No. 21-1225

IN THE

Supreme Court of the United States

THE ESTATE OF DILLON TAYLOR, *et al.*,

Petitioners,

v.

SALT LAKE CITY, UTAH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The decision below misapprehends summary-judgment standards given this Court's well-established precedents. Despite Respondents' arguments, this Court has seen fit to grant review under similar circumstances. *See, e.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 197–98 (2004) (summarily reversing decision in Fourth Amendment excessive-force case "to correct a clear misapprehension of the qualified immunity standard"); *Tolan v. Cotton*, 572 U.S. 650, 650–51 (2014) (vacating Fifth Circuit's decision affirming summary judgment based on qualified immunity because the court failed to adhere to the correct legal standard).

This Court has long held that excessive-force claims are to be judged under the Fourth Amendment's "objective reasonableness" standard. *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1 (1985); *Graham v. Connor*, 490 U.S. 386 (1989). The Tenth Circuit, however, has departed from this standard and is applying its own twofold reasonableness inquiry: (1) whether the officer was in danger at the precise moment he or she used force; and (2) whether the officer's own reckless or deliberate conduct during the seizure unreasonably created the need to use this force.

Not only has the Tenth Circuit supplanted the Fourth Amendment's objective-reasonableness standard with its own inquiry, but that court is also applying this standard subjectively. In this case, the Tenth Circuit used its finding that Officer Cruz "reasonably feared for his safety" to conclude that his actions could not have been reckless or deliberate. In so holding, the Tenth Circuit ignored the second prong of its reasonableness inquiry, which

requires the court to consider whether the officer's own conduct unreasonably created the need for excessive force. Respondents argue that an officer's reckless or deliberate conduct is not a consideration in determining whether that officer reasonably feared for safety, and that reasonable fear alone is enough to satisfy the use of lethal force under the Fourth Amendment's totality-of-circumstances test. This is a misapprehension of the qualified-immunity standard, which requires that the officer's conduct in question be reasonable under the totality of circumstances. Those circumstances here included that Dillon[1] was not committing any crime or evading arrest.

Absent further guidance from this Court on the objective-reasonableness standard, circuit courts can define "objective reasonableness" however they see fit and in a manner that circumvents the Fourth Amendment. Giving such power to the circuit courts will inevitably result in an expansion of qualified immunity such that it will protect officers whom the doctrine is expressly intended to exclude.

The opinion below also misapplies the summary-judgment standard. Settled law holds that where evidence is ambiguous, a party opposing summary judgment is entitled to have all reasonable inferences drawn in its favor. A lack of consistent precedent expounding this principle—particularly as it relates to video evidence—has allowed the Tenth Circuit and other courts to distort

1. The name *Taylor* will be used to refer to Petitioners collectively whereas a first name will be used when a reference to any individual is needed.

it, resulting in conflicting decisions based on individual judges' improper weighing of evidence.

The record in this matter raised a genuine issue of material fact. The video capturing Officer Cruz shooting Dillon is subject to more than one reasonable interpretation. Perhaps the best evidence of this is the dissent below, whose author noted that he was "left to wonder whether [he] viewed the same video evidence as [his] colleagues." *Est. of Taylor v. Salt Lake City*, 16 F.4th 744, 780 (10th Cir. 2021) (Lucero, J., dissenting).

This case presents a prime opportunity for this Court to provide further guidance regarding a frequently applied standard. By explaining in greater detail what it means to draw all reasonable inferences in a nonmovant's favor when ambiguous video evidence is implicated, this Court would be providing valuable direction to lower tribunals across the United States and preventing unintended extension of qualified immunity. If the Tenth Circuit's decision is allowed to stand, this case will set a dangerous precedent "exten[ding] the judicially created doctrine of qualified immunity to shield officers even when there is a substantial and material dispute in the evidence." *Id.* at 777 (Lucero, J., dissenting).

I. The Tenth Circuit's decision conflicts with this Court's precedents.

A. The Tenth Circuit's decision violates this Court's precedent on the objective reasonableness of an officer's use of force under the Fourth Amendment.

The Tenth Circuit's decision violates well-established Supreme Court precedent on the inquiry regarding the reasonableness of the officer's use of force. Police use of excessive force is an established constitutional violation. *Tennessee v. Garner*, 471 U.S. 1, 7–8 (1985). In an excessive-force case, the factfinder determines whether the police officer is liable by deciding whether the force in question was excessive under the Fourth Amendment's objective-reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 399 (1989). Thus, the relevant question in excessive-force cases is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. Analyzing this question requires careful attention to the facts of each case when applying *Graham*'s three factors: "(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to safety of the officers or others, and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396.

In *Sevier v. City of Lawrence, Kan.*, 60 F.3d 695, 699 (10th Cir. 1995), the Tenth Circuit explained that the reasonableness of defendants' actions is twofold: (1) whether the officers were in danger at the precise moment

they used force; and (2) whether defendants' own conduct during the seizure unreasonably created the need to use the force.

