No. _____

In the Supreme Court of the United States

TRINIDAD CUTSHALL,
Petitioner,

v.

DONALD DILLOW, ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The first issue presented for review is whether the Fourth Amendment permits law-enforcement officers to use multiple forms of significant force—including less-lethal impact rounds, chemical agents, a police canine, and repeated physical strikes—against a suspect whom the complaint alleges was already medically incapacitated, nonthreatening, and not resisting, and whether the Fifth Circuit erred by treating the presence of an alleged medical emergency and purported noncompliance as justification for force without applying the Fourth Amendment's totality-of-the-circumstances analysis or crediting petitioner's well-pleaded version of disputed facts.

The second issue presented for review is whether, at the Rule 12(b)(6) stage, a court may treat an officer-authored incident report attached to a §1983 complaint as establishing the truth of disputed factual assertions concerning resistance when the complaint expressly alleges that those assertions are false, or whether the law requires the court to accept the complaint's well-pleaded allegations and treat the report only as evidence that officers made the challenged assertions.

The third issue presented for review is whether, in an interlocutory appeal from the denial of a Rule 12(b)(6) motion asserting qualified immunity, where discovery has not occurred and the plaintiff proffers body-worn-camera footage that materially bears on the disputed factual predicate for immunity, a court of appeals may deny supplementation or consideration of that footage and nevertheless resolve the qualified-

immunity question by crediting a disputed police report over the complaint, and whether such a practice is consistent with binding and persuasive precedent and the principles governing appellate review of disputed facts.

PARTIES TO THE PROCEEDINGS

Petitioner, and plaintiff-appellee below is Trinidad Cutshall.

Respondents, and defendant-appellants below are Donald Dillow, Nahuel Faiura, Todd Klosterman, N. Poirier, D. R. Calhoun, M. A. Carrizales, R. W. Holley, C. Marshall, P. Batton, Kenneth Sandor, E. Hernandez, J. Luna, and S. Cogburn, in their individual capacities.

Defendant Harris County, Texas, was not an appellant nor appellee below and is not a party to this petition.

RELATED PROCEEDINGS

United States District Court (SD Tex.):

Cutshall v. *Harris County*, No. 4:25–cv–02899 (Sept. 4, 2025) (motions to dismiss denied) (App. 22–23)

Cutshall v. *Harris County*, No. 4:25–cv–02899 (Oct. 28, 2025) (motions to dismiss denied) (App. 24–25)

United States Court of Appeals (CA5):

Cutshall v. *Dillow*, No. 25–20386, consolidated with *Cutshall* v. *Sandor*, No. 25–20499 (Apr. 17, 2026) (motion to supplement the record denied) (App. 26–27)

Cutshall v. *Dillow*, No. 25–20386, consolidated with *Cutshall* v. *Sandor*, No. 25–20499 (Aug. 24, 2026) (reversed and remanded) (App. 1–21)

Cutshall v. *Dillow*, No. 25–20386, consolidated with *Cutshall* v. *Sandor*, No. 25–20499 (Sept. 9, 2026) (panel rehearing and rehearing en banc denied) (App. 28–29)

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The Fifth Circuit's opinion is reproduced in the Appendix at App. 1–21. The Southern District of Texas's orders denying the motions to dismiss are reproduced in the Appendix at App. 22–25.

JURISDICTION

The Fifth Circuit's judgment was entered on August 24, 2026. The Fifth Circuit denied rehearing on September 9, 2026. App. 28–29. This Court has jurisdiction under 28 U. S. C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, 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." U. S. Const., Amdt. IV.

Section 1983 of Title 42 of the United States Code provides, in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

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

Federal Rule of Civil Procedure 12(b)(6) provides:

"Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted . . . ." Fed. Rule Civ. Proc. 12(b)(6).

Federal Rule of Appellate Procedure 10(e) provides, in relevant part:

> "(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.
>
> "(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be

> corrected and a supplemental record may be certified and forwarded:
>
> "(A) on stipulation of the parties;
>
> "(B) by the district court before or after the record has been forwarded; or
>
> "(C) by the court of appeals.
>
> "(3) All other questions as to the form and content of the record must be presented to the court of appeals." Fed. Rule App. Proc. 10(e).

Federal Rule of Civil Procedure 8(a)(2) provides in relevant part: "A pleading that states a claim for relief must contain: . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. Rule Civ. Proc. 8(a)(2).

INTRODUCTION

This is a case that has made the national news and is the topic of popular discussion all over the media and the United States. It is a matter of national importance. This case presents a fundamental question at the intersection of the Fourth Amendment and the federal rules governing civil-rights litigation: may a court dismiss a constitutional excessive-force claim by crediting an officer-authored incident report over the plaintiff's expressly contrary allegations, while declining to consider body-worn-camera footage that the plaintiff contends materially contradicts that report? The decision below answers that question in a manner that threatens to insulate serious allegations of unconstitutional police force from meaningful judicial review before discovery can begin.

Petitioner Trinidad Cutshall alleges that he was experiencing a serious medical emergency when law-enforcement officers subjected him to an escalating and sustained use of force. According to the complaint, officers deployed less-lethal impact rounds, chemical agents, and a police canine against him, and repeatedly struck him during his extraction from a truck until he lost consciousness. Petitioner alleges that he was medically incapacitated, posed no immediate threat, and was not resisting the officers. These allegations, if accepted as true at the pleading stage, describe a use of force that demands careful evaluation under the Fourth Amendment's objective-reasonableness standard and the totality-of-the-circumstances analysis required by this Court's precedents.

Yet the Fifth Circuit reversed the denial of qualified immunity and ordered dismissal after accepting the officers' account of petitioner's conduct despite the complaint's express dispute of that account. The court's approach effectively elevated the incident report's disputed narrative over the well-pleaded allegations it was supposed to evaluate at the 12(b)(6) stage. The result was not merely a decision about whether the alleged conduct violated clearly established law; it was a decision that resolved a critical factual dispute against petitioner before the case could proceed to discovery.

That approach raises consequential questions under prior precedent and this Court's repeated instruction that courts must evaluate the totality of the circumstances when determining whether force was objectively reasonable. The reasonableness of force cannot be assessed in isolation from the circum-

stances confronting the officers, including whether the person subjected to force was medically compromised, posed an immediate threat, or was actively resisting. Nor may a court substitute a disputed account of those circumstances for the plaintiff's well-pleaded allegations when deciding a motion to dismiss.

The procedural circumstances make the error particularly consequential. Because the case was resolved before discovery, the body-worn-camera footage on which petitioner sought to rely was not part of the district-court record. Petitioner moved to supplement the appellate record with footage that, according to his motion, bears directly on whether he was resisting and on the nature and extent of the force used against him. The Fifth Circuit denied that request (App. 26–27) and nevertheless resolved the appeal by crediting the disputed incident-report narrative. The court thus declined to consider the evidence petitioner identified as materially relevant to the very factual premise on which the dismissal rested.

The issues presented for review matter well beyond this case. Civil-rights plaintiffs frequently challenge police accounts of encounters in which the officers themselves control the contemporaneous reports and much of the available evidence. Body-worn cameras can provide important evidence of what occurred, yet that evidence may not be available for judicial consideration before discovery. If courts may resolve disputed factual premises against plaintiffs at the pleading stage by treating an officer's report as conclusive, the protections afforded by the Fourth Amendment and the ordinary rules of federal pleading risk being

diminished precisely when factual development is most needed.

This Court's review is warranted to ensure that excessive-force claims are evaluated under the governing constitutional standard, that disputed allegations are not converted into established facts at the motion-to-dismiss stage, and that appellate review in qualified-immunity cases proceeds on a proper understanding of the record and the applicable procedural rules. Petitioner respectfully requests that the Court grant the petition for a writ of certiorari.

STATEMENT OF THE CASE

This incident has made the national news, and the underlying lawsuit has been the talk of both ABC and FOX news channels in Houston, Texas. As such, this is no ordinary case but, rather, a seminal and landmark case of national importance. The crux of this matter is that of police brutality, as is evidenced by the below photo of the petitioner.[1]

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[1] https://tinyurl.com/3eevsuht (Sep. 10, 2025, as visited Oct. 21, 2026, and archived on the Internet Archive); https://tinyurl.com/84k765um (YouTube Link) https://tinyurl.com/mwmzpfxh (Internet Archive) FOX (Sep. 11, 2025, as visited Oct. 21, 2026, and archived on the Internet Archive).



This is a photo of petitioner after being beaten, shot with rubber bullets, ripped to shreds by German Shepherds, succumbing to tear gas, and being punched repeatedly by law enforcement in the head and face until the point of unconsciousness.

I. The encounter

On December 27, 2023, Houston police encountered an 18-wheel tractor-trailer traveling at approximately five miles per hour on Interstate 10. Officers attempted to stop the vehicle. After those efforts failed, officers deployed spike strips, immobilizing the truck. App. 3. The complaint, brought under 42 U. S. C. §1983 and the Fourth Amendment, thus invoking federal question jurisdiction under 28 U. S. C. §1331, alleges that petitioner was suffering a severe medical emergency, namely, sepsis, and was medically incapacitated. The complaint alleges that he was sober, as is evidenced by medical records, and that his unusual conduct was attributable to his medical condition rather than voluntary resistance.

The ensuing encounter lasted for hours. Officers first fired multiple 40mm nonlethal rounds toward the truck. SWAT personnel then deployed tear gas and additional chemical agents and used armored vehicles to breach the truck. A police canine was deployed and ripped petitioner to shreds. Officers then entered the cab and repeatedly struck petitioner during the forcible extraction until the point of unconsciousness. Petitioner's criminal charges of evading were dismissed in their entirety as he did not have the *mens rea* of "intentionally" to be properly convicted for evading.

The Fifth Circuit's opinion confirms that the officers employed nonlethal rounds, tear gas, a police dog, armored vehicles, and physical force before removing petitioner from the truck. App. 3–5, 12–16. Petitioner alleges that the force was gratuitous because he was

medically incapacitated and not resisting. He alleges that any movements interpreted by officers as resistance were involuntary manifestations of his medical condition. The complaint further alleges severe physical injury and loss of consciousness resulting from the force.

