No. 13-731

In The
Supreme Court of the United States

DEPUTY JARRETT MORRIS, DEPUTY JOSEPH SCHMIDT and DEPUTY JEREMY ROGERS,

Petitioners,

v.

CAROL ANN GEORGE,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Johnson v. Jones*, 515 U.S. 304 (1995), this Court held that a defendant is entitled to immediate review of a District Court's denial of a claim for qualified immunity if the denial turned on a question of *law*. In *Scott v. Harris*, 550 U.S. 372 (2007), this Court held that an appellate court should reverse a District Court's denial of a qualified immunity claim even if it was based on a determination that there were questions of *fact*, if a review of the record as a whole reveals that the plaintiff's version of events is not believable and that the defendant's conduct was objectively reasonable. The questions presented are:

1. Was the Court of Appeals correct when it held that it was "categorically precluded" from reviewing the record as a whole to determine whether plaintiff's version of events, which the District Court held sufficient to defeat qualified immunity, was blatantly contradicted by the record such that no reasonable jury could believe it?

2. If the Court of Appeals was required to review the record as whole to determine whether plaintiff's version of events was blatantly contradicted by the record such that the defendant deputies were entitled to qualified immunity, is a video or audio recording (such as in *Scott*) the *only* evidence that is sufficient to overcome plaintiff's conflicting version of events?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Carol Ann George, plaintiff, appellee below, and respondent here.
- Deputy Jarrett Morris, Deputy Joseph Schmidt, Deputy Jeremy Rogers, defendants, appellants below, and petitioners here.

In addition, the County of Santa Barbara, Deputy Harry Hudley and Deputy Larry Hess were defendants in the underlying action and appellants below but are not parties to this petition.

No corporations are involved in this proceeding.

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The Ninth Circuit's amended opinion, the subject of this petition, is for publication but does not yet have an official citation. (Appendix ("App.") 1-65.) The Ninth Circuit's initial opinion is published at 724 F.3d 1191 (9th Cir. 2013). The Ninth Circuit's order amending the opinion and the dissent, and denying the petition for rehearing was not published in the official reports. *George v. Morris*, 2013 U.S.App.LEXIS 19214 (9th Cir. 2013).

JURISDICTION

The Ninth Circuit initially filed its opinion on July 30, 2013. *George v. Morris,* 724 F.3d 1191 (9th Cir. 2013.) Appellants timely petitioned for panel rehearing and rehearing en banc. An amended opinion and amended dissent were filed on September 16, 2013, the same day on which the petition for rehearing and rehearing en banc were denied. (App. 1-65.) This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on writ of certiorari the Ninth Circuit's September 16, 2013 decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondent brought the underlying action under 42 U.S.C. § 1983 which states:

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondent alleges that the petitioner deputies violated her husband's rights under the Fourth Amendment to the United States Constitution, which reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue,

but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Factual Background

Donald George had recently been diagnosed with brain cancer and was despondent over his prognosis. Early on the morning of March 6, 2009, Donald told his wife Carol,[1] "I don't want to live like this, I'm going to be a vegetable." (App. 29-30.) He asked Carol to leave the house but she refused to do so, because she was afraid that he would commit suicide. When later that morning she saw Donald take his keys from their nightstand and head downstairs, Carol was concerned and followed him. She saw him go to their truck, locate his pistol and load it with ammunition. (App. 4.) Aware of her husband's suicidal thoughts, Carol had hidden all the firearms but had not been able to find the gun in the truck. (App. 28-30.)

When Carol saw her husband retrieve and load his gun, she begged him to give her the gun, "yanking at him" and "screaming at the top of [her] lungs" but he was too strong and would not turn over the weapon.

[1] Carol George and Donald George are referred to by first name for the purpose of clarity.

(App. 30.) At that point, hysterical with fear, she "started panicking" and called 911. (App. 30.) The call went to the Ventura Office of the California Highway Patrol (CHP). Carol exclaimed to the dispatch officer, "My husband has a gun!" She was "hysterically screaming, indeed shrieking almost incomprehensively as loud as any human being could," crying, "no, no no!" (App. 29.) The 911 operator tried, but could not obtain a complete address as Carol was unable to provide it. The Ventura CHP contacted a Santa Barbara Sheriff's Department (SBSD) 911 dispatcher. (App. 4.) The Ventura dispatcher informed the SBSD that he had a female caller "screaming that her husband has a gun." (App. 26.) The SBSD was able to call Carol back and obtain her complete address. (App. 4.)

Santa Barbara County Sheriff's deputies were dispatched to the George's house and told they were responding to a domestic disturbance involving a firearm. Deputies Jarrett Morris and Jeremy Rogers arrived first, with Deputy Joseph Schmidt right behind – they met Carol in front of the house and she advised them that Donald was on the patio and still had a gun. (App. 5.)

The deputies established a perimeter around the house. They could not see Donald and took care to cover any potential escape routes and to provide themselves some cover. Deputy Schmidt lay down in ice plants at the bottom of a steep slope – from his position on the ground, he could see the back of the house, which had a second floor balcony. (App. 5.)

There is some dispute as to which deputy first spotted Donald emerging onto the balcony, but there is no dispute that when he emerged, he was carrying a gun and using a walking device. Deputy Schmidt identified himself and shouted at Donald to show his hands. Once he heard Deputy Schmidt yell, Deputy Rogers came from the front of the house to the rear. (App. 5.)

