United States Court of Appeals

for the

Fifth Circuit

Case No. 23-30006

BRUCE WASHINGTON, Individually,

Plaintiff-Appellee,

v.

ALEXANDER THOMAS, in his individual capacity,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA IN NO. 2:22-CV-632
HONORABLE LANCE M. AFRICK, U.S. DISTRICT JUDGE

BRIEF FOR PLAINTIFF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Counsel for Plaintiff-Appellee respectfully contend that there is no need for oral argument. This is the appeal of a summary judgment that is dependent upon a review of the written record and existing well established law. Thus Plaintiff-Appellee believes oral argument is unwarranted. If the Court calendars oral argument, Plaintiff-Appellee would like to participate.

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JURISDICTIONAL STATEMENT

Defendant-Appellant Alexander Thomas filed a Notice of Interlocutory Appeal on January 3, 2023, as to the U.S. District Court for the Eastern District of Louisiana's December 22, 2022 Order denying the Defendant-Appellant's Motion for Summary Judgment regarding Plaintiff-Appellee's Fourth Amendment claim of unlawful search. ROA.7215, ROA.6663.

Plaintiff-Appellee asserts that this Court lacks jurisdiction to consider this appeal, and that the District Court has federal question jurisdiction over this action under 28 U.S.C. § 1331, as this is a case "arising under the Constitution, laws, or treaties of the United States," specifically 42 U.S.C. § 1983.

This is an attempted interlocutory appeal from an order that is not final, but merely denies a motion for summary judgment. The District Court denied summary judgment because genuine issues of material fact exist as to whether Defendant-Appellant violated a clearly established constitutional right and whether Defendant-Appellant's search of Plaintiff-Appellee was objectively reasonable. As will be explained herein, because the denial of the summary judgment was based on contested fact issues, and neither issues of law nor the application of law to uncontested facts, this Court does not have jurisdiction to entertain this interlocutory appeal.

STATEMENT OF THE ISSUES

I. Whether this Court has jurisdiction consider Defendant-Appellant's interlocutory appeal where Defendant-Appellant challenges the genuineness rather than the materiality of the District Court's fact-based denial of summary judgment on qualified immunity?

II. Whether the District Court correctly denied summary judgment because a reasonable jury could find that Defendant-Appellant's search of Mr. Washington amounted to a constitutional violation as it was conducted without reasonable suspicion that Mr. Washington was armed and dangerous, and without his consent?

III. Whether the District Court correctly denied qualified immunity because a reasonable law enforcement officer would know, based on clearly established law, that the search was unlawful as the totality of the circumstances did not give rise to reasonable suspicion that Mr. Washington was armed and dangerous?

IV. Whether the District Court correctly denied qualified immunity because a reasonable law enforcement officer would know, based on clearly established law and the totality of the circumstances, including a threat of escalation immediately prior to seeking consent to search, that Mr. Washington's actions did not indicate valid and voluntary consent?

STATEMENT OF THE CASE

This case arises from the humiliating and invasive pretextual traffic stop of Bruce Washington ("**Plaintiff-Appellee**") by three deputies of the St. Tammany Sheriff's Office ("**STPSO**"), including Deputy Alexander Thomas ("**Defendant-Appellant**"). Mr. Washington and his passenger were ordered out of the vehicle, questioned, yelled at, berated, ridiculed, told to "shut up," prevented from contacting their family or attorney, and detained for twenty minutes – all for a traffic citation that was ultimately dismissed, *nolle prosequi*. ROA.6664.

Defendant-Appellant's treatment and nonconsensual search of Mr. Washington was not only undignified, but unlawful. Through this lawsuit, brought pursuant to 42 U.S.C. § 1983, Mr. Washington asserts that Defendant-Appellant violated his Fourth Amendment right to be free from warrantless searches absent reasonable suspicion that he was armed and dangerous, or his consent. This matter comes before this Court on Defendant-Appellant's interlocutory appeal of the District Court's Order denying Defendant-Appellant's motion for summary judgment on the basis of qualified immunity. ROA.6663.