II. The complaint disputed the officers' account

Petitioner attached an incident report to his complaint. Petitioner expressly put the veracity of the incident report into question time and time again. The report contained narratives prepared by officers involved in the arrest. The officers' narratives characterized petitioner as resisting and, during the physical extraction, reaching for knives. Petitioner's complaint, however, alleged the opposite: that he was not resisting and that the officers' description of his conduct was false. The complaint challenged the officers' characterization of his movements and alleged that the conduct attributed to "resistance" was instead attributable to his medical emergency.[2]

That distinction matters because Rule 12(b)(6) requires the court to accept well-pleaded factual allegations as true and draw reasonable inferences in the plaintiff's favor. It also matters because the Fifth Circuit has itself held that a police report attached to

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[2] See Plaintiff's Original Complaint, *Trinidad Cutshall* v. *Harris County*, *Texas*, *et al.*, No. 4:25–cv–02899 (SD Tex. 2025), ECF No. 1; see also Harris County Sheriff's Office Incident Report, Exhibit to Plaintiff's Original Complaint, *Trinidad Cutshall* v. *Harris County*, *Texas*, *et al.*, No. 4:25–cv–02899 (SD Tex. 2025), ECF No. 1-3.

a complaint does not establish the truth of disputed assertions where the plaintiff expressly rejects the report's conflicting account.

III. The district court denied qualified Immunity

The district court considered the motions to dismiss and denied them. App. 22–25. At that point, no discovery had occurred. The case therefore remained at the pleading stage. The district court was required to accept the complaint's well-pleaded factual allegations and could not resolve factual disputes in favor of defendants.

IV. The Fifth Circuit reversed

The defendants took interlocutory appeals asserting qualified immunity. The Fifth Circuit reversed in part and remanded. App. 7–8, 21. The court held that the challenged force was objectively reasonable and that petitioner failed to plead a plausible excessive-force claim. The court's analysis repeatedly relied on the officers' narratives in the incident report. The panel stated that, although petitioner alleged that he was unarmed and unconscious, those allegations were "directly contradicted" by narratives in the exhibits attached to the complaint. The panel relied on those narratives to conclude that petitioner had actively fought with officers and attempted to reach for knives. App. 15–16.

The panel therefore treated the officers' version of disputed facts as controlling at the pleading stage. The panel also concluded that chemical irritants were reasonable because petitioner was a "barricaded, non-

compliant suspect." App. 19. As to the physical extraction, the panel concluded that petitioner's alleged resistance and alleged attempts to reach for knives justified the force. The panel also rejected petitioner's claims against the bystander officers because, in its view, there was no underlying constitutional violation of excessive force. App. 20–21.

V. The Fifth Circuit's treatment of the police report conflicts with its own precedent and the precedent of its sister Circuits

The panel expressly addressed the interaction between Rule 10(c), its exhibit-controls doctrine, and *Pena*. The panel acknowledged that under *Pena*, when a plaintiff expressly rejects and expressly puts the veracity of the exhibit (*i. e.*, incident report attached to complaint) into question, the court presumes only that officers made the assertions, not that those assertions are in fact truthful. App. 10, n. 4.

But the panel concluded that petitioner had attached the report, relied on its narratives, and did not question the veracity of those narratives. App. 10, n. 4. That is blatantly untrue. Petitioner time and time again expressly put the veracity of the incident report into question and, nevertheless, the Fifth Circuit simply ignored it. That conclusion presents the central pleading question in this case. If the complaint in fact expressly disputed the report's account of resistance—as petitioner alleges—then the panel's treatment of the report cannot be reconciled with *Pena* and other sister Circuits.

VI. Petitioner sought to supplement the appellate record with body-camera footage

While the interlocutory appeal was pending, petitioner sought to supplement the appellate record with body-worn-camera footage that actually showed what transpired on the day in question. The body-camera footage showed officers beating petitioner and ripping petitioner to shreds with a police K9 German Shepherd while petitioner was not resisting. The video is disturbing and shows petitioner screaming and begging for mercy. This was the most obvious effort of petitioner to expressly put the veracity of the incident report into question.

Petitioner prayed unto the Fifth Circuit that it allow him to supplement the record with said body-camera footage that clearly shows excessive force and what actually happened, not what the incident report said. Petitioner prayed that the Fifth Circuit simply watch 1:36:00–1:40:00 of the body camera that clearly showed excessive force and the nonresistance of petitioner located at the link in the attached footnote.[3]

The motion explained that the footage was highly probative of the disputed factual question whether petitioner was resisting and of the manner and degree of force used against him. Because the case was simply at the 12(b)(6) stage, discovery had not yet occurred, and this is the reason why the footage had not been introduced into the district-court record. The Fifth Circuit denied the motion. App. 27. This was extremely puzzling to petitioner as to why the Fifth

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[3] https://tinyurl.com/54uptjrk.

Circuit would simply not acknowledge four minutes of video footage proving what had happened. The Fifth Circuit simply disregarded it and credited the incident report over petitioner's factual assertions in a well-pleaded complaint at the 12(b)(6) stage.

The docket reflects that petitioner's April 13, 2026, motion sought supplementation with said body-camera footage. The court denied the motion on April 17, 2026. App. 26–27. Petitioner therefore comes before this Court after the Fifth Circuit had both refused to supplement the record with said body-camera footage and resolved the qualified-immunity question by crediting disputed documentary allegations against him.

This matter presents at least three independently c*ertw*orthy questions on which the Circuits are genuinely and deeply divided. First, whether the Fourth Amendment's prohibition on excessive force against a subdued, nonresisting person in a medical emergency applies to K9 bites, tear gas/chemical agents, rubber bullets/less-lethal munitions, and striking—and whether the Fifth Circuit's narrower approach to such force in medical-emergency contexts conflicts with the broad consensus of its sister Circuits. Second, whether, on a Rule 12(b)(6) motion to dismiss, a court must accept the plaintiff's well-pleaded allegations and may not credit the contents of an officer-authored incident report over those allegations when the plaintiff expressly disputes the report's veracity—a question on which the Circuits have produced irreconcilable approaches. Third, whether an appellate court may or must allow supplementation of the record with body-worn-camera footage that was not before the

district court but that directly contradicts an incident report—a novel and unresolved question of appellate procedure that strikes at the heart of accurate appellate review.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit erred in that its decision departs from its own precedent and the overwhelming sister Circuit consensus that force against a subdued, nonresisting person who has succumbed to a medical emergency violates the Fourth Amendment via excessive force

Just last year, this Court vacated and remanded the Fifth Circuit's "Moment-of-Threat" reasoning and replaced it with a "Totality of the Circumstances" consideration. *Barnes* v. *Felix*, 605 U. S. 73 (2025). In this matter, the Fifth Circuit erred once again because over and over again in its opinion, the Fifth Circuit completely ignores the totality of the circumstances, including that petitioner was suffering from a medical emergency. Instead, the Fifth Circuit simply looked to snippets of small encounters when the officers claimed that petitioner was resisting, which was completely false. The Fifth Circuit clearly is not in accordance with this Court's application of the law in the excessive force context—that the totality of the circumstances must be considered from an objective standpoint. *Graham* v. *Connor*, 490 U. S. 386 (1989).

Under *Graham* v. *Connor*, the Fourth Amendment's objective-reasonableness standard requires courts to weigh the severity of the crime, the immediate threat

posed by the suspect, and whether the suspect is actively resisting or attempting to evade arrest. *Ibid.* The Supreme Court has never addressed whether and how this framework applies specifically to persons who are involuntarily nonresisting due to a medical or mental health emergency, leaving the Circuits to develop divergent doctrines.

A. The Fifth Circuit is also the clear outlier compared to its sister Circuits

The broad consensus from the Fifth Circuit's sister Circuits is that force against individuals suffering a medical emergency is presumptively excessive in violation of the Fourth Amendment. A robust cross-circuit majority holds that using significant force—including K9 bites, impact munitions, and physical strikes—against a person who is subdued, compliant, or physically incapacitated by a medical emergency is presumptively unreasonable and that this principle is clearly established.

1. K9 Bites

In *Luethje* v. *Kyle*, the Tenth Circuit held it was clearly established that "continued use of force after an individual has been subdued is a violation of the Fourth Amendment," and that this principle applied with equal force to K9 deployments against nonresisting, nonfleeing suspects, even without a prior case exactly on point. *Luethje* v. *Kyle*, 131 F. 4th 1179 (CA10 2025). The Tenth Circuit had earlier held in *Vette* v. *K-9 Unit Deputy Sanders* that allowing a police dog to attack [an individual] after he is subdued,

violates the Fourth Amendment. *Vette* v. *K-9 Unit Deputy Sanders*, 989 F. 3d 1154 (CA10 2021).

In *Becker* v. *Elfreich*, the Seventh Circuit held it was clearly established that allowing a police dog to continue biting a suspect who had surrendered or was passively resisting violated the Fourth Amendment, reasoning that it was well established that police officers could not use significant force on nonresisting or passively resisting suspects. *Becker* v. *Elfreich*, 821 F. 3d 920 (CA7 2016). Additionally, in *Bates* v. *Rezentes*, a district court within the Ninth Circuit found it clearly established that prolonging a police dog bite after a suspect had done everything in their power to communicate surrender, and giving a physically incapacitated suspect repeated commands to sit up or crawl, rather than calling off the dog, constituted excessive force. *Bates* v. *Rezentes*, 731 F. Supp. 3d 1119 (ND Cal. 2024).

Additionally, in *Poulin* v. *Bush*, a district court within the Eleventh Circuit applied *Priester* v. *City of Riviera Beach* to hold that releasing a K9 on a nonfleeing, unarmed suspect sitting on the ground surrounded by five officers fell within the "obvious clarity" exception to qualified immunity. *Poulin* v. *Bush*, 650 F. Supp. 3d 1280 (MD Fla. 2023); *Priester* v. *City of Riviera Beach, Fla.*, 208 F. 3d 919 (CA11 2000).

2. The Fifth Circuit also completely disregarded its prior binding precedent that made clear that when a suspect is not resisting due to a medical emergency, any continued use of force is clearly excessive in violation of the Fourth Amendment

The Fifth Circuit in *Spiller* so expressly stated that "officers engage in excessive force when they physically strike a suspect who is not resisting arrest." *Spiller* v. *Harris Cnty., Texas*, 113 F. 4th 573, 578 (CA5 2024). In its *Carroll* opinion from 2015, the Fifth Circuit again stated:

> "The law was clearly established at the time of the deputies' conduct that, once a suspect has been handcuffed and subdued, and is no longer resisting, an officer's subsequent use of force is excessive. See, *e. g.*, *Bush* v. *Strain*, 513 F. 3d 492, 501–502 (CA5 2008); *Gomez* v. *Chandler*, 163 F. 3d 921, 922, 924–925 (CA5 1999) (concluding that use of force 'while [a prisoner's] hands were handcuffed behind his back' could be considered excessive, precluding summary judgment). This includes repeated applications of a Taser after a suspect is arrested, subdued, and 'no longer resisting arrest.' *Anderson* v. *McCaleb*, 480 Fed. Appx. 768, 773 (CA5 2012) (per curiam);

> *Autin* v. *City of Baytown*, 174 Fed. Appx. 183, 185 (CA5 2005)."[4]

The *Mason* court noted that "we have explained that an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased." *Mason* v. *Lafayette City-Par. Consol. Gov't*, 806 F. 3d 268, 277 (CA5 2015). The *Joseph* court also reminded the Fifth Circuit of its *Darden* opinion in so stating:

> "*Darden* announced no new rule; it reaffirmed an already-existing one. *Darden* repeated what had long been established in our circuit: Officers engage in excessive force when they physically strike a suspect who is not resisting arrest. For us to say that the unlawfulness of such conduct wasn't clearly established in 2017, despite the fact that *Darden* said it was clearly established in 2013, would flout precedent and our rule of orderliness."[5]

In 2023, the *Austin* opinion provided the seminal argument that makes the basis and foundation for petitioner's entire theory of his case:

> "We recently held that in this circuit, 'the law has long been clearly established that an officer's continued use of force on a restrained and subdued subject is objectively unreasonable.' *Timpa*, 20 F. 4th, at 1034 (collecting cases). For instance,

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[4] *Carroll* v. *Ellington*, 800 F. 3d 154, 177 (CA5 2015).