The pivotal events in this case occurred in the next few moments – indeed it was merely twelve seconds from when the deputies first saw Donald had a gun until shots were fired. (App. 6-7.) The only surviving eyewitnesses to these events, the deputies, have testified that after manipulating the back of the gun as if he was either cocking it or removing the safety, Donald said something like "no you won't" and then raised the gun and pointed it directly at Deputy Rogers. Fearing for Deputy Rogers' life, all three deputies then fired at Donald. (Excerpts of Record ["ER"] 878, 883, 889.) If in fact, Donald pointed his gun, there is no dispute that the deputies were entitled to shoot. (App. 18.) However, the District Court concluded that Carol had adduced adequate evidence to call this fact into question.[2]

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[2] The District Court cited, and the Ninth Circuit relied upon the following additional evidence to support the qualified immunity denial. First, the District Court noted there was a dispute about who made the decision to set up a perimeter. (App. 70.) (Reliance on this dispute conflicts with the Ninth Circuit's confirmation that events prior to the shooting are irrelevant, at

(Continued on following page)

Carol's primary evidence was her own declaration submitted in support of summary judgment, stating that Donald was not strong enough to have raised the gun with both hands, as Deputy Rogers believed he had done. (App. 72.) Neither the District Court nor the Ninth Circuit were concerned that this conflicted with Carol's on-scene statement regarding her husband's activities that morning, including descending the stairs, retrieving and loading the gun and effectively resisting her efforts to "yank" it from him. (App. 29-30.)

When the shots were fired, Donald fell to the ground. Together the three deputies fired approximately nine shots. They then ran to assist Donald, applied first aid, and called an ambulance. He died two hours later at the hospital. (App. 7.)

Several months prior to his diagnosis, Donald had a conversation with a friend, who had been diagnosed with cancer. He told his friend that if he got cancer he would "get a gun, call the sheriff and have them shoot me." (App. 32-33.) While it was Carol that placed the call to law enforcement, the rest of the incident played out much as Donald had conceived.

App. 21 n. 14.) The second dispute concerned who saw Donald first and how he was holding his gun. (App. 71.) Third, the District Court noted a dispute regarding whether Deputy Schmidt could see Donald's gun when he ordered him to drop it. (App. 71.) The deputies assert that none of these purported disputes raise a triable issue.

B. Procedural Background

Carol filed her First Amended Complaint in the District Court on July 13, 2009. In addition to the petitioning parties here, she also sued the County of Santa Barbara and supervising deputies Harry Hudley and Larry Hess. (App. 7-8.) The County and the individual deputies moved for summary judgment on December 13, 2010. On June 24, 2011, the District Court entered an order granting in part and denying in part Defendants' motion for summary judgment. (App. 8.) The court dismissed Carol's claims of unreasonable seizure (of Carol), excessive force and supervisory liability against supervising deputies Hess and Hudley, and claims against the County of Santa Barbara under *Monell v. Dept. of Soc. Services*, 436 U.S. 658 (1978). (App. 8.)

The court denied deputies Morris, Rogers and Schmidt's assertion of qualified immunity. The Court found that the following disputed issues of material fact precluded a qualified immunity determination on summary judgment:

- Which deputy first decided to set up a perimeter;
- Who first saw Donald on the patio;
- In which hand Donald held the gun; and
- Whether the deputies reasonably felt Donald posed a threat – that is, whether or not he pointed his gun at Deputy Rogers. (App. 57-58; 70-73.)

On June 13, 2011 defendant deputies Morris, Roger and Schmidt filed their Ninth Circuit notice of appeal on the denial of qualified immunity. The deputies asserted that the disputed issues were not material, and that under *Scott v. Harris*, 550 U.S. 372 (2007), the Court was required to review the record as a whole. They further argued that Carol's declaration that her husband could not raise the gun with both hands (the only fact they conceded would be material if truly disputed), was clearly contradicted by her own statements on the morning of the shooting regarding what had occurred that day. When viewed as a whole, no reasonable jury could have believed that after all Donald had accomplished that morning, including physically resisting his wife's attempts to forcibly take the gun away from him, he was incapable of raising both arms to point a gun.[3]

The Ninth Circuit heard oral argument on February 7, 2013 and filed its initial Opinion on July 30, 2013, affirming the District Court's denial of summary judgment. The Court held that the District Court found there were questions of fact that precluded a determination that the deputies were entitled to qualified immunity and that it was therefore categorically precluded from considering the deputies' arguments. (App. 9-11.)

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[3] In fact, it was only Deputy Rogers that specifically recalled that he raised both arms. (App. 72.)

Judge Trott filed a lengthy dissent agreeing with the deputies that the Court was required to review the evidence as a whole, and that reviewed as a whole, no reasonable fact-finder could believe Carol's version of events. (App. 23-65.) He set out the deputies' testimony and Carol's statement the day of the shooting. He explained why Carol's conflicting declaration was not credible and why her expert, Thomas Parker's, declaration was irrelevant and inadmissible. Judge Trott strongly supported the deputies' claim to qualified immunity under *Scott* and its progeny, including *Wilkinson v. Torres,* 610 F.3d 546 (9th Cir. 2010). (App. 65.)

On August 13, 2013, the three deputies filed a petition for panel rehearing and rehearing en banc. In addition to the larger legal issues, the deputies pointed out that factually, the amount of time that passed between when the deputies first saw Donald with a gun on the balcony and when they fired shots was a mere twelve seconds, while the majority's opinion stated that it was four minutes. (*George*, 724 F.3d at 1191, 1194.)

