RECORD NO. 21-3267

In The

United States Court of Appeals

For The Eighth Circuit

CASONDRA POLLREIS, on behalf of herself and her minor children, on behalf of W.Y., on behalf of S.Y.,

Plaintiff–Appellant,

v.

LAMONT MARZOLF; JOSH KIRMER,

Defendants–Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS AT FAYETTEVILLE

APPELLANT'S PETITION FOR REHEARING EN BANC

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RULE 35(b)(1) STATEMENT

On an appeal from summary judgment, a divided panel used dashcam footage to determine that it "need not . . . view[ ] [the evidence] in the light most favorable to the nonmoving party," and could instead determine for itself that a "calm and nonthreatening" woman posed a threat to—and failed to comply with the orders of—a police officer sufficient to justify the officer's decision to threaten her with a taser. Slip op. at 7, 8 n.2. In so doing, the panel majority egregiously misconstrued binding Supreme Court precedent that requires courts at the summary-judgment stage to view facts in the light most favorable to the nonmoving party unless that party's story is so "blatantly contradicted by the record . . . that no reasonable jury could believe it," *Scott v. Harris*, 550 U.S. 372, 380 (2007). By applying *Scott* here, where the record evidence falls short of this high bar, the panel majority invites (if not requires) courts in this circuit to resolve disputed facts at summary judgment.

En banc review is therefore necessary to secure and maintain uniformity of this court's decisions with those of the Supreme Court.

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INTRODUCTION

The parties do not dispute that dashcam footage shows it was a dark and rainy night when Officer Lamont Marzolf threatened to tase Cassi Pollreis for asking why he was holding her 12- and 14-year-old boys facedown at gunpoint on their quiet residential street. They do dispute, however, whether Cassi posed a threat or was noncompliant when Officer Marzolf threatened her with force. Ordinarily, such factual disputes could not be resolved at summary judgment, where they must instead be viewed in favor of the nonmoving party. But the panel majority reasoned that, with dashcam video, it "need not . . . view[ ] [the evidence] in the light most favorable to the nonmoving party," and could instead determine for itself that Officer Marzolf's threatened use of force was reasonable. Slip op. at 8 n.2 (citing *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

The panel majority's reliance on *Scott* is not just misplaced—it is an egregious error that invites courts in this circuit to abandon standard principles of summary judgment by resolving disputed facts using video. True, *Scott* itself involved dashcam footage. But the video there so "utterly discredited" a party's claims "that no reasonable jury could have believed him." *Scott*, 550 U.S. at 380; *see also id.* ("Far from being the cautious and controlled driver [that he claims,] what we see on video more closely

resembles a Hollywood-style car chase of the most frightening sort . . . .”). Here, by contrast, dashcam video *supports* Cassi’s claims at best and is ambiguous at worst. As the Supreme Court expressly cautioned in *Scott*, unless a party’s claims are so “blatantly contradicted by the record . . . that no reasonable jury could believe it,” 550 U.S. at 380, courts at summary judgment are required to view facts in the light most favorable to the nonmoving party. *See also Banks v. Hawkins*, 999 F.3d 521, 525 (8th Cir. 2021) (“Where the record does not conclusively establish the lawfulness of an officer’s use of force, summary judgment on the basis of qualified immunity is inappropriate.”). And as Judge Kelly’s dissent points out, this circuit has “repeatedly held that whether and to what degree an individual is noncompliant or poses a threat are issues of fact properly resolved by a jury.” Slip op. at 10–11 (listing cases).

The panel majority’s egregious misapplication of the circumscribed rule in *Scott* creates an exception that swallows the longstanding rule that factual disputes at summary judgment are always viewed in the light most favorable to the nonmoving party. The consequences are extreme for the judges in this circuit, inviting (if not requiring) them to assume the role of juror at summary judgment and creating a rift with the Supreme Court over the justiciability of excessive-force claims before trial. En banc rehearing is

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needed to resolve this rift and determine whether a court may decide factually disputed excessive-force claims for itself or whether those claims must be decided by a trier of fact.

BACKGROUND

I. Factual Background.

On the night of January 8, 2018, Cassi was enjoying dinner and a football game with her family at her parents' home in Springdale, Arkansas. At halftime, she drove home with her husband and their two daughters. But because they lived only a few houses away, she allowed their two sons, aged 12 and 14, to walk home by themselves. It was around 9:30 pm.