[5] *Joseph on behalf of Est. of Joseph* v. *Bartlett*, 981 F. 3d 319, 342 (CA5 2020) (citing *Darden* v. *City of Fort Worth*, *Texas*, 880 F. 3d 722 (CA5 2018)).

in *Bush* v. *Strain*, 513 F. 3d 492 (CA5 2008), this court held that an officer who slammed an arrestee's face into a car after she was 'handcuffed and subdued,' *id.*, at 501, was not entitled to qualified immunity. Notably, in that case the officer claimed the arrestee 'continued resisting arrest while he attempted to cuff her.' *Id.*, at 496. We determined, though, the duration of the arrestee's resistance was a disputed fact which precluded qualified immunity at the summary judgment stage. *Id.*, at 502. This court has clarified that ' "subdued" does not mean "handcuffed." If the suspect lacks any means of evading custody—for example, by being pinned to the ground by multiple police officers—force is not justified.' *Joseph*, 981 F. 3d, at 335.

"Furthermore, in *Darden* v. *City of Fort Worth*, we held that 'a constitutional violation occurs when an officer tases, strikes, or violently slams' a subject who 'is not actively resisting.' 880 F. 3d, at 731. In that case, we reversed the grant of qualified immunity to officers who physically restrained and repeatedly tased a man they suspected of dealing cocaine. *Id.*, at 725–726. While the officers claimed the arrestee was not complying with their commands and struggled against their restraint, the court determined a factual dispute remained as to whether the arrestee, who was asthmatic and told the officers he could not breathe, was 'merely trying to get into a position where he could breathe and was not resisting arrest.' *Id.*, at 730.

"In addition to *Darden*, we have reversed the grant of qualified immunity to officers in several other cases involving excessive force with Tasers. See, *e. g.*, *Ramirez* v. *Martinez*, 716 F. 3d 369, 379 (CA5 2013) (tasing a restrained, subdued subject in prone position); *Newman* v. *Guedry*, 703 F. 3d 757, 764 (CA5 2012) (tasing a subdued subject); *Anderson* v. *McCaleb*, 480 Fed. Appx. 768, 773 (CA5 2012) (tasing a subject who was no longer resisting); *Massey* v. *Wharton*, 477 Fed. Appx. 256, 263 (CA5 2012) (tasing a subject who was not resisting, was not a threat to the officers or others, and was not attempting to flee); *Autin* v. *City of Baytown*, 174 Fed. Appx. 183, 186 (CA5 2005) (tasing a subdued subject who was not resisting).

"These cases clearly established the alleged unreasonableness of the Defendant-Officers' continued tasing and use of force to restrain Shaw after he was subdued and restrained and when he was not actively resisting due to a medical emergency. Genuine fact disputes exist as to whether the Defendant-Officers restrained and subdued Shaw before they continued to tase him, hold him in prone position on his chest with an officer's knee pressed to his back, and handcuff him in a restraint chair. Similarly, factual disputes remain regarding whether Shaw was actively resisting restraint or was merely passively/involuntarily resisting due to the effects of his seizure.

"This conclusion comports with a recent decision of another circuit that has considered similar facts. See *Helm* v. *Rainbow City*, 989 F. 3d 1265

> (CA11 2021). There, police officers repeatedly tased a young woman while she was experiencing a seizure. *Id.*, at 1269. 'Tasing an individual once (let alone three times) when the individual poses no threat to the officers or others and is experiencing a medical emergency' is so 'patently excessive that the constitutional violation was clearly established,' 'even in the absence of case law.' *Id.*, at 1276 (quotation marks and citation omitted).
>
> "Because at the time of this incident it was clearly established that the continued use of force, particularly tasing, against a restrained and subdued subject who was not actively resisting due to a medical emergency violates the Fourteenth Amendment, the Defendant-Officers are not entitled to qualified immunity, as fact issues remain."[6]

Here, petitioner was experiencing a medical emergency; this explains any allegation that he was "resisting." Perhaps he was desperately trying to breathe. Petitioner was not in his right mind as he had no perception of reality. This is not resisting; this is a medical emergency and is completely justified. Although petitioner tried to supplement the record with body-camera footage showing said excessive force, the Fifth Circuit quickly ignored and disregarded it. The Fifth Circuit not only has gone against its own prior

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[6] *Austin* v. *City of Pasadena*, *Texas*, 74 F. 4th 312, 326–327 (CA5 2023).

precedent but also is clearly a minority jurisdiction compared to its sister Circuits.

3. Less-Lethal Munitions & Tear Gas

In *Phillips* v. *Community Insurance Corp.*, the Seventh Circuit held that firing four rubber/polyurethane baton rounds at the same part of a suspect's lower body constituted unreasonable force and that officers were not entitled to qualified immunity, finding the force intrusion at least on the high end of the spectrum of less-lethal force. *Phillips* v. *Cmty. Ins. Corp.*, 678 F. 3d 513 (CA7 2012). Additionally, in *Marks* v. *Bauer*, the Eighth Circuit took up a similar issue when an officer shot a suspect in the face with a chemical-filled projectile from approximately five to ten feet away while the suspect was falling and posed no imminent threat. *Marks* v. *Bauer*, 166 F. 4th 1121 (CA8 2026). The court held it was clearly established that shooting an unarmed man posing no imminent threat was unlawful under the Fourth Amendment regardless of whether the force was deadly or less-than-deadly. *Ibid.*

In *Deorle* v. *Rutherford*, the Ninth Circuit also analyzed a similar set of circumstances. *Deorle* v. *Rutherford*, 272 F. 3d 1272 (CA9 2001). There, an officer shot an unarmed, emotionally disturbed man walking on his own property with a lead-filled beanbag round (cloth-cased shot "akin to a rubber bullet"), destroying his eye, without giving any warning. *Ibid.* The suspect had committed no crime beyond disturbing the peace, posed minimal danger, and had previously complied with officers' commands. *Ibid.* The Ninth

Circuit held the force violated the Fourth Amendment on the merits and denied qualified immunity. *Ibid.*

Additionally, the Eleventh Circuit took up this issue when an arrestee was shot at. *Wade* v. *Daniels*, 36 F. 4th 1318 (CA11 2022). *Wade* reaffirmed that gratuitous use of nondeadly force when a criminal suspect is not resisting arrest constitutes excessive force under the Fourth Amendment and that this was clearly established as of February 2014. *Ibid.* The court held that an officer's use of nondeadly force against a nonresisting suspect violated clearly established rights. *Ibid.*

Additionally, the Seventh Circuit took up the issue of tear gas on a nonresisting suspect. *Estate of Escobedo* v. *Bender*, 600 F. 3d 770 (CA7 2010). There, officers deployed tear gas in quantities twelve times the incapacitating level against a suicidal, nonviolent individual barricaded alone in his apartment who was not holding hostages and posed no imminent threat to others. *Ibid.* The court held it was clearly established that both this use of tear gas and the use of flash-bang devices were unreasonable. *Ibid.* The court surveyed sister-circuit precedent establishing that tear gas against nonthreatening individuals clearly violates the Fourth Amendment, including *Vinyard* v. *Wilson*, 311 F. 3d 1340, 1349 (CA11 2002) (pepper spray on handcuffed detainee was unreasonable); *Slakan* v. *Porter*, 737 F. 2d 368, 372 (CA4 1984) (use of tear gas is unreasonable when there is no direct physical threat posed); and *Adams* v. *Metiva*, 31 F. 3d 375 (CA6 1994) (mace on incapacitated individual violates right to be free from excessive force). Here, as is evidenced above, the Fifth Circuit's opinion

in this matter is at odds with the overwhelming majority of sister-circuit opinions on this issue.

4. Striking and Physical Blows

The Fourth Circuit held in *Lewis* v. *Caraballo* that it was clearly established that a nondangerous, nonactively resistant, and at least partially subdued arrestee had the Fourth Amendment right to be free from excessive force in the form of head strikes. *Lewis* v. *Caraballo*, 98 F. 4th 521 (CA4 2024). The Third Circuit held in *Peroza-Benitez* v. *Smith* that repeatedly punching an unarmed, injured suspect in the head with closed fists violated clearly established law. *Peroza-Benitez* v. *Smith*, 994 F. 3d 157 (CA3 2021).

The Tenth Circuit held in *McCoy* v. *Meyers*, 887 F. 3d 1034 (CA10 2018), that striking a handcuffed, nonresisting arrestee more than ten times violated clearly established law because use of force on effectively subdued individuals violates the Fourth Amendment. *McCoy* v. *Meyers*, 887 F. 3d 1034 (CA10 2018). The Eleventh Circuit synthesized this line in *Piazza* v. *Jefferson County*, holding it clearly established that when [officers] continued to use substantial force against [a] prisoner who had clearly stopped resisting—whether because he has decided to become compliant, he has been subdued, or he is otherwise incapacitated—that use of force was excessive. *Piazza* v. *Jefferson Cnty., Alabama*, 923 F. 3d 947 (CA11 2019).