On September 16, 2013, the Ninth Circuit denied panel rehearing and rehearing en banc but concurrently issued an amended decision and dissent. Judge Trott was the only member of the panel to support rehearing. (App. 2-3.) The amended decision corrects the timing inaccuracy and notes that the time lapse between when the deputies first saw Donald with the gun and when shots were fired was twelve seconds. The dissent elaborates on this point, arguing that

it clearly illustrates the split-second nature of the events at issue and the time the deputies had to take action with life-and-death implications. (App. 55.) This, Judge Trott asserted, gave even more credence to the deputies' claim of qualified immunity. This timely petition followed.

REASONS TO GRANT THE PETITION

Review is necessary to correct a departure from this Court's precedent in *Scott,* and to maintain the protection that qualified immunity affords to peace officers who risk their lives to serve the public under the most perilous circumstances. The Ninth Circuit's decision, in direct conflict with *Scott v. Harris, categorically precludes* review when the District Court denies qualified immunity on the basis of a disputed issue of fact. Review is unavailable even if the plaintiff's evidence that the District Court relied upon is overtly flawed, as with the contradicting video evidence in *Scott*, or in this case, where plaintiff's own statements the day of the shooting are irreconcilable with her summary judgment declaration. The challenged decision is in conflict not only with this Court's precedent, but also with cases from every other circuit that has considered the question.

Review is further necessary to clarify a conflict between the circuits as to what type of evidence is necessary to establish the unreasonableness of the plaintiff's version as this Court found the video

accomplished in *Scott*. Was the Ninth Circuit in this case correct that only "video-type" evidence is adequate to defeat the plaintiff's version or, as the defendant officers argued, must the court consider any evidence that renders the plaintiff's version unbelievable?

We expect peace officers to intervene in the most dangerous situations, to place themselves directly in harm's way without hesitation. We shield them with qualified immunity to ensure that the fear of litigation will not give them reason to waver in fulfilling the duties and obligations that society relies on them to accept. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). But the Ninth Circuit's decision removes the qualified immunity shield whenever the District Court finds that there is a genuine issue regarding whether the use of force was objectively reasonable. The appellate court has no discretion to look past the finding at the evidence upon which the District Court relied.

If the officers must endure trial in these cases in order to benefit from qualified immunity, then the benefit of the immunity is substantially lost. *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). In deadly force cases like this one, "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary." *Graham v. Conner*, 490 U.S. 386, 396-97 (1989). When an officer acts reasonably in these circumstances, he or she is entitled to qualified immunity; immunity not only from liability but also from the

challenges inherent in standing trial. But trial will be the outcome facing the three Santa Barbara County Sheriff's deputies in this case and undoubtedly, many more if this decision stands.

The Ninth Circuit decision conflicts not only with this Court's decision in *Scott*, but with decisions of nearly all courts of appeals, including the Ninth Circuit. Set forth below are cases from nine circuits, in all of which the Courts, in spite of *Johnson*, undertake a review of a District Court's finding that a genuine dispute of fact precludes summary judgment for the defendants on their claim of qualified immunity. In each of these cases, appellate courts have stated that, as in *Scott*, if the record as a whole sufficiently discredits plaintiff's evidence, the appellate court must disregard it, and based on remaining evidence, determine whether the officer's actions were reasonable as a matter of law. If the Ninth Circuit panel had followed this existing law, it would have found that the deputies' use of deadly force was reasonable because, once blatantly contradicted evidence is disregarded, the remaining undisputed evidence showed that they only shot at Donald after he pointed his gun at Deputy Morris.

It is essential that this Court grant review and provide a definitive statement regarding how appellate courts should review District Court denials of qualified immunity based upon a determination that there is a disputed issue of material fact. Because of the conflict in authority with this Court and nearly all appellate courts, certiorari is necessary to

maintain uniformity and consistency on the scope of review of these cases, which profoundly impact peace officer protection from unwarranted litigation. Review is also essential because consistency and clarity of the rules governing interlocutory review of orders denying qualified immunity is a matter of exceptional national importance.

I. THE PANEL'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT IN *SCOTT V. HARRIS*

In *Scott*, 550 U.S. at 380, this Court reiterated the general principle that, when the party moving for summary judgment "has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the *record taken as a whole* could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." (Citation omitted, emphasis added.) Accordingly, "When opposing parties tell two different stories, one of which is blatantly contradicted by the record so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment [based on qualified immunity]." *Id.*

Finding plaintiff's "version of events was so utterly discredited by the record that no reasonable jury could have believed him," this Court in *Scott* reversed the District Court's denial of qualified immunity.

Video evidence of the principle event in the case – a car chase – discredited plaintiff's testimony that he posed no serious risk to the public. This Court held that the court of appeals should not have relied on plaintiff's testimony, which the Court called a "visible fiction," to find that there was a factual issue sufficient to deny summary judgment. *Id.* at 380-81.

The Ninth Circuit in this case nevertheless stated that it could not consider the deputies' claim that the evidence supporting the District Court's determination was similarly unreliable when viewed with the record as a whole. (App. 9, 11.) Relying on *Johnson v. Jones*, 515 U.S. 304 (1995), the majority said that whether evidence creates a genuine issue is "categorically unreviewable on interlocutory appeal." (App. 9.) The Court determined that *Scott* did not intrude on the *Johnson* jurisdictional bar because "not a single Justice of the Supreme Court [in *Scott*] discussed the limits of the collateral order doctrine in qualified immunity cases." (App. 11.) Even if *Scott* did have application to the jurisdictional limitations set out in *Johnson* (which the Court denied), any such application would have to be rigidly limited to those cases involving similar video-type evidence that was at issue in *Scott*. Pointing out that this case involved no video evidence, the Ninth Circuit stated that even if there *were* video evidence like in *Scott*, it was precluded from reviewing it. (App. 12-13.) After *Scott*, this is not the law.