Unbeknownst to Cassi and her family, Springdale Police that evening were engaged in a search. Earlier that day, Officer Josh Kirmer was trying to find a woman with outstanding arrest warrants. App. 216; R. Doc. 43, at 2. Based on a tip, Officer Kirmer believed she was staying with Tomas Silva, a Hispanic gang member. *Id.* Officer Kirmer surveilled Silva and saw him, an unidentified woman, and two other Hispanic men enter a Chevy Cobalt. *Id.*; App. 133; R. Doc. 31-1, at 5. One of the men was shorter and skinnier than the other, but both were wearing hooded sweatshirts and dark pants. App. 216; R. Doc. 43, at 2; App. 133; R. Doc. 31-1, at 5. Officer Kirmer relayed this information to other officers in the area, one of whom attempted to engage

them in a traffic stop. App. 216; R. Doc. 43, at 2. Silva and the others instead fled, eventually wrecking the car. *Id.* The four occupants abandoned the car and split up, two running north and two running south. *Id.* Officer Kirmer radioed other officers requesting that they set up a search perimeter, and Officer Lamont Marzolf responded to this call. *Id.*

Police dispatch directed Officer Marzolf to the intersection of Luvene and Lynn Street, near where Cassi and her family lived. *Id.* (21:39:50).[1] As he turned onto Lynn Street and began his search, he knew three things: (1) Silva could be armed, given his past interactions with police, (2) of the other two Hispanic men, one was shorter and skinnier than the other, but both were wearing hooded sweatshirts and dark pants, and (3) the suspects were last seen running from police.

Officer Marzolf's blue squad car lights flashed prominently as his car crept down Lynn Street. App. 217; R. Doc. 43, at 3 (21:39:16). Seconds later, Officer Marzolf spotted Cassi's two boys. *Id.* (21:39:44). They were casually walking down the sidewalk in the direction of Officer Marzolf's patrol car wearing hooded sweatshirts and light colored pants. *Id.* (21:39:56). One boy

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[1] Officer Marzolf's dashcam recorded the events that evening, and associated timestamps from that video are included parenthetically where applicable. The video is reproduced at the following link for the Court's convenience: https://ij.org/wp-content/uploads/2021/12/ECF%2023.mp4.

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was taller and larger than the other. *Id.* Aside from their difference in size and the hooded sweatshirts they were wearing, the two strolling boys in no way resembled the fleeing adult Hispanic suspects Officer Marzolf was searching for. But Officer Marzolf nonetheless turned on his high beams and angled his car toward them, stopping it in their path. *Id.* (21:40:09).

Officer Marzolf stepped out of his vehicle and asked the boys what they were doing. *Id.* (21:40:13). One of the boys responded, pointing behind Officer Marzolf in the direction of their home. *Id.* (21:40:15). Officer Marzolf panicked, yelling to the boys, "Hey, stop, stop, turn away, turn away from me." *Id.* (21:40:18). The boys obeyed Officer Marzolf's commands and turned away, holding their arms out to their sides. *Id.*

Officer Marzolf then advanced on them, drawing his firearm and pointing it at their backs. *Id.* He also pulled out his flashlight. *Id.* Officer Marzolf asked the boys, "What are your names?" *Id.* (21:40:21). One of the boys responded, but Officer Marzolf could not hear his soft, still immature voice and had him repeat his name several times. *Id.* After the boy repeated his name a third time, Officer Marzolf audibly confirmed the boy's name and holstered his flashlight, but he kept his firearm drawn and pointed at the boys' backs.

By this time, Cassi had arrived home and noticed the commotion down the street. Recognizing her boys, she calmly approached Officer Marzolf and asked, "Officer, officer, may I have a word with you?" App. 218; R. Doc. 43, at 4 (21:40:33). Officer Marzolf lowered his firearm and acknowledged her presence, but otherwise did not engage with her. *Id.* Instead, he confirmed the boys' general physical description over the radio with Officer Kirmer, who instructed Officer Marzolf to detain them. *Id.* (21:40:57). Officer Marzolf complied, retraining his gun on the boys and ordering them onto the ground. *Id.* (21:41:14). The boys obeyed his commands.