The Tenth Circuit majority below deviated from the objective-reasonableness inquiry applicable in the excessive-force context. The majority rested its decision solely on *Sevier*'s first prong, finding that "the totality of the circumstances indicates that—by the time Officer Cruz discharged his weapon—he reasonably perceived that Mr. Taylor posed an immediate, mortal threat to his safety or the safety of others." Pet. App. A. 40a. In finding that prong one was satisfied, the Tenth Circuit summarily determined—or wholly disregarded—whether Officer Cruz unreasonably created the need to use deadly force with his own reckless or deliberate conduct: "there is no basis for concluding that Officer Cruz acted recklessly and unreasonably in the circumstances surrounding his seizure (i.e., use of lethal force against) of Mr. Taylor, or that any such actions by Officer Cruz 'immediately connected with the seizure' 'creat[ed] the need for force.'" *Est. of Taylor*, 16 F.4th at 772 (alteration in original) (quoting *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001)). The issue with that determination is that Officer Cruz still would not be entitled to qualified immunity because there is a genuine dispute of fact as to whether Officer Cruz violated Dillon's Fourth Amendment rights by using force as a result of Officer Cruz's own reckless or deliberate actions. The Tenth Circuit essentially did away with *Graham*'s totality-of-the-circumstances test by ignoring the first and third prongs, and, with respect to the second prong ("whether the suspect poses an immediate threat to safety of the officers or others") not taking into consideration the officer's actions.

B. The decision below violates this Court's precedents holding that on summary judgment, facts must be construed to favor the nonmoving party.

This Court has long held that "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan*, 572 U.S. at 656 (internal citations omitted). As the Court has explained, "[t]his is not a rule specific to qualified immunity; it is simply an application of the more general rule 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.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

In *Tolan*, the district court granted summary judgment to the defendant, and the Fifth Circuit affirmed, reasoning that regardless of whether the defendant had used excessive force, he was entitled to qualified immunity because he did not violate any clearly established right. *Id.* at 651. This Court vacated the Fifth Circuit's decision because "the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Id.* (quoting *Anderson*, 477 U.S. at 255).

Like the *Tolan* court, the Tenth Circuit below failed to view evidence and draw inferences in favor of the nonmovant (Taylor in this case). In fact, the Tenth Circuit directly contravened its duty by construing ambiguous video evidence in a light most favorable to Respondents.

II. Qualified immunity should be narrowed or abolished.

By circumventing the analysis of an officer's reckless or deliberate conduct in excessive-force cases, the Tenth Circuit's decision expands the scope of qualified-immunity protection to those the doctrine expressly excludes. Qualified immunity was intended to "protect all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). In excessive-force cases, the inquiry that decides whether the force used by police was so excessive that it violated the Fourth Amendment is the same inquiry that decides whether the qualified-immunity defense is available. *See, e.g.*, *Dixon v. Richer*, 922 F.2d 1456, 1463 (10th Cir. 1991). This identity of inquiries gives circuit courts latitude to define and—as the Tenth Circuit did here—impermissibly alter the Fourth Amendment's objective-reasonableness standard, thus rendering the doctrine of qualified immunity ever malleable and unreconcilable with its purpose to "give[] government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 563 U.S. at 743.

Respondents' argument that Taylor failed to identify any "clearly established precedent" that would have put every reasonable officer on notice that use of deadly force violated the Fourth Amendment, Resps.' Br. 29, only highlights the issue that needs to be resolved. Qualified immunity has stagnated the development of constitutional law by encouraging courts to perpetually avoid determining the constitutionality of challenged practices by instead simply finding that any constitutional violation is not clearly established.

The Tenth Circuit's extraordinary conclusion—that Officer Cruz did not have "fair warning" that his actions in shooting an unarmed twenty-year-old man not engaged in suspicious activity based on an anonymous tip did not violate the Fourth Amendment—illustrates that modern qualified-immunity jurisprudence is fundamentally flawed and in need of reconsideration by this Court.

Moreover, members of this Court, and other legal scholars across the ideological spectrum have recognized that qualified immunity is grounded in neither the text of 42 U.S.C. § 1983 nor the common law of official liability that existed when that statute was enacted. What began as an attempt by this Court to apply a narrow good-faith defense to a false-arrest claim (because bad faith was an element of that claim at common law) has since been transformed by judicial policy preference into a near-total liability shield across all § 1983 claims. The near-universal indemnification of government officials means that qualified immunity is unnecessary to serve its primary purpose of protecting officials from risk of financial liability during exercise of their discretion in the line of duty.

In *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), this Court held that federal executive officials and wardens were entitled to qualified immunity with respect to civil-rights conspiracy claims asserted by aliens who were detained following 9/11 and allegedly abused by guards. Justice Thomas concurred in the Court's judgment. In discussing the common-law backdrop for qualified immunity, Justice Thomas criticized the evolution of this doctrine. He noted that "we have 'completely reformulated qualified immunity along principles not at all embodied in the common law.'"

