No. 23-617

In The
Supreme Court of the United States

CASONDRA POLLREIS,

Petitioner,

v.

LAMONT MARZOLF,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The Petition established that the Eighth Circuit's decision below represents a radical expansion of this Court's decision in *Scott* v. *Harris*, 550 U.S. 372 (2007), one that sharply diverges from other circuits and that threatens to permit appellate judges to resolve disputed facts at summary judgment any time video forms a part of the record. We further established that this case—presenting few disputed facts and no extraneous legal issues—is the right vehicle to answer the question presented. And we explained how the rapid development and proliferation in video technology since *Scott* was decided make the question presented important.

Respondent disputes little of this. He agrees that most of the facts in the case are undisputed and that appellate judges "enjoy no comparative expertise" in resolving disputed questions of fact. BIO 9 (quoting *Johnson* v. *Jones*, 515 U.S. 304, 316 (1995)). He also makes no attempt to deny the importance of the question presented.

Instead, he spends the bulk of his opposition flipping the procedural posture of this case on its head, pretending as though the district court carefully parsed the record to decide Cassi's Fourth Amendment claim on the merits and the panel majority below applied qualified immunity to affirm. But the *opposite* is true: the district court applied qualified immunity without deciding whether Respondent's threatened use of force was reasonable, while the panel majority reached for the dashcam footage to draw its own conclusions about the facts and decide

Cassi's claim on the merits. If anything, Respondent's puzzling inversion of the procedural posture of this case highlights why the Petition should be granted, not denied.

Elsewhere, Respondent offers merely token opposition. He disputes Petitioner's characterization of the circuit split in this case, for example, but makes no attempt to reconcile the expansive decision below with the restrained approach followed by other circuits. And, much like the panel below, he tries to use the inconclusive dashcam video to argue that no disputed facts exist. Neither is a reason to deny the petition.

I. The procedural posture of the case, which Respondent gets backwards, supports granting the Petition.

Respondent mischaracterizes the decisions below in two respects, effectively flipping the procedural posture of this case. First, he suggests that the district court made findings of fact concerning the reasonableness of his threatened use of force, arguing that reversing the decision below would "usurp the district court's expertise in determining the relevant undisputed facts." BIO 9. Second, he argues that the Eighth Circuit drew no factual inferences from the dashcam footage at issue, claiming instead that it relied on the district court's fact findings to award him qualified immunity. BIO 13. Neither characterization is true, Respondent's qualified immunity arguments are misplaced, and the actual procedural posture of this case only reinforces why the Petition should be granted.

A. The district court made no findings of fact concerning the reasonableness of Respondent's threatened use of force.

Respondent block-quotes a portion of the district court's discussion of the events that gave rise to this case, arguing that they represent the district court's determination of the "relevant undisputed material facts." BIO 9–12. Respondent presumably takes the position that, because the district court described Cassi as "taking a sideways step" when ordered backwards, the Eighth Circuit could rely on that determination to conclude that Cassi was noncompliant or posed a danger sufficient to justify Respondent's threat to tase her.[1]

The problem for Respondent, however, is that the district court explicitly dismissed Cassi's Fourth Amendment claim under qualified immunity, holding that "aiming a taser at a suspect for no legitimate purpose was not a violation of clearly established law." Pet. App. 56a. Because the district court held that the absence of clearly established law barred Cassi's claim, it did not need to decide—much less make

[1] In passing, Respondent claims that Cassi "does not dispute any of these facts in her petition for writ of certiorari" and "concedes that the video evidence does not contradict any of these facts." BIO 11. As Cassi's Petition repeatedly makes clear, however, both claims are categorically untrue. See, *e.g.*, Pet. 10 ("[The parties] do dispute—vehemently—whether Cassi posed a threat or was noncompliant when Officer Marzolf threatened her with force."); Pet. 19 ("In other words, the video shows that Cassi may have been nonthreatening and attempting to comply with Officer Marzolf's commands, or it shows that she may have posed a threat and intentionally ignored him.").

factual findings concerning—whether she obeyed Respondent's commands or posed him a threat sufficient to justify his threat to tase her. Indeed, at no point did the district court hold or even suggest that Cassi was noncompliant or otherwise posed a threat to Respondent during their encounter. If anything, the fact that the district court characterized Respondent's conduct as threatening force "for no legitimate purpose" suggests that it thought Cassi was *not* disobeying orders or presenting a threat when he threatened to tase her.[2] The district court's decision therefore cannot provide a basis for the Eighth Circuit's freewheeling fact finding, and it is not a reason to deny the Petition.