Scott, decided twelve years after *Johnson*, created an exception to the bar on reviewing questions of

"genuineness." *Scott* held that a plaintiff's alleged facts bind a court of appeals only "to the extent supportable by the record." *Scott*, 550 U.S. at 381 n. 8. If the appellate court finds that the "record as a whole" utterly discredits the plaintiff's story so that there is no genuine factual issue for a jury to decide – "the reasonableness of [the officer's] actions . . . is a pure question of law" for the court of appeals. *Id.*

The Ninth Circuit essentially disregarded this Court's direction in *Scott* to rely on the "record as a whole" when deciding whether a fact issue was "genuine." The Ninth Circuit stated that this level of review would require it to find that *Scott* implicitly overruled *Johnson*, a step the Court was unwilling to take. But it was not necessary for the Ninth Circuit to overrule *Johnson*, because *Johnson* and *Scott* are compatible. *Johnson* remains good law after *Scott*, generally preventing interlocutory review of a District Court's determination that fact questions are genuine. But here, like in *Scott* – where the record directly contradicts plaintiff's version of the material events – *Scott* directs the court of appeals to look past a plaintiff's unsupported claims and dismiss the case on interlocutory appeal.

The Ninth Circuit in this case further stated that even if it were to allow "for the sake of argument," the possibility that *Scott* established an exception to *Johnson*, it would not apply to this case because there was "no videotape, audio recording, or similarly dispositive evidence." (App. 12-13.) This misconstrues the reach of *Scott*, which stated a general principle

not limited to that case's specific facts. If there is evidence in the record that eviscerates plaintiff's story, the court of appeals must grant qualified immunity. *Scott*, 550 U.S. at 380-81. The form that evidence takes is immaterial. The Supreme Court described the video in *Scott* as merely "an added wrinkle," not as a specific requirement for reversal. *Id.* at 378. The video was determinative not because it was a video, but because it "utterly discredited" plaintiff's version of what happened. *Id.* at 380-81.

The Ninth Circuit's decision to ignore, or at least to rigidly restrict *Scott* makes this case appropriate for review by this Court.

II. THE PANEL'S OPINION, CATEGORICALLY DENYING REVIEW BASED ON JURISDICTION, CONFLICTS WITH APPELLATE DECISIONS FROM NEARLY ALL CIRCUITS, INCLUDING THE NINTH

Certiorari is appropriate where the challenged decision is in conflict with decisions of other circuit courts on the same important matter. Supreme Court Rule 10(a). That is the case here. This opinion, holding that any decision by the District Court that the parties' evidence presents a genuine issue of material fact is categorically unreviewable on interlocutory appeal, creates a direct conflict with nearly all other circuits, including prior Ninth Circuit precedent in *Wilkinson,* 610 F.3d 546.

A. Sixth Circuit

The Sixth Circuit has dealt most extensively with the application of *Scott.* In *Chappell v. City of Cleveland*, 585 F.3d 901 (6th Cir. 2009), police officer defendants shot and killed a teenage boy while conducting a protective sweep of his home. The boy's estate sued the officers who unsuccessfully asserted qualified immunity. The District Court held there was "a *factual* dispute about the nature of the threat posed . . . rendering it impossible to rule whether the officers' reaction was objectively reasonable." *Id.* at 904, emphasis added. The officers appealed and the appellate court held that "the District Court's characterization of the basis for its ruling does not necessarily dictate the availability of appellate review." *Id.* at 906.

The Sixth Circuit acknowledged the jurisdictional limitation imposed by *Johnson*[4] but explained that "the court is not obliged to, and indeed should not, rely on the nonmovant's version where it is 'so utterly discredited by the record' as to be rendered 'a visible fiction.'" *Chappell,* 585 F.3d at 906, citing *Scott,* 550 U.S. at 380-81. The Court held that the evidence upon which the lower court had denied summary judgment was incomplete because it failed to adequately consider all of the undisputed facts,

[4] The court actually cited *Leary v. Livingston County,* 528 F.3d 438, 447 (6th Cir. 2008), an appellate decision that echoes *Johnson.*

including non-video evidence that the boy had continued to move towards the officers when commanded to stop. *Chappell,* 585 F.3d at 911. The *Chappell* Court also commented on the District Court's assertion that the boy was holding the knife in an unthreatening manner, stating that this assumption,

> . . . represents the impermissible substitution of the district judge's own personal notions about what might have been . . . in a sanitized world of imagination quite unlike the dangerous and complex world where the detectives were required to make an instantaneous decision.

Id. at 912.

The Court reversed, holding the split-second decision to use deadly force in self-defense was not objectively unreasonable. *Id.* at 916. Other Sixth Circuit cases include *Moldowan v. City of Warren,* 578 F.3d 351 (6th Cir. 2009) [recognizing "an apparent exception" to the *Johnson* jurisdictional limitation as discussed by the dissent in this case (App. 46)]; *Coble v. City of White House,* 634 F.3d 865, 867-69 (6th Cir. 2010) [court considered audio tape but found it did not blatantly contradict] and *Austin v. Bedford Township Police Dept.,* 690 F.3d 490, 496 (6th Cir. 2012) [court considered soundless video but found no blatant contradiction].