B. The Fifth and Eighth Circuits' narrower views and minority rules deepen an existing circuit split warranting this Court's review

The Fifth Circuit has developed a more granular, fact-intensive framework that creates troubling outlier results in the medical-emergency context. In *Benfer* v. *City of Baytown*, *Texas*, 120 F. 4th 1272 (CA5 2024), the court acknowledged that under *Sligh* v. *City of Conroe*, 87 F. 4th 290, 299 (CA5 2023), releasing a dog violates the Fourth Amendment where the suspect was not suspected of any crime; did not pose an immediate safety threat to officers or others; and was in need of emergency medical intervention due to self-harm—but only where there were no attempts to subdue [the suspect] without the use of a dog bite, [or to] provid[e] [the suspect] any warning. *Benfer* v. *City of Baytown*, *Texas*, 120 F. 4th 1272 (CA5 2024). This multifactor approach differs structurally from the broader rule recognized in the Third, Fourth, Seventh, Tenth, and Eleventh Circuits that incapacitation itself—regardless of precise warning protocols—is what makes further force presumptively unreasonable. See *ibid.*

The Eighth Circuit's approach is similarly narrower. In *Cartia* v. *Beeman*, the court granted qualified immunity where an officer forced a suspect to the ground after she reached out toward her boyfriend who was being subdued, holding it was not clearly established that [the] conduct in forcing [the] suspect to ground violated the Fourth Amendment—despite the suspect's nondangerous behavior. *Cartia* v. *Beeman*,

122 F. 4th 1036 (CA8 2024). A person experiencing a seizure or cardiac episode in the Fifth Circuit who is struck, K9-bitten, or shot with rubber bullets receives less Fourth Amendment protection than the identical person in the Third, Fourth, Seventh, Ninth, Tenth, or Eleventh Circuit. This matter presents this split in stark relief and is an ideal vehicle to establish a national standard.

II. The Fifth Circuit erred by improperly displacing petitioner's well-pleaded factual allegations with a disputed incident report at the Rule 12(b)(6) stage, contrary to the rule that petitioner's version of events must be accepted as true, especially when petitioner time and time again expressly puts the veracity of the incident report into question

The Ninth Circuit issued the most comprehensive treatment in *Khoja* v. *Orexigen Therapeutics*, *Inc.*, warning of a concerning pattern of defendants using incorporation by reference to insert their own version of events into the complaint to defeat otherwise cognizable claims. *Khoja* v. *Orexigen Therapeutics*, *Inc.*, 899 F. 3d 988 (CA9 2018). *Khoja* held unequivocally that it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint. *Ibid.* The doctrine, *Khoja* stressed, is not a tool for defendants to short-circuit the resolution of a well-pleaded claim. *Ibid.*

The Fourth Circuit applied this logic directly to a police incident report in *Goines* v. *Valley Community*

Services Board, holding that the district court should not have treated as true factual statements in [the] police incident report because the plaintiff did not rely on [the] report for its truthfulness and no portion of any of his claims was dependent upon [the] truth of any statements contained in [the] report. *Goines* v. *Valley Cmty. Servs. Bd.*, 822 F. 3d 159 (CA4 2016). The court specifically cautioned that the "exhibit-prevails" rule does not operate where the plaintiff disputes the factual account in the document. *Ibid.*

Within the Second Circuit, courts have held that even implicit, conclusory, contradictory, or implausible objections to the authenticity or accuracy of a document render consideration impermissible at the motion to dismiss stage. *FDIC* v. *U. S. Mortgage Corp.*, 132 F. Supp. 3d 369 (EDNY 2015); *Prime Contractors, Inc.* v. *APS Contractors Inc.*, 754 F. Supp. 3d 289 (EDNY 2024).

District courts in the Ninth Circuit applying *Khoja* now routinely hold that incorporation of a document is proper but it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint. *United States* v. *Adobe, Inc.*, 791 F. Supp. 3d 966 (ND Cal. 2025); *Garbaccio* v. *Starbucks Corp.*, 809 F. Supp. 3d 1261 (WD Wash. 2025).

A. The Fifth Circuit blatantly disregarded its own precedent enumerated in *Pena*

The Fifth Circuit blatantly went against its own precedent enumerated in *Pena* v. *City of Rio Grande City*. *Pena* v. *City of Rio Grande City*, 879 F. 3d 613 (CA5 2018). There, the Fifth Circuit made clear that

where the plaintiff's complaint expressly rejects those elements of the [police report] that conflict with [plaintiff's] account, the court presumes only that the Officers made the assertions contained in the report, not that those assertions are in fact truthful. *Ibid.* In that scenario, the plaintiff's own factual allegations govern the 12(b)(6) analysis. *Ibid.*

1. The Fifth Circuit's and Third Circuit's minority rule deepens an existing circuit split warranting this Court's review and is also in direct contravention of *Iqbal* and *Twombly*

The Third Circuit, however, takes a markedly more defendant-favorable approach like the Fifth Circuit. In *ALA*, *Inc.* v. *CCAIR*, *Inc.*, the Third Circuit held that when an allegation in the complaint is contradicted by a document incorporated in it by reference, the document controls and the allegation is not accepted as true. *ALA*, *Inc.* v. *CCAIR*, *Inc.*, 29 F. 3d 855 (CA3 1994) (citing *Nishimatsu Construction Co.* v. *Houston Nat'l Bank*, 515 F. 2d 1200, 1206–1207 (CA5 1975)). This rule applies even when the plaintiff disputes the accuracy of the document, unlike the Ninth and Fourth Circuit approaches that condition the exhibit-controls rule on the plaintiff having relied upon the document for its truth. See *ALA*, *Inc.*, *supra.*

Additionally, the central procedural error in this matter is the Fifth Circuit's use of exhibits attached to the complaint to affirmatively contradict petitioner's version of the events at the 12(b)(6) stage. This Court in *Ashcroft* v. *Iqbal* and *Bell Atl. Corp.* v.

Twombly requires courts to accept all well-pleaded factual allegations as true and to draw all reasonable inferences in the plaintiff's favor at the 12(b)(6) stage. *Ashcroft* v. *Iqbal*, 556 U. S. 662 (2009); *Bell Atl. Corp.* v. *Twombly*, 550 U. S. 544 (2007).

Here, the Fifth Circuit and other minority jurisdictions have created a major circuit split in how an exhibit attached to a complaint at the 12(b)(6) stage should be treated. This is an irreconcilable conflict that this Court must address. Additionally, the Fifth Circuit has recklessly disregarded this Court's wisdom enumerated in *Iqbal* and *Twombly* that at the 12(b)(6) stage, the plaintiff's version of events must be taken as true. Especially crucial here is that time and time again, petitioner expressly put the veracity of the attached incident report into question as is evidenced by petitioner's efforts to supplement the record with body-camera footage. The Fifth Circuit, however, shut petitioner down in these efforts.

III. The Fifth Circuit erred by refusing to supplement the record with body-camera footage directly contradicting the incident report by clearly showing nonresistance and excessive force

A. The circuit split over appellate supplementation of the record presents a major certworthy question requiring this Court to clarify when supplementation is permissible or required

This issue is the most certworthy because it presents a genuine procedural crisis with no Supreme Court resolution: where body-worn-camera footage was not introduced in the district court because discovery had not yet commenced but would directly contradict an incident report that the appellate court credited at the 12(b)(6) stage to dismiss the complaint, may or must the court of appeals allow supplementation of the record in order to arrive at the truth?

1. The Text and Uniform Interpretation of Fed. Rule App. Proc. 10(e)

Federal Rule of Appellate Procedure 10(e) authorizes supplementation of the appellate record only to conform the record to what occurred in the district court—not to introduce new evidence. Fed. Rule App. Proc. 10(e). This purpose has been uniformly described by the Circuits. The Sixth Circuit reasoned that the appellate rule allowing supplementation of the appellate record is limited to correcting

omissions from or misstatements in the record, and does not allow supplementation with new evidence that was not before the district court. *United States* v. *Murdock*, 398 F. 3d 491 (CA6 2005). The Tenth Circuit reasoned that Rule 10(e) does not countenance supplementing the record when evidence was not before the district court. *M. Welles & Associates*, *Inc.* v. *Edwell*, *Inc.*, 69 F. 4th 723 (CA10 2023).

The First Circuit reasoned that Rule 10(e) is not a procedure for putting additional evidence, no matter how relevant, before the court of appeals that was not before the district court. *United States* v. *Rivera-Rosario*, 300 F. 3d 1, 9 (CA1 2002). The Eleventh Circuit reasoned that the appellate record need not be supplemented when the record truly discloses what occurred in the district court. *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F. 3d 1247 (CA11 2021).

a. The Emerging Split: Inherent Appellate Authority and Special Circumstances

Despite the textual uniformity of Federal Rule of Appellate Procedure 10(e), several Circuits have recognized that appellate courts retain inherent equitable authority to supplement the record in special circumstances even beyond the rule's textual scope—a power distinct from the district court's more limited authority. As the district court in *Lester* v. *Portfolio Recovery Associates* noted, the Eleventh Circuit's inherent equitable power to supplement (recognized in *Young* v. *City of Augusta*, 59 F. 3d 1160 (CA11 1995)) is broader than what the text of Rule 10(e) permits—

but district courts lack this power. *Lester* v. *Portfolio Recovery Assocs.*, *LLC*, 324 F. Supp. 3d 1227 (ND Ala. 2018).

The *Freedman*, *Levy*, *Kroll & Simonds* v. *Mendelson* survey of appellate case law identified four general circumstances in which federal appellate courts consider matters beyond the record on appeal as a matter of inherent discretion, including where the omission was inadvertent, where the record is incomplete due to circumstances beyond the parties' control, where justice requires, and where the evidence is uncontested. *Freedman*, *Levy*, *Kroll & Simonds* v. *Mendelson*, 197 F. R. D. 276 (ED Va. 2000).

b. The Body-Camera-Specific Conflict

A critical circuit conflict has materialized over whether, when body-worn-camera footage exists but was not introduced in the district court, the appellate court may or should remand or supplement rather than affirm dismissal. The Eleventh Circuit held in *Swinford* v. *Santos* that the incorporation-by-reference doctrine allowed the district court to consider body-worn-camera footage at 12(b)(6) even though the complaint did not explicitly incorporate it, where the footage was referenced in the complaint and its authenticity was unchallenged. *Swinford* v. *Santos*, 121 F. 4th 179 (CA11 2024); see also *Baker* v. *City of Madison*, 67 F. 4th 1268 (CA11 2023) (reaching the same result). Most notably, the Eleventh Circuit in *Johnson* v. *City of Atlanta* held that the incorporation-by-reference doctrine does not require the complaint to refer to the exhibit at issue or to attach it.

Johnson v. *City of Atlanta*, 107 F. 4th 1292, 1300 (CA11 2024).

