Spotlight&pgtype=Homepage. The same month, an officer-worn bodycam recorded an officer shooting 16-year-old Ma'Khia Bryant, with law enforcement contending the video showed her lunging with a knife at another woman at the time shots were fired. Farnoush Amiri & Andrew Welsh-Huggins, *Recordings Show Chaos Surrounding Ma'Khia Bryant Shooting*, AP NEWS (Apr. 24, 2021), https://apnews.com/article/makhia-bryant-ohio-shooting-video-recordings-186abfbcfd1717a8c42a38021a83de4b. And about a week later, a state of emergency was declared in Elizabeth City, North Carolina, in anticipation of local-government officials' release of video of the police shooting of Andrew Brown. ABC News, *Police Shooting of Andrew Brown*, YOUTUBE (Apr. 26, 2021), https://www.youtube.com/watch?v=O88-DuFpaFY. These cases are only a few of many, but they demonstrate the influential role of video evidence and underscore the high stakes for both civil-rights litigants and police defendants when video evidence is in the record.

This moment has been a long time coming. In 2014, there was only one excessive-force case "involving bodycam evidence in which a federal district court issued a published decision on a defense summary judgment motion," compared to 29 in 2018. Mitch Zamoff, *Assessing the Impact of Police Body Camera Evidence on the Litigation of Excessive Force Cases*, 54 GA. L. REV. 1, 30 (2019); *see also* Michael Avery et al., POLICE MISCONDUCT: LAW AND LITIGATION § 3.22 (2020) ("The accelerating adoption of dashcams and body-worn cameras by police officers and more widespread civilian access to video recording on smartphones . . . means that there is increasingly video evidence in police misconduct cases."). The increase in bodycam evidence follows a national trend across cities, counties, and states implementing police-worn bodycamera programs. Jeffrey Bellin & Shawarma Pemberton, *Policing the Admissibility of Body Camera Evidence*, 87 FORDHAM L. REV. 1425, 1431 (2019). In 2013, "fewer than 25 percent of [surveyed] law enforcement agencies used body cameras[,]" but by 2017, 34 states had enacted laws addressing the use of police-worn bodycams. *Id.* at 1430-31.

Moreover, video evidence capturing civilian-police encounters is not limited to bodycams and dashcams. Videos captured on smartphones are playing a key role in courts and in the court of public opinion. Indeed, the central piece of evidence in Derek Chauvin's trial was a video of George Floyd's fatal encounter with police taken by a teenaged bystander, Darnella Frazier,

on her smartphone. Nicholas Bogel-Burroughs & Marie Fazio, *Darnella Frazier Captured George Floyd's Death on Her Cellphone. The Teenager's Video Shaped the Chauvin Trial*, N.Y. TIMES (Apr. 20, 2021), https://www-nytimes-com./2021/04/20/us/darnella-frazier-video.html. And legal experts and advocates from groups like the NAACP Legal Defense and Education Fund and National Lawyers Guild have encouraged bystanders to film interactions between law enforcement and civilians when bystanders think they are witnessing police misconduct. Ryan W. Miller, *What Should You Do If You See Police Using Excessive Force? Legal Experts Say Film It, Just As Bystanders Did In George Floyd's Death*, USA TODAY (Apr. 2, 2021), https://www.usatoday.com/story/news/nation/2021/04/02/derek-chauvin-trial-what-do-when-you-see-police-brutality/7046047002/.

In light of the increasing importance of video of citizen-police interactions, it is critical for this Court to address the proper standard governing video evidence at the summary-judgment stage. In the 14 years since *Scott*, commentators have noted the improper tendency of courts to treat video evidence as if it were "somehow more objective than other evidence" even though it requires interpretation and can be "vulnerable to a host of cognitive biases." Caren Myers Morrison, *Body Camera Obscura: The Semiotics of Police Video*, 54 AM. CRIM. L. REV. 791, 800-01 (2017); *see, e.g.*, Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1336 (2010). But it is precisely because video evidence is so persuasive that

"courts must resist" the idea "that video is, in and of itself, the thing or event depicted, rather than one more piece of evidence of the thing depicted that a factfinder can interpret, consider, and use." Howard M. Wasserman, *Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement*, 96 N.C. L. Rev. 1313, 1325-26 (2018). Clarifying that traditional summary-judgment rules apply to video evidence and require inferences in nonmovants' favor is critical to ensuring that courts do not substitute their own judgments for that of a jury when excessive-force claimants' constitutional rights are at stake.

III. PETITIONER'S CASE SHOULD GO TO A JURY BECAUSE THERE ARE GENUINE DISPUTES OF MATERIAL FACT REGARDING THE REASONABLENESS OF RESPONDENTS' USES OF FORCE.