A. The Lead Up to the Search

In the evening of March 13, 2021, Plaintiff-Appellee and his cousin, Gregory Lane, were driving in St. Tammany Parish, where they both grew up and still live. Mr. Washington stopped to get gas. St. Tammany Parish Sheriff's Office

("**STPSO**") deputies, Defendant-Appellant and Shaun Wood, sat in a squad car nearby, watching them. ROA.6030. When Mr. Washington turned right out of the gas station, the deputies tailed him for a mile. ROA.6030. At approximately 8:00 PM, Defendant-Appellant initiated his emergency lights. ROA.6030. Mr. Washington immediately pulled into the brightly-lit parking lot of a smoothie shop, and rolled his window down. ROA.6030.

Defendant-Appellant approached Mr. Washington on the driver's side of the vehicle, and requested Mr. Washington's license, registration, and car insurance. ROA.6031. Defendant-Appellant asked Mr. Washington to open the passenger-side door. ROA.903. Mr. Washington helped Mr. Lane open the door, and inquired about the basis of the traffic stop. ROA.6031. Defendant-Appellant refused to answer until Mr. Washington provided the requested documentation. ROA.6031. Defendant-Appellant informed Mr. Washington that he stopped him for failure to use a turn signal and improper lane usage. ROA.6031. In good faith, Mr. Washington told Defendant-Appellant that he did indeed use his turn signal. ROA.5772. Rather than proceed to a warrant check, Defendant-Appellant questioned Mr. Washington about his whereabouts and his intended destination. ROA.5772. Mr. Washington asked Defendant-Appellant how this question related to the traffic stop and informed Defendant-Appellant that he knew his rights under the law. ROA.6031. Defendant-Appellant then threatened Mr. Washington, telling

him that Mr. Washington was going to make the traffic stop **"go a different way than it has to be."** ROA.6031.

Immediately thereafter, Defendant-Appellant ordered Mr. Washington out of his vehicle and asked Mr. Washington if he had any weapons. ROA.6664. Mr. Washington truthfully responded that he never carried weapons. ROA.6664. Defendant-Appellant said, "do you mind if I pat you down for officer safety," communicating a belief that Mr. Washington presented a threat to officer or public safety. ROA.6664.

B. The Unlawful Search

Mr. Washington, believing he was not free to decline Defendant-Appellant's request and fearful of retaliation because of Defendant-Appellant's threat mere seconds earlier, said nothing and, against his wishes, submitted to Defendant-Appellant's show of authority. *See* ROA.6117 (Decl. of Plaintiff-Appellee), ROA.447 (Second Amended Complaint).

Defendant-Appellant then proceeded to search Mr. Washington's person without verbal, implied, valid or voluntary consent, or articulable reasonable suspicion of criminal activity or threat to deputy or public safety. ROA.6031-32, ROA.6038-48. The traffic stop continued for approximately fifteen minutes after Mr. Washington was searched, concluding with Mr. Washington receiving a traffic citation, which was dismissed *nolle prosequi*. ROA.6664.

C. Course of Proceedings and Disposition in District Court

On March 10, 2022, Plaintiff-Appellee and Mr. Lane filed a complaint in the U.S. District Court for the Eastern District of Louisiana, and on August 10, 2022, filed a Second Amended Complaint asserting Section 1983 claims against Defendant-Appellant and Deputies Shaun Wood and Jackson Bridel, in their individual capacities, and Sheriff Randy Smith, in his official capacity (collectively, the "**Defendants**"), for violations of their First and Fourth Amendment rights, and Title VI of the Civil Rights Act of 1964, and asserting *Monell* liability. ROA.19-65, ROA.432-482.

On September 7, 2022, Defendants filed a motion to dismiss for failure to state a claim (despite having filed Answers to each Complaint). ROA.562. On November 8, 2022, the District Court denied Defendants' motion to dismiss Plaintiff-Appellee's unlawful search claim against Defendant-Appellant, finding it clearly established that alleged "uncooperativeness" is insufficient to provide reasonable suspicion that an individual is armed and dangerous. ROA.934. The District Court found that "a reasonable officer would have known that" the fact that "it was evening and there was an apparently open traffic-related warrant against" Mr. Washington "did not give rise to reasonable suspicion." ROA.934. The District Court noted that Defendants' argument that Mr. Washington consented to the frisk was inappropriate

for resolution at the motion-to-dismiss stage, as the Complaint stated he did not consent. ROA.934.