B. Tenth Circuit

The Tenth Circuit conducted a similar analysis in *Lewis v. Tripp*, 604 F.3d 1221 (10th Cir. 2010), in which a chiropractor asserted state authorities (suspecting he was practicing without a license) had illegally searched his office. The defendants appealed the District Court's denial on summary judgment of their qualified immunity defense. After acknowledging the jurisdictional limitation of *Johnson*, the Court explained that the rule had "attracted some exceptions that we also must consider" including:

> When the 'version of events' the District Court holds a reasonable jury could credit is 'blatantly contradicted by the record,' we may assess the case based on our own *de novo* view of which facts a reasonable jury could accept as true.

Lewis, 604 F.3d at 1225-26.

The Court reversed after undertaking a *de novo* review of the facts. Another Tenth Circuit case, *Roosevelt-Hennix v. Prickett*, 717 F.3d 751, 757 (10th Cir. 2013), also references the *Scott* "exception" to *Johnson.*

C. Eleventh Circuit

The Eleventh Circuit has also considered *Scott* in conjunction with the question of jurisdiction. In *Pourmoghani-Esfahani v. Gee,* 625 F.3d 1313 (11th Cir. 2010), where plaintiff asserted both excessive force and deliberate indifference to medical care, the

District Court denied defendant's motion for summary judgment based on qualified immunity, finding that based on plaintiff's version of events, defendant had violated the constitution. *Id.* at 1313 n. 1. The appellate court affirmed as to the claim of excessive force but by reviewing plaintiff's story, modified where necessary by conflicting video evidence, the court determined defendant had not been deliberately indifferent. *Id.* at 1315, 1317-18. The court disagreed with plaintiff's assertion that it had no jurisdiction to review fact questions. *Id.* at 1313 n. 1. See also, *Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013) [acknowledging *Scott* and the appellate court's ability to "discard a party's account" when it is "inherently incredible and could not support reasonable inferences sufficient to create an issue of fact"].

D. Third Circuit

The Third Circuit considered *Scott*'s relationship to *Johnson* in *Blaylock v. City of Philadelphia*, 504 F.3d 405 (3d Cir. 2007). After a discussion of *Johnson* and its imposition of jurisdictional limits (at 408-09), the Court considered *Johnson* in the context of *Scott*. Though it acknowledged that this Court had not discussed the limits of the collateral order doctrine in *Scott*, the Third Circuit held that *Scott* necessarily impacted those limits, reasoning:

> *Scott* would thus appear to support the proposition that, in this interlocutory appeal, we may exercise some degree of review over

> the District Court's [factual] determination. . . .

Id. at 413-14. The rule of *Scott*, the Court held,

> may represent the outer limits of the principle of *Johnson* [] – where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a Court of Appeals may say so, even on interlocutory review.

Id. at 414. While in *Blaylock*, the court held that defendant's evidence was inadequate to refute plaintiff's version of events, the court clearly accepted that it had jurisdiction to overrule the District Court's denial of summary judgment had the defendant's evidence been more compelling. The Sixth Circuit approved of the Third Circuit's approach in *Blaylock* stating it "represents a principled way to read *Johnson* and *Scott* together and to correct the rare blatant and demonstrable error without allowing *Scott* to swallow *Johnson*." *Romo v. Largen*, 723 F.3d 670, 674 n. 3 (6th Cir. 2013).

E. Fourth Circuit

The Fourth Circuit has held that *Scott* "simply reinforces the unremarkable principle that at the summary judgment stage, facts must be viewed in a light most favorable to the nonmoving party when there is a *genuine* dispute as to those facts." *Witt v. W. Va. State Police Troop 2*, 633 F.3d 272, 277 (4th Cir. 2011), emphasis in original, quotation marks

omitted. In *Witt*, the appellate court affirmed a District Court's denial of summary judgment. The court held that the dashboard video produced by defendant did not capture significant events and was not a basis to reverse the District Court's decision. *Id.* at 277. The court clarified that *Scott* did not alter the summary judgment standard but only clarified that there could be no *genuine* issue if one side's story was blatantly false. *Id.* at 276. While the Fourth Circuit did not reverse the District Court's decision, the court's analysis is consistent with *Scott* and contrary to how the lower court in this case proceeded. See also, *Iko v. Jones*, 535 F.3d 225, 230 (4th Cir. 2008) [deciding based on *Scott* to review District Court's fact determination in light of video evidence].

F. Second Circuit

In *Stansbury v. Wertman,* 721 F.3d 84 (2d Cir. 2013), a false arrest case, the court also considered a District Court denial of a qualified immunity claim based on a finding that genuine issues of fact precluded summary judgment. The Second Circuit held that the District Court's analysis was flawed because it "analyzed each piece of evidence in the case *seriatim* and in isolation" rather than properly reviewing the record "in its totality." *Id.* at 87. The plaintiff claimed that some of the documentation in the record was invalid or nonexistent but citing *Scott*, the appellate court held that these "assertions do not constitute a genuine dispute as to those facts." *Id.* at 90 n. 4, quotation marks omitted. The court concluded

that "ignoring frivolous allegations" [as permitted by *Scott*], the record established uncontroverted facts that provided probable cause for the subject arrest and required summary judgment for the defendant. *Stansbury*, 721 F.3d at 95. So, in *Stansbury*, the Second Circuit relied on *Scott* to disregard plaintiff's allegations that were unsupported by the record and as a result, reversed the District Court's summary judgment denial.