However, the Tenth Circuit held in *Fuqua* v. *Santa Fe County Sheriff's Office* that a district court acted within its discretion to *refuse* judicial notice of body camera and dash camera videos at the 12(b)(6) stage, because the videos' contents were subject to reasonable dispute and consideration would have required factual findings inappropriate at the pleading stage. *Fuqua* v. *Santa Fe Cnty. Sheriff's Off.*, 157 F. 4th 1288 (CA10 2025).

c. The novel appellate-supplementation dimension

When body-worn-camera footage was *not* before the district court and the plaintiff seeks to have it considered on appeal—or argues the appellate court should have remanded for its consideration rather than relying solely on the officer's incident report—no circuit has squarely addressed whether refusal to remand or supplement constitutes reversible error. The Eleventh Circuit in *Jackson* v. *City of Atlanta, Georgia*, came close: the Eleventh Circuit declined to exercise pendent appellate jurisdiction over the authenticity of a spliced bystander/BWC video, holding the issue of authenticity was more properly addressed at the summary judgment stage, but left open the question of what duty the appellate court has when unreviewed video directly contradicts a relied-upon incident report at the 12(b)(6) stage. *Jackson* v. *City of Atlanta, Georgia*, 97 F. 4th 1343 (CA11 2024).

Interestingly, in *United States* v. *Kehoe*, the Fourth Circuit denied a government motion to supplement

the appellate record with a different body camera video because the parties agreed the video in the joint appendix was a video of the events sufficient to decide the appeal—confirming that supplementation is discretionary but denial is not automatic where the video bears directly on the dispositive issue. *United States* v. *Kehoe*, 893 F. 3d 232 (CA4 2018).

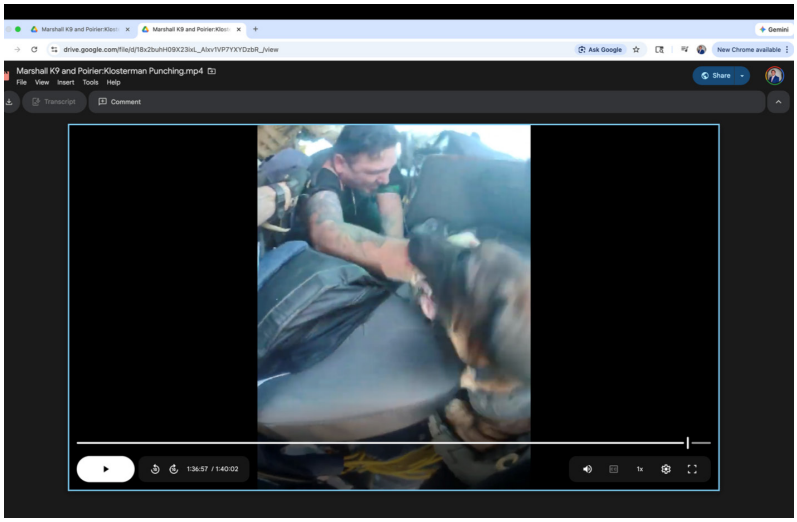
The circuit conflict here is structural: the Eleventh Circuit allows consideration of police BWC footage at 12(b)(6) even without explicit incorporation, while the Tenth Circuit and Fifth Circuit hold such footage cannot be considered if its contents are disputed. Neither rule squarely addresses the appellate dimension—what the court of appeals must do when there is a disputed incident report instead of available (but unintroduced) body-camera footage that directly contradicts it. This is a recurring, consequential, and unresolved question of appellate jurisdiction and procedure. This matter is a vehicle to resolve it: where body-camera footage would show the petitioner was incapacitated and not resisting, but the Fifth Circuit credited the officer's report to the contrary and dismissed at 12(b)(6), the failure to remand or supplement with that footage raises a pure question of appellate procedure untethered from qualified immunity's merits. No circuit has held that such refusal is reversible error, and no circuit has held it is not. The issue is ripe for Supreme Court resolution.

B. The Fifth Circuit blatantly ignored this Court's wisdom mentioned in *Scott* v. *Harris* and, thus, erred in refusing to allow supplementation of the record with said body-camera footage

This Court reasoned:

> "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* v. *Harris*, 550 U. S. 372, 380 (2007).

Although this was a case where evidence was already in the record and it was a case at the summary judgment stage, *Scott*'s wisdom holds true—video footage matters and sets the record straight when two parties are telling different stories. See *ibid.* Again, in *Freedman*, the Eleventh Circuit identified four general circumstances in which federal appellate courts consider matters beyond the record on appeal as a matter of inherent discretion, including where the omission was inadvertent, where the record is incomplete due to circumstances beyond the parties' control, where justice requires, and where the evidence is uncontested. *Freedman*, *Levy*, *Kroll & Simonds*, 197 F. R. D., at 279–280.



Snippet of German Shepherd in the footage ripping petitioner to shreds while other respondent Deputies are punching petitioner repeatedly in the back of the skull until the point of unconsciousness while petitioner screams, "*Please God Help Me!*"[7]

Here, petitioner possesses body-camera footage proving excessive force and nonresistance. It is absolutely clear in the video footage what happened—the respondent Deputies nearly killed petitioner who was not resisting in any way and, rather, was experiencing a medical emergency. This footage was not a part of the District Court record because discovery had not yet commenced. Any omission from the appellate record was inadvertent. In this case, petitioner's and respondents' versions of what transpired

[7] The most important part of the footage can be watched from 1:36:00–1:40:00 and is located at the following link: https://tinyurl.com/54uptjrk.

are completely different. The federal appellate Circuits are split on what to do in a scenario such as this. As such, petitioner prays that this Court reconcile this conflict. Petitioner would contend that the Fifth Circuit erred in not considering video footage that proves what transpired, which was excessive force.

* * *

This case has made the national news and is of national importance. All over the United States, people are talking about this case. This case presents three important questions concerning the constitutional protections afforded to individuals subjected to significant police force, the proper application of Rule 12(b)(6) when a plaintiff expressly disputes the truth of an officer-authored incident report, and the role of appellate courts when potentially dispositive body-worn-camera footage was unavailable for consideration by the district court before discovery. Each question implicates fundamental principles governing the enforcement of the Fourth Amendment, the fair administration of federal civil-rights litigation, and the integrity of judicial review.

Petitioner Trinidad Cutshall alleges that he was experiencing a serious medical emergency when law-enforcement officers subjected him to an escalating series of forceful measures, including less-lethal impact rounds, chemical agents, a police canine, and repeated physical blows. He further alleges that he was medically incapacitated, was not resisting, and sustained severe injuries, including loss of consciousness. At the pleading stage, however, the Fifth Circuit resolved disputed questions concerning petitioner's conduct by

relying on officer-authored narratives that petitioner expressly challenged, thereby accepting the officers' characterization of events over the well-pleaded allegations of the complaint.

The court then declined to consider or otherwise accommodate petitioner's request concerning body-worn-camera footage that, according to petitioner, materially bears on those disputed facts. The consequence is substantial. If disputed allegations of resistance may be treated as established facts at the motion-to-dismiss stage merely because an officer's report is attached to the complaint, a plaintiff's ability to obtain discovery and prove a constitutional violation may be foreclosed before the relevant evidence can be tested. And if the totality of the circumstances is not meaningfully considered when evaluating force against a person alleged to be suffering a medical emergency, the constitutional prohibition against unreasonable force risks becoming ineffective precisely when an individual may be least capable of protecting himself.

The questions presented therefore extend beyond the particular facts of this case. They concern the consistent application of the Fourth Amendment, the distinction between allegations and proof, and the proper treatment of evidence bearing directly on the factual premises underlying qualified-immunity determinations. This Court's review would provide needed guidance to the lower courts and clarify the governing principles in an area of exceptional importance to individuals, law-enforcement officers, and the administration of justice. For these reasons, petitioner respectfully requests that this Court grant the

petition for a writ of certiorari, review the judgment of the Fifth Circuit, and grant such further relief as the Court deems just and proper.

CONCLUSION

This Court should grant certiorari, review the judgment of the Fifth Circuit, vacate or reverse that judgment as appropriate, and remand this case for further proceedings consistent with this Court's opinion. Petitioner further requests all other relief to which he may be entitled at law or in equity.

Respectfully submitted.

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OCTOBER 2026

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Appendix A

[Filed: Aug. 24, 2026]

United States Court of Appeals
for the Fifth Circuit

No. 25–20386

TRINIDAD CUTSHALL,

Plaintiff—Appellee,

versus

DONALD DILLOW, *Sergeant, in his Individual Capacity*; NAHUEL FAIURA, *Deputy, in his Individual Capacity*; TODD KLOSTERMAN, *Sergeant, in his Individual Capacity*; N. POIRIER, *Deputy, in his Individual Capacity*; D. R. CALHOUN, *Lieutenant, in his Individual Capacity*; M. A. CARRIZALES, *Sergeant, in his Individual Capacity*; R. W. HOLLEY, *Deputy, in his Individual Capacity*; C. MARSHALL, *Deputy, in his Individual Capacity*; P. BATTON, *Deputy, in his Individual Capacity*,

Defendants—Appellants,

CONSOLIDATED WITH

No. 25–20499

Appendix A

TRINIDAD CUTSHALL,

Plaintiff—Appellee,

versus

KENNETH SANDOR, *Deputy, Individually*; E. HERNANDEZ, *Deputy, Individually*; J. LUNA, *Deputy, Individually*; S. COGBURN, *Deputy, Individually*,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:25–CV–2899

Before HIGGINBOTHAM, SMITH, and OLDHAM, *Circuit Judges.*

PER CURIAM:[1*]

Truck driver Trinidad Cutshall led Houston police on a brief slow-speed chase before they disabled his truck. In the hours-long standoff that ensued, officers employed nonlethal rounds, tear gas, a dog, and multiple SWAT vehicles, before dragging Cutshall from the cab. Cutshall sued thirteen of the arresting officers, alleging violations of his Fourth and Fourteenth Amendment rights. The officers moved to dismiss, invoking qualified immunity, and the district court denied their motions. Because qualified immunity bars some of Cutshall's claims, we REVERSE and REMAND.

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[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Appendix A

I

On December 27, 2023, Houston Police Sergeant Carrizales encountered an 18-wheeler driving at about 5 mph on I-10 outside of Houston. After Carrizales failed to get the driver's attention with his lights, siren, or verbal commands, officers used spike strips to immobilize the truck. The driver, Trinidad Cutshall, continued to engage the throttle and change gears—apparently unaware that his truck was immobilized. Officers fired several 40mm nonlethal foam rounds at the passenger window, attempting to break the window to both get Cutshall's attention and provide a better view inside the cab. On Lieutenant Calhoun's orders, Deputy Batton fired four of these rounds, while Deputy Holley fired two. None broke Cutshall's window or elicited a response from him. Once these efforts failed, SWAT took over the operation. Carrizales, Calhoun, Batton, and Holley withdrew.