Cassi, frustrated by Officer Marzolf's unwillingness to communicate with her, continued walking toward Officer Marzolf and asked him, "What happened?" *Id.* (21:41:23). Officer Marzolf responded, "Hey, step back." *Id.* (21:41:24). Unable to step back because of Officer Marzolf's squad car, Cassi stepped sideways, explaining, "They're my boys." *Id.* (21:41:25). Unmoved, Officer Marzolf yelled at Cassi to "Get back!" and stepped toward her, his weapon still pointing at her boys lying on the ground. *Id.* (21:41:25). Incredulous, Cassi responded, "Are you serious?" Officer Marzolf drew his taser with his left hand and pointed it at Cassi, keeping his firearm trained

on her boys with his other hand.[2] "I am serious, get back," he said. *Id.* (21:41:30). Cassi attempted to deescalate the situation, telling her sons, "It's okay, boys." *Id.* (21:41:36).

This tense standoff lasted for several seconds. Eventually, Officer Marzolf holstered his taser, but again commanded Cassi to "Get back!" App. 219; R. Doc. 43, at 5 (21:41:38). Cassi asked Officer Marzolf, "Where do you want me to go?" *Id.* (21:41:38). Officer Marzolf responded, "I want you to go back to your house." *Id.* Cassi again attempted to reason with Officer Marzolf, imploring him, "Are you serious? They're 12 and 14 years old." *Id.* Officer Marzolf responded, falsely, "And I'm looking for two kids about this age right

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[2] In a subsequent deposition, Officer Marzolf justified drawing a taser on Cassi in part because "[s]he was disobeying [his] verbal commands." App. 144; R. Doc. 31-2, at 9.

now, so get back in your house." *Id.* Understandably upset, Cassi again reassured her boys, "Oh, my God. You're okay guys, I promise," and ran back to her home a few houses down the street. *Id.*

Officer Marzolf continued to detain Cassi's 12- and 14-year-old boys at gunpoint until backup arrived, even as other Pollreis family members appeared to reassure him that the boys were not the suspects he was looking for. App. 219–20; R. Doc. 43, at 5–6. At one point, Officer Marzolf placed both boys in handcuffs, where they remained lying on the ground as other officers questioned them. App. 220; R. Doc. 43, at 6. Eventually, cooler heads prevailed, and another officer ordered the boys be released after Officer Marzolf admitted to the other officer that the boys were probably not the wanted suspects. App. 221; R. Doc. 43, at 7. As he walked to the car, Officer Marzolf mumbled to himself: "Dumb." (21:47:28).

II. Procedural Background.

Cassi filed a lawsuit against Officers Kirmer and Marzolf in the Western District of Arkansas on October 17, 2018. App. 7-18; R. Doc. 1, at 1–12. In her complaint, Cassi alleged five claims for relief pursuant to 42 U.S.C. § 1983 on behalf of her sons and herself. App 13-17 (¶¶ 28-33); R. Doc. 1, at 7–11 (¶¶ 28-33). Only one claim—Cassi's Fourth Amendment excessive force claim against Officer Marzolf for threatening her with his taser—is relevant

to this appeal.[3] The district court awarded summary judgment to Officer Marzolf on this claim, concluding that he was entitled to qualified immunity because, although "the Eighth Circuit has developed its case law regarding the threatened use of *firearms*, . . . there have been no such developments surrounding the threatened use of tasers" sufficient to put Officer Marzolf on notice that his conduct was unlawful. App. 244; R. Doc. 43, at 30 (emphasis in original).

On appeal, the panel majority affirmed without reaching the issue of clearly established law. Although it concluded that Officer Marzolf seized Cassi, slip op. at 5–6, it nonetheless held that Cassi's Fourth Amendment rights had not been violated because Officer Marzolf's use of force was reasonable, *id.* at 6–8. In the panel majority's view, even though Cassi "was not suspected of committing any crime," "was not actively resisting arrest," and "commendably remained calm and nonthreatening," Officer Marzolf was nonetheless "understandably concerned for his own safety" and justified in threatening to tase her. *Id.* at 7. Why? Because the dashcam footage

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[3] Cassi's claims brought on behalf of her sons were the subject of a separate interlocutory appeal. *See Pollreis v. Marzolf*, 9 F.4th 737 (8th Cir. 2021) (reversing the district court's denial of qualified immunity to Officer Marzolf). A petition for certiorari concerning that appeal was subsequently denied by the United States Supreme Court. *Pollreis v. Marzolf*, 142 S. Ct. 904 (2022).