G. First Circuit

In *Campos v. Van Ness*, 711 F.3d 243 (1st Cir. 2013), the First Circuit considered a District Court's denial, with no written opinion, of qualified immunity. *Id.* at 244. The court noted the jurisdiction limitation on appeal but stated that "the Supreme Court had carved out an exception to that rule" for those occasions where the non-movant's version was "blatantly contradicted by the record such that no reasonable jury could believe it." *Id.* On those occasions, the court stated, it should not adopt that version of facts for purposes of ruling on a motion for summary judgment. *Id.* In the end, the court held that defendants' proffered evidence did not blatantly contradict the plaintiff's version. Accordingly, it upheld the District Court's decision.

H. Eighth Circuit

The Eighth Circuit followed *Scott* in *Wallingford v. Olson*, 592 F.3d 888 (8th Cir. 2010) when it reversed

the District Court's denial of summary judgment, holding that although the District Court found there was a factual dispute, in fact "the videotape conspicuously refutes and completely discredits *Wallingford*'s version of the material facts" and "demonstrates as a matter of law," that defendant's use of force was objectively reasonable. *Id.* at 893.

In *Thompson v. King,* 730 F.3d 742 (8th Cir. 2013), the District Court held there were genuine issues of material fact and therefore denied summary judgment to two officers asserting qualified immunity in a claim based on failure to provide medical care. *Id.* at 747. The appellate court reversed as to one of the officers, finding that the undisputed facts did not amount to a constitutional violation (*id.* at 748), and affirmed as to the other officer, after reviewing videotape and determining that it did not blatantly contradict the plaintiff's version of events. *Id.* at 747 n. 3. The Eighth Circuit therefore also views *Scott* as a means when appropriate to reverse a District Court's finding of a genuine issue of fact. See also, *Coker v. Arkansas State Police,* 734 F.3d 838 (8th Cir. 2013) [considering dash-camera evidence per *Scott* but finding no blatant contradiction with plaintiff's version].

I. Ninth Circuit

Finally, prior Ninth Circuit case law conflicts with this opinion. In *Wilkinson,* 610 F.3d at 550, a police shooting case, the court cited *Scott* for the

principle that "when the facts, as alleged by the non-moving party, are unsupported by the record such that no reasonable jury could believe them, we need not rely on those facts for purposes of ruling on the summary judgment motion." The court went on to review the entire record and reverse the District Court's determination that there were genuine issues of fact. *Id.* at 551-53. The *Wilkinson* record included a statement by the shooting officer that was potentially inconsistent with the immediate threat that was the justification for the shooting. Additional evidence included a bystander witness statement that plaintiff thought created a triable issue.

But the Ninth Circuit found, "Plaintiff's sanitized version of the incident cannot control on summary judgment when the record as a whole does not support that version." *Wilkinson,* 610 F.3d at 551. Specifically, the court concluded that plaintiff's version omitted "the urgency of the situation," noting that the entire episode occurred in less than nine seconds. *Id. Wilkinson* did not involve any video evidence. Though in some sense conceding that the *Wilkinson* court appeared to employ *Scott* as an exception to *Johnson*'s jurisdictional rule under similar circumstances, the appellate court in this case asserted that *Wilkinson* was irrelevant and created no precedent because the *Wilkinson* court didn't expressly consider the *Johnson* jurisdiction question. (App. 14.) But jurisdiction is a necessary precondition to court action. If the *Wilkinson* court had no jurisdiction to review the District Court's denial of summary

judgment, then it was improper for the court to proceed. The assumption by the court below that the *Wilkinson* court acted without jurisdiction, while perhaps convenient, lacks appropriate deference to the earlier precedent.

The above analysis shows that most of the appellate courts have now had occasion to consider *Scott* and its impact on appellate review of District Court decisions denying summary judgment motions based on qualified immunity. Circuits that have considered the question have all held either explicitly or implicitly, that *Scott* creates an exception to the collateral order rule; and allows appellate courts to reverse a District Court's determination that summary judgment on qualified immunity grounds is improper because of the existence of a genuine issue of fact. Review is necessary here because the decision below is at odds with this consensus.

III. THE NINTH CIRCUIT PANEL'S ASSERTION THAT THE RULE IN *SCOTT* IS LIMITED TO CASES WITH A VIDEO RECORDING IS AN OVERLY NARROW INTERPRETATION OF THE CASE

The court below asserts first and foremost that regardless of the evidence offered, any determination by the District Court that a genuine issue of fact precludes summary judgment is categorically unreviewable. (App. 9.) The court goes on however, to state that even if it were to accept that *Scott* provides an

exception to the jurisdictional rule of *Johnson*, this case would *not* fit within that exception because "it points to no videotape, audio recording, or similarly dispositive evidence that 'blatantly contradicts' or 'utterly discredits' Carol's side of the story." (App. 12-13.) This narrow interpretation of *Scott* is a separate basis to grant certiorari because it is inconsistent with the decision itself, and is a source of disagreement between the appellate courts.