On November 29, 2022, Defendant-Appellant moved for summary judgment on the unlawful search claim based on qualified immunity. ROA.2169-2202. On December 22, 2022, the District Court denied Defendant-Appellant's Motion, finding that there were genuine issues of material fact, and that, construing the facts in Plaintiff-Appellee's favor, a jury could find that Defendant-Appellant lacked reasonable suspicion and consent to search Mr. Washington, without which a reasonable officer would know it was unlawful to conduct a frisk. ROA.6663. Defendant-Appellant now appeals.

SUMMARY OF THE ARGUMENT

To distract this Court from its limited standard of review, the Defendant-Appellant contorts the issues on appeal, attempting to turn what is clearly a fact issue into one of law, and convince this Court that it has jurisdiction to hear this interlocutory appeal. But the Order from the District Court is clear: Defendant-Appellant's Motion for Summary Judgment was denied based on genuine issues of material fact as to whether Defendant-Appellant had either reasonable suspicion or Mr. Washington's consent to conduct a search of his person. Because the denial was based on contested fact issues and not issues of law or the application of law to uncontested facts, under the established law of this Circuit, this Court does not have jurisdiction to entertain this interlocutory appeal.

If this Court finds that it does have jurisdiction to hear this interlocutory appeal, Plaintiff-Appellee contends that the District Court was correct in finding that genuine issues of material fact exist; Defendant-Appellant and Plaintiff-Appellee plainly have vastly differing contentions as to the very facts that are determinative of the outcome of the case. The District Court, properly viewing the facts in the favor of Plaintiff-Appellee—as it must at summary judgment—determined that a reasonable jury could conclude that Defendant-Appellant did not act reasonably in conducting a search of Mr. Washington without his consent or reasonable suspicion that Mr. Washington was armed and dangerous.

The District Court appropriately and carefully analyzed the facts of this case and ultimately found that a reasonable jury could conclude that Defendant-Appellant had neither Mr. Washington's consent, nor reasonable suspicion that he was armed and dangerous when Defendant-Appellant conducted the pat down, and that such conduct violated Mr. Washington's clearly established constitutional right to be free from unlawful searches when, absent any articulable facts suggesting a safety risk to the officers or the public, he did not validly and voluntarily consent to the search. Thus, summary judgment was properly denied on the basis of qualified immunity.

STANDARDS OF REVIEW

A. Standard of Review on Interlocutory Appeal

Denial of summary judgment on the basis of qualified immunity is immediately appealable *only if* the denial is "predicated on conclusions of law and not genuine issues of material fact." *Kokesh v. Curlee*, 14 F.4th 382, 390 (5th Cir. 2021); *see also Ducksworth v. Landrum*, 62 F.4th 209, 212 (5th Cir. 2023) (quoting *Flores v. City of Palacios*, 381 F.3d 391, 393 (5th Cir. 2004)).

"When a district court denies summary judgment on the basis that genuine issues of material fact exist, it has made two distinct legal conclusions: that there are genuine issues of fact in dispute, and that these issues are material." *Reyes v. City of Richmond*, 287 F.3d 346, 350–51 (5th Cir. 2002) (internal quotation marks omitted). But a district court's finding that a genuine factual dispute exists is a *factual determination* that the Fifth Circuit is "prohibited from reviewing" on appeal of the denial of qualified immunity. *Id. See also Ducksworth*, 62 F.4th at 212 (this Court has "no jurisdiction to consider the correctness of the plaintiff's version of the facts and cannot review the district court's factual determination that a genuine factual dispute exists"). In such cases, the Court of Appeals may consider *only* whether the district court "correctly assessed the legal significance—that is, *the materiality*—of the disputed facts" in the denial of qualified immunity. *Edwards v. Oliver*, 31 F.4th 925, 928-29 (5th Cir. 2022) (emphasis added); *Manis v. Lawson*,

585 F.3d 839, 842-43 (5th Cir. 2009). "An officer challenges materiality when he contends that 'taking *all* the plaintiff's factual allegations as true no violation of a clearly established right was shown.'" *Reyes*, 287 F.3d at 351 (emphasis in original).