Next, SWAT members took up positions around Cutshall's truck. Sergeant Dillow parked an armored vehicle called a BEAR in front of the truck to prevent it from moving. Deputy Sandor fired two 40mm tear gas rounds at the cab. One deputy reported that Cutshall "would jump and beg[in] to look around" when these rounds were fired, but that Cutshall would then "go back into a stare like we were not there." Deputy Hernandez used a ROOK (essentially an armored forklift with a hydraulic ram instead of tines) to break the rear passenger window. Deputy Luna then placed a single CS canister into the cab, which had no effect. Hernandez used the

ROOK to remove the passenger door and cleared an opening in the rear of the cab "in order to gain a better visual of the suspect and his surroundings inside the vehicle." Deputy Hernandez and Deputy Luna then withdrew.

With the cab open, SWAT members approached and observed Cutshall but could not see his hands. Deputy Poirier then fired three 40mm non-lethal foam rounds at Cutshall, which "displayed a desirable effect on the suspect," although Cutshall "still refused to exit." After observing Cutshall "lower his right hand out of sight," Deputy Marshall deployed police dog Timon, and Timon bit Cutshall's right arm. Deputy Marshall then entered the cab and unbuckled Cutshall's seatbelt, but Cutshall still "continued to resist." Deputy Marshall removed Timon and "backed up approximately 8 feet," taking no further part in removing Cutshall.

Four deputies (Poirier, Faiura, Cogburn, and Klosterman) entered the cab. A tussle ensued, and Deputy Poirier reported punching Cutshall several times "[d]ue to the . . . level of resistance." Cutshall then grabbed Poirier's forearm, and in response, Deputy Poirier and Deputy Klosterman punched Cutshall in the face several times each. Cutshall then released Poirier and grabbed Klosterman instead. At the same time, Poirier and Cogburn observed pocketknives clipped to Cutshall's pants pocket, and saw Cutshall reach for the knives. Deputy Cogburn reported calling out that Cutshall was reaching for a knife during the fight, and that he was able to remove the knives from Cutshall's pants

and throw them out of reach. Deputy Faiura did not see the knives at the time, but did see Cutshall reach for his pants pocket. Finally, the four deputies removed Cutshall from the cab, assisted by another officer, Sergeant Dillow, who pulled Cutshall out, dropped him to the ground, and handcuffed him.

Once handcuffed, deputies walked Cutshall to a waiting ambulance. Cutshall was placed on a stretcher and taken to Ben Taub Hospital. There, he remained uncooperative and tried to "hit staff." Cutshall was later indicted for felony evading arrest, but the charges were dropped.

Cutshall sued thirteen of the officers involved in his arrest under 42 U. S. C. § 1983 and state law. As to federal law, Cutshall pleaded two Fourth Amendment claims (for excessive force and failure to intervene) and two Fourteenth Amendment Due Process claims (for summary punishment and failure to render medical aid). Cutshall attached two documents to his complaint: an incident report containing narrative descriptions of the events from the officers, and six hundred pages of hospital records from his stay at Ben Taub Hospital.

Thirteen of the officers then filed motions to dismiss, which the district court denied in a pair of identical two-page orders. The district court stated that it had "considered the motions, submissions, and applicable law *in detail*." ROA.1234 (emphasis in original). All thirteen officers appealed the denial of their motions to dismiss. Our review is de novo.

II

First, jurisdictional housekeeping is in order. Congress granted federal courts of appeals jurisdiction over "final decisions." 28 U. S. C. § 1291. That generally means lower court judgments that totally resolve litigation. *See Mitchell* v. *Forsyth*, 472 U. S. 511, 524–25 (1985). But there is an exception: The collateral-order doctrine teaches that pre-final judgment orders qualify as "final[,] and thus appealable[,] if they are conclusive, resolve important questions separate from the merits, and are effectively unreviewable on appeal from the final judgment in the underlying action." *Frias* v. *Hernandez*, 142 F.4th 803, 811 (5th Cir. 2025) (OLDHAM, J., concurring) (discussing *Mitchell*) (quotation omitted). Unsurprisingly, "the class of cases capable of satisfying this stringent test should be understood as small, modest, and narrow." *Id.* (quoting *United States* v. *Wampler*, 624 F.3d 1330, 1334 (10th Cir. 2010) (GORSUCH, J.)) (quotation marks omitted).

This formalism matters because, while all thirteen defendants in this case filed motions to dismiss, they had varied approaches to which claims they wanted dismissed and on what grounds. Five of the motions[2] invoked qualified immunity as to Cutshall's § 1983 claims. The remaining eight motions[3] invoked qualified immunity as to Cutshall's § 1983 claims but

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[2] Filed by Deputies Marshall, Holley, and Batton, Sergeant Carrizales, and Lieutenant Calhoun.

[3] Filed by Deputies Hernandez, Luna, Sandor, Poirier, Faiura, and Cogburn, and Sergeants Dillow and Klosterman.

did not mention the state law claims. Even more confusing, the motions varied in their treatment of the § 1983 claims as well. The first five motions requested dismissal of Cutshall's excessive force claims but did not mention bystander liability, summary punishment, or failure to render aid. And the remaining eight motions requested dismissal of the excessive force and bystander liability claims but did not mention summary punishment or failure to render aid.

On appeal, the officers ask this court to reverse and hold that the district court should have dismissed all of Cutshall's claims; yet their scattershot pleading means only some of those claims are before us. As we see it, the officers have invoked our interlocutory appellate jurisdiction as to the claims they challenged on qualified immunity grounds in their motions to dismiss—but only those claims. *See Johnson* v. *Williams*, 95 F.3d 50, 50 (5th Cir. 1996) (per curiam) (no appellate jurisdiction where defendants "ha[d] not yet plead the affirmative defense of qualified immunity"); *cf. Dean* v. *Phatak*, 162 F.4th 555, 561 (5th Cir. 2025) ("[O]ur review is circumscribed by the limits on our jurisdiction.") (quotation omitted). That means we have jurisdiction over Cutshall's excessive force claims against all thirteen officers, and his bystander liability claims against Hernandz, Luna, Sandor, Poirier, Faiura, Cogburn, Dillow, and Klosterman. Since none of the officers even mentioned Cutshall's summary punishment or failure to render aid claims, let alone invoked qualified im-

munity as a defense, we lack jurisdiction over those claims. *See Dean*, 162 F.4th at 562.

The same is true for Cutshall's state law tort claims, since none of the officers invoked official immunity as a defense to those claims. True, five of the officers mentioned the Texas Tort Claims Act's ("TTCA") ban on exemplary damages. *See* TEX. CIV. PRAC. & REM. CODE § 101.024 ("This chapter does not authorize exemplary damages."). But not one motion invoked any immunity from suit the officers enjoyed under Texas law, whether at common law or under the TTCA's election-of-remedies provision. *See id.* §§ 101.026, 101.106 (a)–(f); *see also City of Houston* v. *Rodriguez*, 704 S. W.3d 462, 468 (Tex. 2024) (describing official immunity in Texas). With no state law immunity from suit at stake, the denial of the officers' motions to dismiss cannot fall within *Mitchell*'s narrow exception to the finality requirement. 472 U. S. at 530.

III

As such, we will address only those claims over which we have appellate jurisdiction: (A) the excessive force claims against all thirteen officers and (B) the bystander liability claims against Hernandez, Luna, Sandor, Poirier, Faiura, Cogburn, Dillow, and Klosterman.

A

Start with the excessive force claims. The Fourth Amendment includes "a right to be free from excessive force during a seizure." *Poole* v. *City of Shreveport*, 691 F.3d 624, 627 (5th Cir. 2012). To establish a

violation of that right, plaintiffs "must demonstrate: (1) injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Anderson* v. *Estrada*, 140 F.4th 634, 642 (5th Cir. 2025) (quotation omitted). The lion's share of our excessive force decisions turn on the latter two prongs, as "the test of reasonableness . . . is not capable of precise definition or mechanical application." *Id.* (quotation omitted). The inquiry is guided by the *Graham* factors, "including (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham* v. *Connor*, 490 U. S. 386, 396 (1989). But courts need not wade into a multi-factor morass where a plaintiff's prima facie case fails at the jump, e.g., where the plaintiff's "injuries are so slight that they will [not] satisfy the injury element." *Flores* v. *City of Palacios*, 381 F.3d 391, 398 (5th Cir. 2004).

We apply this framework to Cutshall's excessive force claims. Given the number of officers Cutshall sued, it is helpful to divide the defendants into groups, arranged in chronological order from the beginning of Cutshall's arrest to the end.

Carrizales, Batton, and Holley

In his complaint and attached exhibits,[4] Cutshall alleges that Deputies Batton and Holley fired "rub-

[4] Cutshall attached an incident report to his complaint. The report contains descriptions of Cutshall's arrest from all but one

ber bullets at" him, and "shot [him] with rubber bullets." Cutshall accuses Sergeant Carrizales of authorizing Batton and Holley to fire the bullets and ordering the use of spike strips to stop his truck. The report attached to Cutshall's complaint, in turn, states that Carrizales initially pulled Cutshall over and that Carrizales and Calhoun authorized the use of rubber bullets by Batton and Holley. It also states that Batton fired four foam rounds at Cutshall's windows that failed to break the glass, while Holley two foam rounds that missed Cutshall's truck entirely.

Pressed at oral argument, Cutshall's counsel could not explain what these officers should have done dif-

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of the 13 defendants, plus several other officers. "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." FED. R. CIV. P. 10(c). And where a plaintiff files a complaint with supporting exhibits, but the complaint "is contradicted by the contents of [the] exhibit[,] . . . the exhibit and not the [complaint] controls." *U. S. ex rel. Riley* v. *St. Luke's Episcopal Hosp.*, 355 F.3d 370, 377 (5th Cir. 2004). Of course, where the plaintiff incorporates an exhibit but "expressly rejects those elements of the [exhibit] that conflict with [his] account," the implication is that the plaintiff questions the veracity of the report. *Pena* v. *City of Rio Grande City*, 879 F.3d 613, 620 n.9 (5th Cir. 2018). In such cases, courts read the complaint with common sense, "presum[ing] only that the Officers made the assertions contained in the report, not that those assertions are in fact truthful." *Id.* Absent that rejection, however, the contents of attached exhibits are treated as factual allegations in the complaint. *U. S. ex. rel. Riley*, 355 F.3d at 377. Because Cutshall attached the officers' report, relies on the narratives therein to support his claims, and does not question the veracity of those narratives, we will consider the report and its contents as part of Cutshall's complaint.

ferently, seeming to concede that none of their actions constituted excessive force. Oral Arg. at 26:00–45 (Q: "I assume that that's okay . . . using the strips?" A: "I think that's fine, I think where they messed up [was] getting in [the] cab.").