The court below improperly adopted respondents' account of petitioner's arrest and disregarded petitioner's conflicting version of events, emphasizing that petitioner did not submit independent evidence in opposing summary judgment. *See* Pet. App. 2 n.1. As discussed *supra*, that penalty cannot be squared with Rule 56(c)(1), which authorizes a nonmovant's "citing of particular parts of the record," to identify genuine disputes of material fact. *See* FED. R. CIV. P. 56(c)(1). The bodycam-video evidence in the record, like any other evidence in the record, was proper support under Rule 56(c)(1) for petitioner's version of the facts, and petitioner was entitled to have the video, like any other evidence in the record, viewed in the light most

favorable to him. *See Tolan*, 572 U.S. at 657; *Scott*, 550 U.S. at 377; *Hanson*, 736 F. App'x at 536 (reaffirming that Rule 56(c)(1) authorized arrestee to rely on video evidence in the record to defeat deputies' summary-judgment motion).

In holding that all three *Graham* factors for assessing the reasonableness of force weighed in favor of respondents, the Tenth Circuit improperly embraced respondents' narrative wholesale—petitioner moved his hands in and out of pockets when told not to, did not follow instructions to put his hands behind his back, "struggled," tried to stand up, and "had an imposing physical stature." Pet. App. 12a-14a. And the court perfunctorily adopted respondents' theory about petitioner's "imperviousness to pain" because he had ingested PCP, *id.* at 13a, despite the video showing petitioner clearly crying out when tased. Video.06:25-06:28.[7] The court made no attempt to draw inferences from the video in petitioner's favor.

By jettisoning traditional summary-judgment requirements and interpreting the video to align with respondents' "universe of evidence" instead of drawing

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[7] Respondents' narrative reflects a too-long-standing myth that Black men may exhibit super-human strength, a trope that has been used to justify uses of greater force. *See, e.g.*, Ainsley Hawthorn, *The Myth that Endangers Black Lives*, PSYCH. TODAY (June 8, 2020), https://www.psychologytoday.com/us/blog/the-sensory-revolution/202006/the-myth-endangers-black-lives; Frederica Boswell, *In Darren Wilson's Testimony, Familiar Themes About Black Men*, NPR (Nov. 26, 2014), https://www.npr.org/sections/codeswitch/2014/11/26/366788918/in-darren-wilsons-testimony-familiar-themes-about-black-men].

inferences in petitioner's favor, *see* Pet. App. 2a n.1, the court skipped over the parts of the video that supported petitioner's version of events. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1155 (2018) (per curiam) (Sotomayor, J., dissenting) (an improper summary-judgment analysis "omits . . . critical facts and draws premature inferences"). For example, the court ignored things suggesting that, rather than refusing to put his hands behind his back, petitioner may have been physically unable to do so. *See* Video.05:39-05:45, 06:19-06:25, 06:28-06:29 (showing petitioner's arms pinned above his head by his sweatshirt and showing an officer's hand holding petitioner's hand to the ground); Video.05:37-05:39 (petitioner responding, "I can't do it" or "I didn't do it" when ordered to put hands behind his back).

Nor did the court include in its analysis video indicators that petitioner was confused rather than noncompliant. *See* Video.02:04-04:24 (petitioner unable to answer simple questions and repeatedly showing Foreman his wallet and open hands when ordered to unbuckle his seatbelt and set aside his wallet); Video.05:56-05:59, 06:28-06:30, 06:36-06:38, 06:43-06:54 (petitioner's repeated echoing of directions to put his hands behind his back); Video.05:50-06:15 (petitioner's repeatedly asking why an officer—"sir"—was punching him). And it did not include additional indications that officers knew of petitioner's confusion. *See* Video.02:04-04:59 (reflecting Foreman's evident familiarity with petitioner and recognition that petitioner could not follow commands such as putting

his wallet on the car's "console," commenting: "You can't even understand directions"); *see also* Ex. 54-9 at 5, 12 (Foreman reporting after the arrest that petitioner was "slow to move" and "couldn't talk").

Viewing the video in the light most favorable to the nonmovant does not require a court to accept alleged facts that are "*blatantly contradicted*" by the video "*such that no reasonable juror could believe them*." *See Scott*, 550 U.S. at 380 (emphasis added). But, when—as in this case—a video gives rise to multiple, conflicting inferences, it does require the court to consider the inferences that favor the nonmovant. *See, e.g.*, *Rice v. Morehouse*, 989 F.3d 1112, 1123 (9th Cir. 2021) ("[A]lthough there is conflicting summary-judgment evidence, a jury could find that [plaintiff] was not actively resisting arrest or attempting to evade arrest by flight"; "[b]ecause the dash-cam video does not clearly contradict [plaintiff's] account, we must accept it."); *Rowlery*, 641 F. App'x at 476-78 (plaintiff's movements "may not have indicated to the deputies that [the detainee] was resisting," but instead may have been caused by defendants pushing him to the floor); *McCue*, 838 F.3d at 63 (video of movement and arrestee's squeezing officer's hand could show either resistance or a "futile attempt to breathe" (citation omitted)); *Bond v. City of Tahlequah*, 981 F.3d 808, 819 (10th Cir. 2020) (video showing plaintiff raising a hammer could be interpreted as threatening or self-defense). By not acknowledging, much less including, in its analysis any inferences favorable to petitioner's version of events, the Tenth Circuit failed to properly evaluate whether any

reasonable jury could have found in favor of petitioner. This case warrants this Court's review or summary reversal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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