Id. at 1871 (Thomas, J., concurring). He also noted that "[o]ur qualified immunity precedents . . . represent precisely the sort of 'free-wheeling policy choice[s]' that we have previously disclaimed the power to make." *Id.* (Thomas, J., concurring). Accordingly, he suggested that "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence." *Id.* (Thomas, J., concurring); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (describing modern qualified immunity as an "absolute shield for law enforcement officers").

This case presents the perfect vehicle for reconsideration of qualified-immunity jurisprudence. Absent reassessment and a narrowing of the modern doctrine, constitutional law will continue to stagnate, and plaintiffs alleging serious constitutional harm will remain without remedies.

III. Guidance regarding application of the summary-judgment standard to ambiguous video evidence is needed by lower courts.

It is well established that when a court evaluates a motion for summary judgment, "all evidence must be construed in the light most favorable to the party opposing summary judgment." *Anderson*, 477 U.S. at 261 n.2. Simple as this principle may sound in theory, its practical application is often less clear-cut.

Respondents point out that while a party opposing summary judgment is usually entitled to have its version of the facts adopted, where the record includes video evidence that clearly contradicts the nonmovant's story,

the facts should be viewed in light of the video evidence. Resps.' Br. 16 (citing *Scott v. Harris*, 550 U.S. 372, 378 (2007)). Respondents insist that the video of Dillon's death is blatantly inconsistent with Taylor's version of the facts such that it was permissible for the district court to find facts consistent with Respondents' narrative.

Scott was a case in which a police officer injured a fleeing driver by ramming the driver's car with his own in an effort to stop the driver from endangering the public. *Scott*, 550 U.S. at 374–75. The driver sued the officer, claiming that the officer had used excessive force. *Id.* at 375–76. The officer moved for summary judgment, but his motion was denied by the district court, and the denial was upheld by the Eleventh Circuit. *Id.* at 376. In reversing the Eleventh Circuit's decision, this Court explained that video of the police encounter contrasted wildly with the factual narrative on which the lower courts had relied, so much so that the lower courts should have viewed the factual record in light of the video evidence rather than in the light most favorable to the plaintiff. *Id.* at 378–79.

Justice Stevens dissented in *Scott*, disagreeing with the majority's interpretation of the video evidence and stating, "the Court has usurped the jury's factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable. . . . If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events." *Id.* at 395–96 (Stevens, J., dissenting).

Here, in contrast to *Scott*, Taylor's version of events was not "so utterly discredited by the record that no reasonable jury could have believed him," *Scott*, 550 U.S. at 380, since Senior Circuit Judge Lucero dissented and expressly agreed that the video evidence supported Taylor's version of events. For instance, while the majority states that Dillon began walking away from Cruz instead of following his commands and that Dillon ignored multiple commands, the video shows that Dillon began walking away from Cruz *before* Cruz even exited his car and that Cruz did not even utter two complete commands before shooting Dillon.[2] *Est. of Taylor*, 16 F.4th at 780–81 (Lucero, J., dissenting). At that point, Dillon had no indication that he was the target of any investigation or that the officers were there to confront him. At worst, Dillon was exercising his right to walk away from an unconstitutional police stop. *See Terry v. Ohio*, 392 U.S. 1, 16 (1968). Viewed in the light most favorable to Taylor, a jury could rely on these facts to support a conclusion that Officer Cruz lacked a reasonable basis to fear Dillon.

Further, without any support from the record, both the majority and the district court variously describe Dillon's hand motions as "digging," consistent with "manipulating something," and "consistent with the drawing of a gun." These characterizations improperly construe the evidence in the light most favorable to Officer Cruz. While the majority concludes that Dillon's defiant behavior and conspicuous hand movements would have caused a reasonable officer to believe that Dillon was

2. The video does not capture the entire interaction between Officer Cruz and Dillon, as the recording device was only turned on during the final seconds of the encounter.

making a hostile motion with a weapon, the video does not capture this so-called defiance and includes minimal, blurry footage of Dillon's hand motions, which are ambiguous at best. *See Est. of Taylor*, 16 F.4th at 781–82 (Lucero, J., dissenting).

The Tenth Circuit has held that where video evidence is subject to multiple interpretations, it is the responsibility of a jury to resolve the factual dispute. *Bond v. City of Tahlequah*, 981 F.3d 808, 819 (10th Cir. 2020), *rev'd on other grounds*, 142 S. Ct. 9 (2021) (per curiam); *Emmett v. Armstrong*, 973 F.3d 1127, 1135 (10th Cir. 2020). Given the importance and ubiquity of video evidence, it is crucial that this Court clarify and standardize this principle throughout the United States by issuing guidance regarding interpretation of a factual record in the light most favorable to a party opposing summary judgment when ambiguous video evidence is at issue.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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