We agree. Batton and Holley fired a handful of foam rounds at Cutshall's window, none of which contacted Cutshall. Carrizales, for his part, initially followed Cutshall in a police cruiser before ordering the use of spike strips to stop Cutshall. Cutshall has pleaded no injuries related to these actions, let alone injuries "result[ing] directly and only from" them. *Anderson*, 140 F.4th at 642. Simply put, having one's tires popped and windows struck with foam is not "more than a de minimis injury," cognizable under the Fourth Amendment. *Glenn* v. *City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001). And even if it were, Cutshall's counsel is right: the officers responded reasonably. Cutshall was at the wheel of a multi-ton semi-truck, did not respond to Carrizales's siren and lights, and ignored lawful commands to stop and exit the vehicle. *See Graham*, 490 U. S. at 396 (noting "threat to . . . safety" and resistance level as relevant factors). Stopping the truck and attempting to get Cutshall's attention with nonlethal rounds was a reasonable—perhaps the *only* reasonable—response, given the danger to the public posed by a rogue semi-truck on the highway. *See Scott* v. *Harris*, 550 U. S. 372, 383–85 (2007); *Salazar–Limon* v. *City of Houston*, 826 F.3d 272, 278 (5th Cir. 2016).

We hold that Cutshall failed to plead a plausible excessive force claim against Carrizales, Batton, or Holley.

Sandor, Hernandez, and Luna

Once SWAT took over the scene, Deputies Sandor, Hernandez, and Luna next tried to get Cutshall out of his truck. They used tear gas and the ROOK police vehicle. First, Sandor fired several tear gas rounds at Cutshall's windshield. Then, Deputy Hernandez used the ROOK to break the rear window of Cutshall's truck, before eventually ripping Cutshall's passenger door off. Finally, Deputy Luna tossed a tear gas canister into Cutshall's truck, using the newly cleared ports in the vehicle's passenger side. Once again, at oral argument Cutshall's appeared to concede that none of these officers used excessive force either. Oral Arg. at 26:45–27:00. With or without that concession, however, Cutshall's claims against these officers fail.

Cutshall at least pleads a plausible injury because he says the gas "blind[ed]" him and caused "permanent vision and nerve damage." But only Sandor and Luna used tear gas—Hernandez only used the ROOK to clear ports in the side of Cutshall's truck. In the qualified immunity context, the court "evaluate[s] each officer's actions separately, to the extent possible." *Poole*, 691 F.3d at 628. Considering Hernandez's acts individually, and in the context of Cutshall's repeated refusal to exit his truck, breaking a window and removing the truck's door did not constitute excessive force. *See Rucker* v. *Marshall*, 119

F.4th 395, 403 (5th Cir. 2024) (no excessive force where officer broke window after suspect "refused officer commands to get out of his car at least 20 times").

Even if Hernandez is responsible for Sandor and Luna's use of tear gas, the result is the same. "We have repeatedly held that 'noncompliance or continued physical resistance' justifies the use of force." *Rucker*, 119 F.4th at 403 (collecting cases). When Hernandez, Luna, and Sandor arrived on the scene, they confronted a suspect at the wheel of a semi-truck, refusing lawful commands to exit, apparently still attempting to drive, all while ignoring every attempt to get his attention. "Fourth Amendment jurisprudence has long recognized that the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U. S. at 396. Employing tear gas to force Cutshall out of the truck without physical force was a reasonable escalation under the circumstances. *See Laney* v. *City of St. Louis*, 56 F.4th 1153, 1156–57(8th Cir. 2023). It therefore cannot ground Cutshall's excessive force claim.

Marshall

When sirens, loudspeaker commands, foam rounds, and tear gas did not induce Cutshall to exit, SWAT finally decided to physically remove him. The first officer to make contact was Deputy Marshall, who was accompanied by a police dog named Timon. Cutshall's complaint described Marshall as

using "excessive and brutal force" on a "disoriented and confused" victim and alleges that Marshall's "vicious German Shepherd" "ripped [him] to shreds." These assertions are accompanied by exhibits attached to the complaint—specifically the police report of the incident—which clarify Cutshall's allegations against Marshall. *See supra,* 8 n.3. In the exhibits, Marshall reports that he approached the cab along with SWAT members and ordered Cutshall to surrender. After several foam rounds were fired at Cutshall, Marshall states that Cutshall lowered his right hand out of sight, and that Marshall then deployed Timon to secure Cutshall's hand "in an attempt to prevent a deadly force encounter." Once the dog bit him, Cutshall "yell[ed]" and still refused "additional commands . . . to come out." Deputy Marshall followed Timon into the truck and managed to unbuckle Cutshall's seat belt, but Cutshall "us[ed] his legs to lock himself in the driver's seat." When Marshall saw other deputies enter the truck, he "chose to physically take [the K9] off to prevent further injuries to the suspect or team members."

Given the facts alleged in the complaint and attached exhibit, Cutshall pleaded no excessive force claim against Marshall based on his use of Timon. "[A]n officer's use of *deadly* force [is] reasonable when a suspect moves out of the officer's line of sight such that the officer could reasonably believe the suspect was reaching for a weapon." *Manis* v. *Lawson*, 585 F.3d 839, 844 (5th Cir. 2009) (emphasis added). *A fortiori*, the use of non-deadly force under the same circumstance is reasonable. Marshall rea-

sonably believed that Cutshall was reaching for a weapon and deployed Timon in response. And Marshall then removed Timon when other officers moved in, to avoid unnecessary harm to Cutshall or the other officers.

Cutshall failed to plead an excessive force claim against Marshall.

Poirier, Faiura, Cogburn, and Klosterman

As Marshall removed Timon officer from the cab, four other (human) officers entered the truck's cab. Deputy Poirier and Sergeant Klosterman entered through the rear of Cutshall's cab, while Deputies Faiura and Cogburn entered through the passenger door. Poirier reported punching Cutshall several times "[d]ue to the confined space and [the] suspect's level of resistance." When Cutshall grabbed Poirier's arm, both Poirier and Klosterman punched him several more times to get Cutshall to release Poirier. Three of the deputies reported seeing knives, and two reported that Cutshall reached toward those knives throughout the encounter. Cogburn stated that Cutshall managed to "place his hands on several" of the knives, before Cogburn grabbed his hand, removed the knives from Cutshall's pants, and threw them aside. Finally, the deputies managed to remove Cutshall's legs from the bottom of his seat, pulling him from the truck through the passenger door and dropping him onto the ground.

Cutshall failed to state an excessive force claim against these officers. As already noted, "noncompliance or continued physical resistance justifies the

use of force." *Rucker*, 119 F.4th at 403 (quotation marks omitted). Given the potential danger posed by Cutshall, who had by this point refused hours of commands to leave his truck while continually trying to drive away, the use of force to extract him was reasonable. *See Anderson*, 140 F.4th at 644–45 ("Repeated[ly] . . . declining to follow an officer's orders constitute[s] active resistance."). Moreover, Cutshall fought being removed from the truck. Three of the four deputies (Poirier, Faiura, and Cogburn) stated that Cutshall had several knives attached to the front of his pants, and Cogburn explicitly reports that Cutshall tried to use them. Faiura recounts that Cutshall reached for the pockets containing the knives throughout the encounter. Sergeant Klosterman did not see the knives, but did see Cutshall grab Poirier "causing [him] pain." In response, the deputies punched Cutshall in the face several times and dragged him from the truck. While Cutshall alleges that he was unarmed and unconscious at the time, that is directly contradicted by multiple narratives in the exhibits attached to the complaint. Those exhibits state that Cutshall actively fought with officers and attempted to reach for knives. Under those circumstances, officers can reasonably use force to subdue the suspect. *See Rucker*, 119 F.4th at 403; *Poole*, 691 F.3d at 629. Because Poirier, Faiura, Cogburn, and Klosterman's use of force was objectively reasonable, Cutshall failed to plead an excessive force claim against them.

Appendix A

Calhoun and Dillow

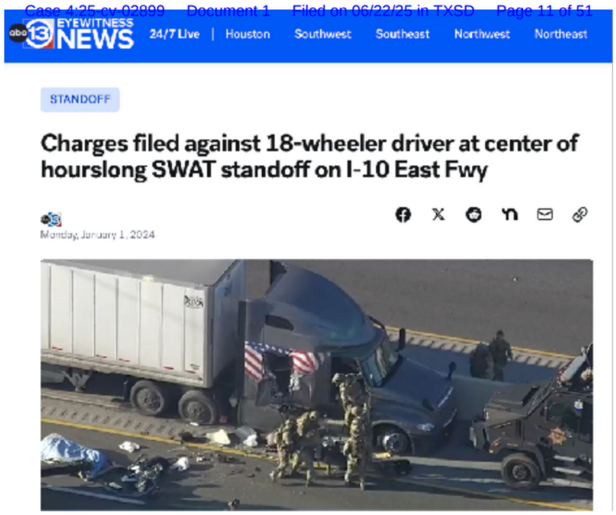
Finally, Cutshall sued two officers who supervised his arrest: Sergeant Dillow and Lieutenant Calhoun. Insofar as Cutshall attempts to pin other officers' conduct on Calhoun and Dillow as supervisors, he faces a steep road: "Supervisors cannot be held liable on a theory of vicarious liability." *Bustos* v. *Martini Club Inc.*, 599 F.3d 458, 468 (5th Cir. 2010). Instead, a plaintiff must show that the supervisor *himself* breached a duty by failing to supervise, and "[t]he threshold for pleading a failure-to-supervise claim is high." *Tuttle* v. *Sepolio*, 68 F.4th 969, 975 (5th Cir. 2023). It means showing "(1) that the supervisor failed to train or supervise the subordinate; (2) a causal link between the failure to train or supervise and the constitutional violation; and (3) that the failure to train or supervise amounts to deliberate indifference." *Id.*

Cutshall did not meet that burden. Start with Calhoun, who Cutshall describes as "the master-mind" behind Deputy Holley firing foam rounds at Cutshall's truck and unspecified officers stopping "the tractor-trailer with stop sticks and spikes." As we have already noted, neither the foam rounds nor the spike strips injured Cutshall and their use was a reasonable response to Cutshall refusing to stop his truck. Because the underlying conduct Calhoun supervised was not unconstitutional, Cutshall failed to show "a causal link between [Calhoun's] failure to . . . supervise and [a] constitutional violation." *Tuttle*, 68 F.4th at 975. His excessive force claim against Calhoun therefore fails.

Cutshall next alleges that Sargeant Dillow was "one of the lead supervisors in this parade" and "authorized his team of 'Army Rangers' to employ the aforementioned tactics." He also accuses Dillow of "ramm[ing] [Cutshall's truck] with the BEAR, deploy[ing] tear gas, and thr[owing] [Cutshall] down on the hard concrete." Taking the vague reference to "aforementioned tactics" to encompass a supervisory claim, the analysis is the same as it was for Calhoun: With no valid excessive force claim against any individual officer, Cutshall can have no supervisory claim against Dillow. *See Tuttle*, 68 F.4th at 975.