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showed that "[t]his event took place at night in the rain," and the armed Marzolf "was alone . . . when [Cassi] approached from behind" and announced herself. *Id.* "Adding to the circumstances," the panel majority continued, "when Officer Marzolf ordered [Cassi] to 'get back,'" she instead "questioned the order and moved sideways."[4] *Id.* These facts led the panel majority to conclude that Officer Marzolf's threat to tase Cassi was reasonable "[u]nder the totality of the circumstances." *Id.* at 8; *see also id.* at 8 n.2 (citing *Scott*, 550 U.S. at 380 ("[F]acts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts.")).

Judge Kelly dissented. In her view, "the fact that it was a dark and rainy night" did not "invariably create a threat to officer safety." *Id.* at 10. Although they were "factors a jury could take into consideration," Judge Kelly argued, they "cannot be dispositive of whether Officer Marzolf's show of force was reasonable when the primary inquiry is whether [Cassi] engaged in conduct that would justify the use of force at all." *Id.* On this point, Judge Kelly

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[4] The panel majority omits the fact that dashcam video shows Cassi was standing in front of Officer Marzolf's police cruiser at the time, making it impossible for her to step back as ordered. (21:41:24); *see also* slip op. at 9–10 (Kelly, J., dissenting) (making the same point). Sideways was the only direction Cassi could move to increase her distance from Officer Marzolf and comply with his command.

emphasized that the dashcam video left crucial moments from that night in dispute. *Id.* (disagreeing that Cassi failed to comply because "[t]he video shows [Cassi], in an attempt to avoid backing up into the police car directly behind her, walking away from Officer Marzolf as soon as he tells her to 'get back'"). Given the parties' dispute over whether Cassi posed a threat or failed to comply and "[v]iewing the evidence in the light most favorable to [Cassi]," Judge Kelly continued, "a reasonable jury could find that drawing a taser on a nonthreatening bystander who was complying or attempting to comply with an officer's orders was not objectively reasonable." *Id.* at 11; *see also id.* at 10–11 ("[W]e have repeatedly held that whether and to what degree an individual is noncompliant or poses a threat are issues of fact properly resolved by a jury." (citing cases)).

This petition for rehearing en banc follows.

ARGUMENT

This case requires rehearing en banc because the panel majority used dashcam video to hold that it "need not . . . view[ ] [the evidence] in the light most favorable to the nonmoving party" on appeal from a motion for summary judgment. Slip op. at 8 n.2. In so doing, it egregiously misconstrued Supreme Court precedent that requires courts at summary judgment to view disputed facts in the light most favorable to the nonmoving

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party unless that party's story is so "blatantly contradicted by the record . . . that no reasonable jury could believe it." *Scott*, 550 U.S. at 380. By applying *Scott* here, where the record evidence falls short of this high bar, the panel majority required courts in this circuit to resolve disputed facts at summary judgment.

Below, in Part I, Cassi explains the longstanding rule that summary judgment is appropriate only where no material facts are in dispute. Where facts are disputed, moreover, courts at summary judgment are instructed to view them in the light most favorable to the nonmoving party. In Part II, Cassi explains that *Scott v. Harris* is an extraordinarily narrow exception to this general rule, reserved for the rare case where video footage "utterly discredit[s]" the nonmoving party's version of events. *Id.* Lastly, in Part III, Cassi explains why the panel majority egregiously erred in applying *Scott* here, where dashcam video *supports* Cassi's story at best and is ambiguous at worst. As a result, the panel majority's decision radically alters the role judges play at summary judgment in this circuit, requiring them to resolve disputed issues of material fact any time the record includes video.

I. Summary Judgment Requires Undisputed Material Facts.

The longstanding rule, enshrined by the Federal Rules of Civil Procedure, is that summary judgment is appropriate only where the movant

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shows that material facts are not in dispute. *See* Fed. R. Civ. P. 56(a) ("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."). If material facts are genuinely disputed, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," the court must deny summary judgment and allow the case to proceed to trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

This rule, and the countless cases interpreting it, rests on the principle that a "'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam) (quoting *Anderson*, 477 U.S. at 249); *see also Sartor v. Ark. Nat. Gas Corp.*, 321 U.S. 620, 627 (1944) ("Rule 56 authorizes summary judgment only . . . where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose . . . is not to cut litigants off from their right of trial by jury if they really have issues to try."). In other words, "[s]ummary judgment is not a substitute for the trial of disputed fact issues," and a "court errs when it takes upon itself, in deciding a summary judgment motion, to

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weigh conflicting evidence and to resolve the issue based on the evidence." *Wilson v. Myers*, 823 F.2d 253, 256 (8th Cir. 1987).