In *Scott,* this Court stated a general principle for how courts should consider summary judgment motions, particularly with respect to claims of qualified immunity:

> When opposing parties tell two different stories, one of which is blatantly contradicted *by the record*, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

Scott, 550 U.S. at 380, emphasis added. In so summing up the rule, this Court did not mention video recordings specifically or any kind of recording, but referred simply to the *record*; if there is evidence in the record as a whole that eviscerates plaintiff's story, the court of appeals must grant qualified immunity. *Id.* at 380-81. This Court described the video in *Scott* as "an added wrinkle," not as a specific requirement for reversal. *Id.* at 378. The video was determinative not because it was a video, but because it "utterly discredited" plaintiff's version of what happened. *Id.* at 380-81. The rule of *Scott* is that if

the record, whatever it contains, is such that elements of the plaintiff's story are not reasonably believable, then the appellate court may disregard those aspects of the story and decide, based on what remains, whether qualified immunity applies. This has been the conclusion the appellate courts have reached in most subsequent decisions.

Few cases have expressly considered the question whether *Scott* is limited to video evidence. *Coble v. City of White House,* 634 F.3d 865 was decided after Sixth Circuit cases that arguably interpreted *Scott* as applying only to cases in which a video recording was part of the record. See *Hayden v. Green,* 640 F.3d 150, 152 (6th Cir. 2011) and *Marvin v. City of Taylor*, 509 F.3d 234, 239 (6th Cir. 2007). Based in part on these precedents, the plaintiff in *Coble* contended that *Scott* was "limited to cases where the events were recorded on a videotape" but the court disagreed. "There is nothing in the *Scott* analysis that suggests that it should be restricted to cases involving videotapes." *Coble,* 634 F.3d at 868-69. The court concluded that the focus was not on the specific nature of videotape, but on "the record" and listed unpublished cases in which other circuits had considered non-video evidence, including medical records, an MRI and an autopsy report, in applying *Scott. Coble,* 634 F.3d at 869. Also from the Sixth Circuit, see *Moldowan,* 578 F.3d at 371 n. 3, where the court cites an unpublished decision for the proposition that contradictory deposition testimony is adequate to reverse a District Court's finding of disputed issues of material fact.

Wilkinson is another example of an appellate court considering non-video evidence to overturn a District Court's determination that there was a disputed issue of material fact. In that case, the evidence (which included no video) that established the blatant contradiction was the failure of the District Court to properly consider the "urgency of the situation." *Id.* at 552. The fact that the shooting officer had himself testified that the unarmed plaintiff "had stopped [driving]" before he fired the last two of six shots was not adequate to create a question of fact whether the officer had time to reevaluate the need for deadly force before firing the final shots. The evidence as a whole, in contrast to plaintiff's sanitized version of events, established that the officer had a reasonable belief that the decedent posed a deadly threat to himself and his fellow officer. *Id.* at 553.

While there are few cases in which the court expressly considers the question of what evidence can be used under *Scott*, several appellate courts have considered a variety of different kinds of evidence, though not surprisingly most often finding that it does meet the stringent standard of showing such blatant contradiction with plaintiff's version of events that no reasonable jury could believe it. These cases include *Stansbury,* 721 F.3d at 90 [holding that plaintiff's assertions that evidence was invalid were frivolous]; *Blaylock,* 504 F.3d at 414 [considering defendant's argument regarding the comparison of two photos but finding it insufficient to overturn District Court finding of genuine issue]; *Campos,* 711 F.3d at

244 [record included no video but the court considered defendant's argument that plaintiff's description of the shooting was "so discredited by the record that no reasonable jury could believe her"] and *Moldowan*, 578 F.3d at 370 n. 3, discussed above.

In sum, while a few cases focus on the precise nature of the evidence employed by this Court in *Scott*, most appellate courts have taken a broader view. In this case, the Ninth Circuit disregarded the defendants' argument in part at least, because the record did not include video-type evidence. (App. 13.) Review is necessary here to establish what kind of evidence can be cited for the purpose of showing a blatant contradiction in plaintiff's version of events. Petitioners assert that this Court's intention was not to limit the application of *Scott* only to those cases that benefit from live recordings of key events.

IV. FAILING TO CONSIDER THE RECORD AS A WHOLE UNDERCUTS THE PROTECTIVE PURPOSE OF QUALIFIED IMMUNITY

Qualified immunity exists "because officials should not err always on the side of caution because they fear being sued." *Hunter*, 502 U.S. at 229 (citation omitted). Qualified immunity recognizes that "holding officials liable for reasonable mistakes might unnecessarily paralyze their ability to make difficult decisions in challenging situations." *Mueller v. Auker*, 576 F.3d 979, 993 (9th Cir. 2009). This Court has emphasized that cases should be dismissed on qualified

immunity grounds "at the earliest possible stage in litigation," *Hunter,* 502 U.S. at 227, because the defense is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell*, 472 U.S. at 526. Since it is "an immunity from suit . . . it is effectively lost if a case is erroneously permitted to go to trial." *Id.* And because an order denying qualified immunity would be "effectively unreviewable," it is immediately appealable even though it is interlocutory. *Scott*, 550 U.S. at 376 n. 2.

In deadly force cases, courts are required as part of the qualified immunity analysis, to examine the balance of the record to determine whether other circumstantial evidence "would tend to discredit the police officer's story." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). The decision below holds, citing only to two pre-*Scott* opinions from the Fifth and Seventh Circuits,[5] that because this inquiry "concerns genuineness . . . we may not decide at this interlocutory stage if the district court properly performed it." (App. 11.)