As to Dillow "ramming" Cutshall's truck with the BEAR, Cutshall's complaint contradicts itself. In his summary of the facts, Cutshall included a photograph of the scene of his arrest, after the officers removed him from the truck:

Appendix A



Evidence of national media attention.[4]

In the photograph, Cutshall is on the ground next to his truck, meaning that by his own telling, Dillow must have already exited the BEAR to assist in finally handcuffing Cutshall. Yet the photo shows (1) a sizeable gap between Cutshall's truck and the BEAR, and (2) Cutshall's front bumper totally undamaged. Moreover, several of the narratives in the report attached to Cutshall's complaint describe Dillow parking the BEAR near Cutshall's truck, not "ramming" the truck. Because the allegation is contradicted by both the complaint itself and the attached report, we will not credit it.

As to deploying "tear gas," our earlier analysis applies: Under the circumstances of a barricaded, noncompliant suspect, it is reasonable to use chemical irritants to induce compliance. *See Graham*, 490

U. S. at 396. Likewise, the officers did not use unreasonable force to remove Cutshall from the cab. Exhibits to the complaint reveal that Cutshall "continue[d] to fight with" officers throughout his removal from the cab—even attempting to "bite [Cogburn] and other deputies." Cutshall blames this behavior on his coronavirus diagnosis, but that is neither here nor there. Whatever explains the behavior *now*, the fact remains that Cutshall fought with officers throughout his removal from the cab. "[C]ase law establish[es] that officers are trained to use nonlethal force to gain compliance if a subject actively resists arrest," *Carroll* v. *Ellington*, 800 F.3d 154, 174–75 (5th Cir. 2015), including using force to reduce a resisting suspect to the ground, *Buehler* v. *Dear*, 27 F.4th 969, 977–78 (5th Cir. 2022). That is exactly what happened here: Dillow assisted in removing a fighting and biting suspect from a cramped truck and understandably dropped that suspect on the ground in the process. That was not objectively unreasonable. Cutshall therefore failed to plead a plausible excessive force claim against Dillow.

B

The complex procedural posture of this case means that we are not quite done. Eight of the officers, Hernandez, Luna, Sandor, Poirier, Faiura, Cogburn, Dillow, and Klosterman moved to dismiss Cutshall's "bystander liability" claims against them and appealed the denial of those motions. These claims are properly before us.

A bystander liability claim only arises where an "officer (1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act." *Whitley* v. *Hanna*, 726 F.3d 631, 646 (5th Cir. 2013) (quotation omitted). Where there is no underlying violation, "secondary liability claims . . . fail" by necessity. *Id.* at 649. At least in this appeal, the only underlying claims that could qualify are the excessive force claims against the other five officers. But Cutshall failed to plead a plausible excessive force claim against any of the officers. As such, his bystander liability by way of excessive force claims necessarily fail as a matter of law. *See Martinez* v. *City of Rosenberg, Texas*, 123 F.4th 285, 290 (5th Cir. 2024) ("[T]he district court properly dismissed Martinez's bystander liability claim because it cannot stand absent an underlying constitutional violation."). We express no opinion on whether Cutshall's other § 1983 claims for summary punishment and failure to render aid could serve as underlying claims for purposes of bystander liability.

* * *

Cutshall's excessive force claims fail because the defendants acted reasonably, and his bystander liability claims fail for lack of an underlying constitutional violation. As a result, the officers' qualified immunity entitled them to dismissal of these claims. Because the district court held otherwise, we REVERSE its decision and REMAND for proceedings not inconsistent with this opinion.

Appendix B

[Filed: Sep. 4, 2025]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TRINIDAD CUTSHALL, Plaintiff, v. HARRIS COUNTY, TEXAS, *et. al.*, Defendants.	§ § § § § § §	Civil Action No. H–25–2899

ORDER

Pending before the Court are Defendant Deputy P. Batton's Motion to Dismiss (Document No. 26); Defendant Lieutenant D. R. Calhoun's Motion to Dismiss (Document No. 27); Defendant Sergeant M. A. Carrizales' Motion to Dismiss (Document No. 28); Defendant Deputy R. W. Holley's Motion to Dismiss (Document No. 29); Defendant Deputy C. Marshall's Motion to Dismiss (Document No. 30); Defendant Sergeant Donald Dillow's Motion to Dismiss (Document No. 31); Defendant Deputy Nauel Faiura's Motion to Dismiss (Document No. 32); Defendant Sergeant Todd Klosterman's Motion to Dismiss (Document No. 33); and Defendant Deputy N. Poirer's Motion to Dismiss (Document No. 34).

Having considered the motions, submissions, and applicable law ***in detail***, the Court determines that each motion should be denied. Accordingly, the Court hereby

ORDERS that Defendant Deputy P. Batton's Motion to Dismiss (Document No. 26) is **DENIED.** The Court further

ORDERS that Defendant Lieutenant D. R. Calhoun's Motion to Dismiss (Document No. 27) is **DENIED.** The Court further

ORDERS that Defendant Sergeant M. A. Carrizales' Motion to Dismiss (Document No. 28) is **DENIED.** The Court further

ORDERS that Defendant Deputy R. W. Holley's Motion to Dismiss (Document No. 29) is **DENIED.** The Court further

ORDERS that Defendant Deputy C. Marshall's Motion to Dismiss (Document No. 30) is **DENIED.** The Court further

ORDERS that Defendant Sergeant Donald Dillow's Motion to Dismiss (Document No. 31) is **DENIED.** The Court further

ORDERS that Defendant Deputy Nauel Faiura's Motion to Dismiss (Document No. 32) is **DENIED.** The Court further

ORDERS that Defendant Sergeant Todd Klosterman's Motion to Dismiss (Document No. 33) is **DENIED.** The Court further

ORDERS that Defendant Deputy N. Poirer's Motion to Dismiss (Document No. 34) is **DENIED.**

SIGNED at Houston, Texas, on this 4 day of September, 2025.

/s/ David Hittner
DAVID HITTNER
United States District Judge

Appendix C

[Filed: Oct. 28, 2025]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TRINIDAD CUTSHALL, Plaintiff, v. HARRIS COUNTY, TEXAS, *et. al.*, Defendants.	§ § § § § §	Civil Action No. H–25–2899

ORDER

Pending before the Court are Defendant Deputy S. Cogburn's Motion to Dismiss (Document No. 60); Defendant Deputy E. Hernandez's Motion to Dismiss (Document No. 61); Defendant J. Luna's Motion to Dismiss (Document No. 62); and Defendant Deputy Kenneth Sandor's Motion to Dismiss (Document No. 63). Having considered the motions, submissions, and applicable law, ***in detail***, the Court determines that each motion should be denied. Accordingly, the Court hereby

ORDERS that Defendant Deputy S. Cogburn's Motion to Dismiss (Document No. 60) is **DENIED.** The Court further

ORDERS that Defendant Deputy E. Hernandez's Motion to Dismiss (Document No. 61) is **DENIED.** The Court further

ORDERS that Defendant J. Luna's Motion to Dismiss (Document No. 62) is **DENIED.** The Court further

ORDERS that Defendant Deputy Kenneth Sandor's Motion to Dismiss (Document No. 63) is **DENIED.**

SIGNED at Houston, Texas, on this 28 day of October, 2025.

/s/ David Hittner
DAVID HITTNER
United States District Judge

Appendix D

[Filed: Apr. 17, 2026]

United States Court of Appeals
for the Fifth Circuit

No. 25–20386

TRINIDAD CUTSHALL,

Plaintiff—Appellee,

versus

DONALD DILLOW, *Sergeant, in his Individual Capacity*; NAHUEL FAIURA, *Deputy, in his Individual Capacity*; TODD KLOSTERMAN, *Sergeant, in his Individual Capacity*; N. POIRIER, *Deputy, in his Individual Capacity*; D. R. CALHOUN, *Lieutenant, in his Individual Capacity*; M. A. CARRIZALES, *Sergeant, in his Individual Capacity*; R. W. HOLLEY, *Deputy, in his Individual Capacity*; C. MARSHALL, *Deputy, in his Individual Capacity*; P. BATTON, *Deputy, in his Individual Capacity*,

Defendants—Appellants,

CONSOLIDATED WITH

No. 25–20499

Appendix D

TRINIDAD CUTSHALL,

Plaintiff—Appellee,

versus

KENNETH SANDOR, *Deputy, Individually*; E. HERNANDEZ, *Deputy, Individually*; J. LUNA, *Deputy, Individually*; S. COGBURN, *Deputy, Individually*,

Defendants—Appellants.

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:25–CV–2899

ORDER:

IT IS ORDERED that appellee's motion to supplement the record on appeal is DENIED. Appellants' response in opposition shows that in his motion to supplement, appellee's counsel creatively edited a key passage from a 2025 Fifth Circuit opinion that is directly on point. Appellee is directed to file a response by noon Thursday April 23, 2026, addressing whether he or his counsel should be sanctioned for this conduct.

LYLE W. CAYCE, *Clerk*
United States Court of Appeals
for the Fifth Circuit
/s/ Lyle W. Cayce

ENTERED AT THE DIRECTION OF THE COURT

Appendix E

[Filed: Sep. 9, 2026]

United States Court of Appeals
for the Fifth Circuit

No. 25–20386

TRINIDAD CUTSHALL,

Plaintiff—Appellee,

versus

DONALD DILLOW, *Sergeant, in his Individual Capacity*; NAHUEL FAIURA, *Deputy, in his Individual Capacity*; TODD KLOSTERMAN, *Sergeant, in his Individual Capacity*; N. POIRIER, *Deputy, in his Individual Capacity*; D. R. CALHOUN, *Lieutenant, in his Individual Capacity*; M. A. CARRIZALES, *Sergeant, in his Individual Capacity*; R. W. HOLLEY, *Deputy, in his Individual Capacity*; C. MARSHALL, *Deputy, in his Individual Capacity*; P. BATTON, *Deputy, in his Individual Capacity*,

Defendants—Appellants,

CONSOLIDATED WITH

No. 25–20499

Appendix E

TRINIDAD CUTSHALL,

Plaintiff—Appellee,

versus

KENNETH SANDOR, *Deputy, Individually*; E. HERNANDEZ, *Deputy, Individually*; J. LUNA, *Deputy, Individually*; S. COGBURN, *Deputy, Individually*,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:25–CV–2899

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before HIGGINBOTHAM, SMITH, and OLDHAM, *Circuit Judges.*

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.