Consequently, when a party moves for summary judgment, that party "ha[s] the burden of showing the absence of a genuine issue as to any material fact, and for these purposes [the movant's facts] must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). If the movant cannot do so, summary judgment must be denied. *See, e.g.*, *Cottrell v. Am. Fam. Mut. Ins. Co., S.I.*, 930 F.3d 969 (8th Cir. 2019); *cf. Woolfolk v. Smith*, 81 F.3d 741 (8th Cir. 1996) (holding that disputed facts precluded the court from exercising jurisdiction over an interlocutory appeal from the denial of summary judgment in a qualified immunity case).

II. The Exception in *Scott v. Harris* is Extraordinarily Narrow.

In *Scott v. Harris*, the Supreme Court carved out a narrow category of disputed facts that courts could resolve at summary judgment. In the rare case where the nonmovant's story is so "blatantly contradicted by the record . . . that no reasonable jury could believe it," a court may award summary judgment despite disputed facts because the dispute is not "genuine" for the purposes of Rule 56. 550 U.S. at 380.

The facts of *Scott* make clear how narrow this exception is. In *Scott*, a plaintiff brought a Fourth Amendment claim under 42 U.S.C. § 1983 against Georgia deputies after they intentionally crashed his car during a high-speed chase, rendering him a quadriplegic. *Id.* at 374–76. The district court held that disputed facts precluded summary judgment, crediting plaintiff's assertions "that, during the chase, 'there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [plaintiff] remained in control of his vehicle.'" *Id.* at 378 (citation omitted). The Supreme Court reversed, emphasizing the "added wrinkle in this case: existence in the record of a videotape capturing the events in question." *Id.* "Far from being the cautious and controlled driver," the Court explains, "what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." *Id.* at 380. Calling plaintiff's version of events "so utterly discredited by the record that no reasonable juror could have believed him" and "visible fiction," the Court awarded summary judgment to the deputies based on "the facts [viewed] in the light depicted by the videotape." *Id.* 380–81.

Since *Scott* was decided, this circuit has applied it sparingly and only where "incontrovertible evidence . . . clearly contradicts [a party's]

allegations." *Wallingford v. Olson*, 592 F.3d 888, 892 (8th Cir. 2010). In *Wallingford*, for example, a woman brought an excessive-force claim against a deputy sheriff, claiming that he "grabbed [her] by the breast and threw her against a police vehicle" before "then throw[ing] [her] onto the street." *Id.* The deputy denied the allegations, but the district court held that disputed material facts precluded his motion for summary judgment. On interlocutory appeal, this Court reversed. Applying *Scott*, this Court emphasized that dashcam footage "conspicuously refutes and completely discredits" the woman's story. *Id.* at 893; *see id.* at 892 ("Despite Wallingford's claims of excessive force, the videotape manifestly shows Deputy Olson did not (1) grab Wallingford by the breast, (2) 'throw' her against a police vehicle, or (3) throw her on the street."). Only in the face of such blatant contradiction with uncontroverted video evidence did this Court depart from traditional principles of summary judgment and "view[ ] the facts in the light depicted by the videotape." *Id.* (alteration in original) (citing *Scott*, 550 U.S. at 381).

Other circuit courts have similarly cabined *Scott*, almost uniformly refusing to apply it. *See, e.g.*, *Eagan v. Dempsey*, 987 F.3d 667, 691 n.56 (7th Cir. 2021) (refusing to apply *Scott*, describing it as "'a narrow, pragmatic exception' reserved for cases of 'irrefutable evidence like that in *Scott*'" (citation omitted)); *Janny v. Gamez*, 8 F.4th 883, 901–02 (10th Cir. 2021)