The majority mischaracterizes both the District Court examination in deadly force cases required by *Scott v. Henrich*, and the effect of that examination on the scope of review on interlocutory appeal. *Scott v. Henrich* requires the District Court to evaluate not

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[5] *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004) (en banc) and *Abdullahi v. City of Madison*, 423 F.3d 763, 772 n. 8 (7th Cir. 2005).

just whether there is evidence that is inconsistent with the officer's version of the incident; but also whether that evidence is sufficient to "convince a rational factfinder that the officer acted unreasonably." *Id.* at 915. In other words, the inconsistency must be substantive – it must make a difference. Since this is a judgment of materiality, not just genuineness, it is necessarily reviewable on interlocutory appeal. *Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996).

Moreover, this superficial approach to appellate review undermines the protective purpose of qualified immunity. Whenever a peace officer is the only remaining witness, all factual questions identified by the District Court would be unreviewable by the appellate court. Even if the totality of the record demonstrates that the evidence offered by the plaintiff and relied on by the District Court is incredible, the appellate court would lack jurisdiction to do anything about it.

This Court has long attempted to avoid rules that "inevitably induce tentativeness by officers, and thus deter the police from protecting the public and themselves." *Scott v. Henrich,* 39 F.3d at 915. Yet, that would be the impact if this decision stands. Cases in which qualified immunity would otherwise have protected peace officers from the burdens of litigation would continue through trial – forcing them to needlessly endure the resulting personal, emotional, professional, and financial costs. The lesson for a peace officer faced with the split-second, life or death choice

whether to use deadly force would be to think twice; to hesitate; perhaps to retreat. Choosing deadly force could mean years of litigation – potentially grounded on demonstrably baseless charges – without any pre-trial appellate recourse. Even if a trial or post-trial appeal ultimately vindicated the peace officer, the goal of the defense would already be "effectively lost." *Mitchell*, 472 U.S. at 526-27. This case is an example of the negative consequences if this misguided rule remains the law of this Court.

The majority acknowledged that when "an individual points his gun 'in the officers' direction,' the Constitution undoubtedly entitles the officer to respond with deadly force." (App. 18, citing *Long v. City & County of Honolulu*, 511 F.3d 901, 906 (9th Cir. 2007).) It refused, however, to credit the deputies' testimony that Donald pointed a gun at Deputy Rogers, because the District Court had found that there was a genuine issue regarding the accuracy of that testimony. (App. 18.) According to the panel, the District Court found a triable issue based on: (1) supposed inconsistencies in the deputies' testimony; (2) opinions from plaintiff's expert; and (3) "medical evidence." (App. 6 n. 3, 11.) The panel did not describe any of this evidence or how it created a triable issue, apparently because it believed that it had no jurisdiction to review the District Court's reasoning. (App. 11.)

As the dissent was not laboring under this misapprehension, it reviewed this evidence in detail, demonstrating that the deputies' description of the

incident was internally consistent in all material respects and that other evidence in the record corroborated it. (App. 25-34.) See *Scott v. Henrich*, 39 F.3d at 915 (court is to review record "to determine whether the officer's story is internally consistent and consistent with other known facts"). Any inconsistencies in their testimony were immaterial. (App. 57-58.) Since the deputies argued the lack of materiality on appeal, and the court had jurisdiction to review materiality under *Behrens*, 516 U.S. at 312-13, the majority could have and should have excluded this evidence from its analysis. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment").

The dissent also explained how none of the plaintiff's expert's opinions were admissible. (App. 35-36; 59-62.) The majority evaded this inconvenience based on the lack of an objection under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Op. 13 n. 10. No *Daubert* motion was necessary, though, because the District Court sustained the deputies' objections to all of the expert's opinions regarding what Donald actually did while he was on the balcony before the shooting. (ER 22, 413, 425-44.) The majority should also have declined to consider the expert's opinions.

Turning to the "medical evidence," the District Court did point to a discrepancy between a medical record and Deputy Morris' initial memory of which

hand Donald was holding the gun in when he walked onto the balcony. (ER 5.) Yet, whether Donald started with the gun in his right or left hand is immaterial. It is undisputed he carried a loaded gun. (App. 6.)

The lower court's reference to "medical evidence" seems to have also included Carol's declaration in which she claims that Donald was incapable of pointing his gun at Deputy Rogers. But her statement to the Sheriff's Department four hours after the incident, describing Donald's actions that very morning, was nearly as persuasive as a video showing him pointing the gun. She described Donald: (1) walking unassisted (with a walker) from the upstairs to the downstairs of their home and outside to a car; (2) unlocking and opening the trunk; (3) pulling out a handgun; (4) retrieving a clip of bullets; (5) inserting the clip into the gun; (6) resisting her attempts at "yanking" and pulling "pretty strong" the gun away from him; and (7) walking back into the house with the gun. (App. 29-31.) This indisputable evidence guts the claim that Donald could not have raised and pointed the gun at Deputy Rogers. Under *Scott* and *Wilkinson,* the majority should not have relied on this blatant fiction.

The remaining evidence demonstrates that the deputies faced a classic "tense, uncertain, and rapidly evolving" situation, requiring them to literally make a split-second life or death decision. *Graham v. Conner*, 490 U.S. at 397. Viewing "the facts [from the Deputies'] perspective at the time [they] decided to fire," *Wilkinson,* 610 F.3d at 551, there is no question

that, after repeated warnings over just twelve seconds, Donald pointed a gun at Deputy Rogers. The law did not require the deputies to wait before neutralizing that threat. *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985).

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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