B. The Eighth Circuit did not apply qualified immunity, and it is not an issue presented here.

Respondent mischaracterizes the posture of this case a second time when he claims that the Eighth Circuit applied qualified immunity to hold that his "show of authority in wielding his taser was objectively reasonable and not in violation of clearly established law." BIO 13. But the panel was crystal clear that it was *not* reaching that issue: "Because we conclude Officer Marzolf did not violate Pollreis's constitutional rights, we need not address whether these rights were clearly established at the time of the incident." Pet. App. 10a.

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[2] At worst, though, the district court's discussion cited by Respondent is dicta, and "[d]ictum settles nothing, even in the court that utters it." *Jama* v. *Immigr. & Customs Enf't*, 543 U.S. 335, 351 n.12 (2005).

It is puzzling, then, why Respondent devotes such a large portion of his brief in opposition defending the Eighth Circuit's decision on qualified immunity grounds. BIO 12–16. True, qualified immunity was the focus of the parties' arguments and briefing before the Eighth Circuit. But the panel majority explicitly chose to avoid that issue. In fact, the panel's avoidance is one of the remarkable features of this case that makes the opinion below worthy of review—Instead of deciding the case on the issue the parties briefed and that the district court decided, it sua sponte invoked *Scott* v. *Harris* and used dashcam footage to decide the facts for itself and dismiss Cassi's claim without reaching the issue of clearly established law. Pet. App. 10a.

What the panel's decision *does not* do, however, is provide a reason to deny the Petition. This Court routinely takes cases knowing that the parties will litigate further issues on remand, including qualified immunity. See, *e.g.*, *Lombardo* v. *City of St. Louis*, 594 U.S. 464 (2021) (per curiam) (vacating and remanding excessive force case for further litigation on the merits and qualified immunity); *Torres* v. *Madrid*, 592 U.S. 306 (2021) (same); *Tanzin* v. *Tanvir*, 592 U.S. 43 (2020) (holding that RFRA provided a damages remedy while recognizing that the parties would continue to litigate qualified immunity).[3] This Court should do

[3] In *Lombardo*, the lower court granted qualified immunity on remand. See *Lombardo* v. *City of St. Louis*, 38 F.4th 684 (8th Cir. 2022). In *Torres* and *Tanzin*, the parties are still litigating qualified immunity. See *Torres* v. *Madrid*, 60 F.4th 596 (10th Cir. 2023) (reversing grant of qualified immunity and remanding for application of proper analysis); *Tanvir* v. *Tanzin*, No. 1:13-CV-6951, 2023 WL 2216256 (S.D.N.Y. Feb. 24, 2023) (granting

the same here and allow the parties to litigate qualified immunity in the first instance on remand.

C. Respondent's qualified immunity arguments misread this Court's precedent.

To the extent that Respondent's qualified immunity arguments are relevant—and they are not because qualified immunity is neither a part of nor a predicate to considering the question presented—they fundamentally misread this Court's precedent. The thrust of his argument is that he is entitled to qualified immunity unless Cassi can identify a prior case involving precisely the same conduct and weapon as used here. BIO 14. But this Court has flatly rejected the idea that such a hairsplitting, weapon-by-weapon distinction can form the basis for granting qualified immunity. See *McCoy* v. *Alamu*, 141 S. Ct. 1364 (2021) (mem.) (vacating a Fifth Circuit decision that awarded qualified immunity to an officer under the theory that unprovokedly pepper spraying an inmate was distinguishable from beating him). Even before *McCoy* was decided, many circuits had already reached the same conclusion. See, *e.g.*, *Terebesi* v. *Torreso*, 764 F.3d 217, 237 n.20 (2d Cir. 2014) (denying qualified immunity to defendant who "point[ed] to the absence of prior case law concerning the precise weapon, method, or technology employed by the police"); *Phillips* v. *Cmty. Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012) (denying qualified immunity, holding that "[e]ven where there are 'notable factual

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qualified immunity), appeal docketed, No. 23-738 (2d Cir. April 26, 2023).

distinctions'" between weapons, "prior cases may give an officer reasonable warning that his conduct is unlawful"); *Nelson* v. *City of Davis*, 685 F.3d 867, 884 (9th Cir. 2012) (denying qualified immunity because "[a]n officer is not entitled to qualified immunity on the ground[ ] that the law is not clearly established every time a novel method is used to inflict injury").

To that end, the Eighth Circuit has long recognized that threats of force—including less-than-lethal force—can support Fourth Amendment claims. In *Wilson* v. *Lamp*, 901 F.3d 981 (2018), the Eighth Circuit denied qualified immunity to officers who pointed their firearms at two non-resisting suspects, holding that "[a]n officer's use of force against a suspect who was not threatening and not resisting [was] unreasonable," even if the officer only *threatened* to use a weapon. *Id.* at 990 (cleaned up). And in *Bauer* v. *Norris*, 713 F.2d 408 (1983), the Eighth Circuit affirmed judgment against a deputy sheriff who threatened an "argumentative, contentious, [and] vituperative" married couple with his flashlight, *id.* at 412, holding that even such a "relatively minor" threat of force was unreasonable, *id.* at 413. These cases made it "sufficiently clear that a reasonable official would understand" that threatening a calm, compliant woman with his taser violates the Constitution. *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002).