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(calling *Scott* a "narrow . . . exception" and refusing to apply it where "no evidence 'utterly discredit[s]' [plaintiff's] version of events" (citation omitted)); *Aguirre v. City of San Antonio*, 995 F.3d 395, 410 (5th Cir. 2021) ("As we have since made clear, *Scott* was not an invitation for trial courts to abandon standard principles of summary judgment by making credibility determinations or otherwise weighing the parties' opposing video evidence against each other any time a video is introduced into evidence. . . . Rather, *Scott* was an exceptional case with an extremely limited holding."); *Norton v. Rodrigues*, 955 F.3d 176, 184 n.7 (1st Cir. 2020) (refusing to apply *Scott*, calling it a "narrow exception"); *Harris v. Pittman*, 927 F.3d 266, 276 (4th Cir. 2019) (refusing to apply *Scott,* explaining that it "is the exception, not the rule" that does not apply "even [where documentary evidence] makes it 'unlikely' that the plaintiff's account is true" (citation omitted)); *Est. of Lopez ex rel. Lopez v. Gelhaus*, 871 F.3d 998, 1009 (9th Cir. 2017) (refusing to apply *Scott* where the record evidence "would not compel a jury" to find for the movant); *Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013) (refusing to apply *Scott*, explaining that it applies only "where an accurate video recording completely and clearly contradicts a party's testimony" such that "that testimony becomes incredible"); *Romo v. Largen*, 723 F.3d 670, 675

(6th Cir. 2013) (construing *Scott* as a limited exception for "blatantly contradicted facts" and refusing to apply it).

The Fifth Circuit's decision in *Aguirre* is particularly relevant to the facts of this case. In *Aguirre*, an arrestee's estate brought an excessive-force claim under Section 1983 after officers violently and improperly restrained him, causing fatal asphyxiation. 995 F.3d at 402. As in this case, a dashcam captured the incident in its entirety. The district court granted the officers summary judgment, relying on the video to hold that no material facts were in dispute. *Id.* at 409. But the Fifth Circuit reversed. "Rather than 'utterly discredit[ing]' the Plaintiffs' version of events," the Court explained, "the video evidence in this case tends to *support* it." *Id.* at 411 (alteration in original) (emphasis added) (citing *Scott*, 550 U.S. at 380). Holding that "[i]t is at best unclear from the video whether or how much Aguirre [resisted the officers,]" the Court determined that "there are at the very least genuine disputes" of fact that precluded summary judgment. *Id.*

Despite this overwhelming case law, the panel majority applied *Scott* and held that no "genuine" dispute of material fact precluded the Court from

determining that Cassi was sufficiently threatening and noncompliant to render Officer Marzolf's threatened use of force reasonable.[5] Slip op. at 8 n.2.

III. The Panel Majority Egregiously Erred in Applying *Scott*.

The panel majority egregiously erred in applying *Scott* to the facts of this case. If the panel opinion is allowed to stand, it will allow *Scott*'s narrow exception to swallow the longstanding rule concerning the adjudication of disputed facts at summary judgment, inviting (if not requiring) judges in this circuit to decide disputed issues of material fact.

Aside from the fact that both this case and *Scott* involved dashcam footage, the two cases could not be more unalike. In *Scott*, the dashcam footage unequivocally and diametrically opposed plaintiff's version of events. *Compare* 550 U.S. at 379 ("During the chase, 'there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [plaintiff] remained in control of his vehicle.'"), *with id.* at 380 ("[W]hat we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury."). Indeed, the Court goes to great lengths to stress how violent and erratic the dashcam footage compares to plaintiff's

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[5] Even though the panel majority earlier held that Cassi "commendably remained calm and nonthreatening" throughout the encounter. Slip op. at 7.

telling of the case, even going so far as to post the video on the Court's website "to allow the videotape to speak for itself." [6] *Id.* at 378 n.5.

Here, by contrast, the dashcam footage largely *supports* Cassi's version of events. Cassi has consistently maintained that she calmly approached Officer Marzolf to ask what he was doing, attempted to comply with his demands, and retreated to her home once he threatened her with his taser. App. 170–75; R. Doc. 31-3, at 6–11 (Cassi's Deposition). The video shows much the same. It shows that, when Cassi realized Officer Marzolf was holding her boys at gunpoint, she calmly approached him and audibly announced her presence. App. 218; R. Doc. 43, at 4 (21:40:33). It shows that, when Officer Marzolf ordered her to step back, she was standing in front of his squad car and instead stepped sideways. *Id.* (21:41:25). It shows that, when Officer Marzolf advanced on Cassi with his taser drawn and ordered her back to her house, she complied. App. 218–19, R. Doc. 43, at 4–5 (21:41:38). In sum, it largely corroborates Cassi's story.

The only issues that the video calls into question are (1) whether and the extent to which Cassi posed a threat to Officer Marzolf, and (2) whether and the extent to which Cassi complied with his demands. Both the majority

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[6] The panel majority should consider giving its readers the same courtesy, especially since Cassi's counsel freely made (and continue to make) the video available at the link above. *See supra* note 1.

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and the dissent appear to agree that these are questions of fact.[7] But the panel majority believes that it "need not . . . view[ ] [the evidence] in the light most favorable to" Cassi because those facts are not "genuinely" disputed, emphasizing that dashcam footage shows that (1) Officer Marzolf was alone, (2) Officer Marzolf was engaged with two potentially armed suspects, (3) Cassi approached him from behind, (4) the event took place at night, and (5) Cassi stepped sideways when Officer Marzolf ordered her to step back. Slip op. at 7, 8 n.2. In the panel majority's view, this meant that the Court could decide for itself that Cassi was threatening and noncompliant notwithstanding her assertions to the contrary. But as Judge Kelly's dissent points out, these factors do not "invariably create a threat to officer safety" and therefore "cannot be dispositive of whether Officer Marzolf's show of force was reasonable when the primary inquiry is whether Pollreis engaged in conduct that would justify the use of force at all." *Id.* at 10. Worse, Judge Kelly explains, at least one of the allegedly undisputed factors that the majority relies upon *was* disputed. *See id.* at 9–10 (arguing that the majority

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[7] *Compare* slip op. at 8 n.2 ("The *evidence* we rely upon to reach our legal conclusion that the momentary seizure was not unreasonable is not disputed and therefore need not be viewed in the light most favorable to the nonmoving party." (emphasis added)), *with id.* at 10 ("[W]e have repeatedly held that whether and to what degree an individual is noncompliant or poses a threat are issues of fact properly resolved by a jury.").

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ignores the fact that Cassi was standing in front of Officer Marzolf's squad car at the time he ordered her backwards, making it difficult (if not impossible) for her to comply as commanded).

In other words, the video shows that Cassi may have been nonthreatening and attempting to comply with Officer Marzolf's commands, or she may have posed a threat and intentionally ignored him. What it does not show, however, is that Cassi's "version of events is so utterly discredited by the record that no reasonable jury could have believed h[er]." *Scott*, 550 U.S. at 380. In the absence of "such visible fiction," the panel majority was required to view the facts at summary judgment in the light most favorable to Cassi. *Id.* at 380–81. By instead weighing the videotape against Cassi's story and making its own conclusions, the panel majority expanded *Scott* well beyond its limited scope and impermissibly infringed on the province of the jury. *See Wilson*, 823 F.2d at 256 ("Summary judgment is not a substitute for the trial of disputed fact issues.").

Left unchecked, the panel majority's decision requires judges in this circuit to engage with disputed facts at summary judgment whenever the record includes video footage. After all, courts are required to grant summary judgment where the appropriate conditions are met. *See* Fed. R. Civ. P. 56(a) ("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." (emphasis added)). If ambiguous video footage can render disputes of material fact "ungenuine" within the meaning of Rule 56—as the panel majority suggests it can—then judges in this circuit will be *required* to carefully weigh and evaluate the veracity of parties' claims at summary judgment every time video footage forms part of the record. This not only puts judges in the difficult position of evaluating the trustworthiness of parties and witnesses without in-person testimony, but also threatens to overwhelm the judiciary in the digital age. *See* https://www.pewresearch.org/internet/fact-sheet/mobile/ (as of 2021, 85% of Americans say that they own a smartphone).

CONCLUSION

When the Supreme Court decided *Scott* in 2007, it did not invite lower courts to abandon traditional principles of summary judgment by making credibility determinations any time a party introduces video into evidence. Unfortunately, the divided panel in this case did just that. Because *Scott* is a narrow exception reserved for the rare case where video footage "so utterly discredit[s]" a party's version of events that it becomes "visible fiction" that "no reasonable jury could have believed," 550 U.S. at 380–81, en banc reconsideration is required to bring this circuit's decisions in line with those

of the Supreme Court. Failure to do so will invite (if not require) judges in this circuit to act as jurors at the behest of parties who film the operative facts of their case.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This petition complies with type-volume limits of Federal Rule of Appellate Procedure 35(b)(2) because it contains 5,337 words, as determined by the word-count function of Microsoft Word for Microsoft 365, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

2. This petition complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Georgia font.

/s/ Anya Bidwell
Anya Bidwell

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2023, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court and served via the Court's CM/ECF system upon all counsel of record.

I further certify that the foregoing Appellant's Petition for Rehearing En Banc has been scanned for viruses and is virus-free pursuant to Eighth Circuit Rule 28A(h).

/s/ Anya Bidwell
Anya Bidwell

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