D. The actual procedural posture of this case supports granting the Petition.

Respondent's misdirection aside, the actual procedural posture of this case supports granting the

Petition. The district court dismissed Cassi's Fourth Amendment claim under qualified immunity, drawing the same impermissible weapon-by-weapon distinction discussed above to conclude that Respondent did not violate clearly established law. Pet. App. 56a. When Cassi sought to challenge that determination on appeal, the Eighth Circuit panel majority—explicitly invoking this Court's decision in *Scott*—sidestepped qualified immunity and foraged through the record, using dashcam footage to resolve disputed facts and decide for itself in the first instance that Cassi's conduct justified Respondent's threat to tase her. Pet. App. 10a. In so doing, the panel below broke the cardinal 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.'" *Tolan* v. *Cotton*, 572 U.S. 650, 656 (2014) (per curiam) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

The only question left to decide is whether the Eighth Circuit's extension of *Scott* to this context meets the deliberately high standard set by this Court. As made clear by *Scott* itself, only where a claimant's "version of events is so utterly discredited by the record that no reasonable jury could have believed him" is it appropriate for a court to conclude that no genuine issue of material fact exists that would preclude summary judgment. 550 U.S. at 380. Cassi maintains that she did not pose a threat and was attempting to comply with Respondent's orders when he threatened to tase her, and he disagrees. These are the only facts that the parties dispute; the Eighth Circuit relied on dashcam video to resolve that dispute; and it did so even though the video in this

case does not meet *Scott*'s intentionally high bar. These are all reasons to grant the Petition.

II. Respondent's other arguments fail.

A. The Eighth Circuit's decision below splits with her sister circuits.

The Petition clearly established that the Eighth Circuit's expansive application of *Scott* in this case sharply diverges from the restrained approach taken by at least eight other circuits. Pet. 12–20. Although Respondent disputes this split, he makes no attempt to reconcile the decision below with any of the other circuit cases cited in the Petition. BIO 6–7. He does not even identify a single other case in which *Scott* has been applied as it was below. This is no oversight—it is a concession of how stark the split in this case is and that a different result would have obtained if this case were brought outside the Eighth Circuit.

Unable to attack the split presented in this case, Respondent takes a different approach. Citing Justice Alito's concurrence in *Taylor* v. *Riojas*, 592 U.S. 7 (2020), he tries to argue that this is an error-correction case. BIO 6–7. But Respondent omits what this Court did in *Taylor*: it granted the petition, vacated the judgment below, and remanded for further proceedings. *Riojas*, 592 U.S. at 9–10. Indeed, Cassi expressly noted in her Petition that this is a case "appropriate for resolution either on the merits or on summary reversal." Pet. i. Thus, even if Respondent's comparison to *Taylor* is apt—and it is not—it is no barrier to granting the Petition.

B. Whether Cassi complied with Officer Marzolf's orders or posed a threat is plainly disputed.

Lastly, Respondent attempts to claim—just as the Eighth Circuit did below—that the video conclusively shows that Cassi failed to follow his order to "get back" and therefore posed him a threat. BIO 16–17. This Court can see that is untrue by watching the video.[4] But even Respondent's characterization of the video suggests that the decision below was wrong for three independent reasons: First, Respondent admits that Cassi "continue[d] walking to the side out of view of the camera" after he ordered her back. *Ibid.* Given the angle of the camera and the positioning of the parties, walking sideways out of frame could only *increase* the distance between her and Respondent, which is hardly disobeying his order. Second, Respondent concedes that when he threatened Cassi with his taser, she was standing so far away from him that she no longer appeared in the frame of the video. BIO 17. Third, even if Cassi technically failed to comply with Respondent's commands, a reasonable jury could still find that he was unreasonable in concluding she posed a threat that justified force.

In other words, Respondent's attempt to recharacterize what the video shows only reinforces what Cassi argued in her Petition—that the video permits a reasonable factfinder (here, a jury) the ability to draw multiple conclusions about what happened (after trial). Pet. 19. Because the Eighth Circuit

[4] As Cassi noted in her Petition, the video is reproduced at the following link for the Court's convenience: https://perma.cc/GV7Y-Z9PK.

nonetheless used the video at summary judgment to justify its own conclusions about what happened that night, it expanded *Scott* well beyond the limits drawn by this Court and by the other circuits below. The Petition should therefore be granted, and the boundaries of *Scott* vigorously enforced to prevent appellate courts from becoming the first and last finders of fact.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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