The standard of review that courts apply in an interlocutory appeal asserting qualified immunity thus differs from the standard employed in most appeals of summary judgment rulings. *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004). Ordinarily, the Court of Appeals reviews the district court's denial of summary judgment *de* novo, applying the same standard as the district court. *Vela v. City of Houston*, 276 F.3d 659, 666 (5th Cir. 2001). In other words, the Court of Appeals—like the district court—would apply the standard set out in Rule 56 of the Federal Rules of Civil Procedure, according to which summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

But, when reviewing an interlocutory appeal, the Fifth Circuit "lack[s] the power to review the district court's decision that a genuine factual dispute exists," and as such, does not apply the standard of Rule 56. *Kinney*, 367 F.3d at 348. Instead, it can consider *only* whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment. *See Behrens v. Pelletier*, 516 U.S. 299, 313 (1996).

On appeal, this Court must accept the Plaintiff's version of the facts as true. *Edwards*, 31 F.4th at 929. The mere existence of video evidence does not—contrary to Defendant-Appellant's attempts to mislead this Court—alter this rule. *See infra* Section I.B.

B. Qualified Immunity

In resolving questions of qualified immunity, courts engage in a two-pronged inquiry. The first asks whether, "[t]aken in the light most favorable to the party asserting the injury . . . the facts [as] alleged show the officer's conduct violated a [federal] right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The inquiry into whether this right was violated requires a balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

In cases alleging unreasonable searches or seizures, the Supreme Court has instructed that courts should define the "clearly established" right at issue on the basis of the "specific context of the case." *Saucier*, 533 U.S. at 201; *see also Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987). In such cases, "the plaintiff must show that there is a genuine dispute of material fact and that a jury could return a verdict entitling the plaintiff to relief." *Edwards*, 31 F.4th at 929 (citing *Joseph ex rel. Estate of Joseph v. Bartlett*, 981 F.3d 319, 329–30 (5th Cir. 2020)). "[T]o

overcome qualified immunity, the plaintiff's version of those disputed facts must also constitute a violation of clearly established law." *Joseph*, 981 F.3d. at 330.

On a district court's denial of summary judgment on the basis of qualified immunity, the court reviews the scope of clearly established law and the objective reasonableness of the defendant government official's actions *de novo*. *Edwards*, 31 F.4th at 928-29; *Freeman v. Gore*, 483 F.3d 404, 410 (5th Cir. 2007).

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER DEFENDANT-APPELLANT'S CHALLENGE TO THE GENUINENESS OF THE DISPUTES OF FACT IDENTIFIED BY THE DISTRICT COURT

A. Defendant-Appellant's Appeal Focuses Exclusively on Challenging the Genuineness of Factual Disputes

By Defendant-Appellant's own admission, this appeal "boils down to a challenge of the genuineness" of the factual disputes, *see* App. Brief at 7, and as such, this Court lacks jurisdiction over it.

Before "reviewing a denial of summary judgment, [this Court] must first determine if [it] ha[s] jurisdiction over the appeal." *Ducksworth*, 62 F.4th at 212. Where an appeal does not involve a challenge to the *materiality* of disputed facts, this Court lacks jurisdiction to consider it. *Edwards*, 31 F.4th at 930; *Ducksworth*, 62 F.4th at 212; *Reyes*, 287 F.3d at 350-51 (citing *Behrens*, 516 U.S. at 313 and *Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 490 (5th Cir. 2001)). As such, where a party's appeal "boils down to a challenge of the genuineness, not the materiality, of factual

disputes," the appeal must be dismissed. *Winfrey v. Pikett*, 872 F.3d 640, 644 (5th Cir. 2017). An officer challenges materiality when he contends that "taking all the plaintiff's factual allegations as true," no violation of a clearly established right was shown. *Cantu v. Rocha*, 77 F.3d 795, 803 (5th Cir. 1996).

Defendant-Appellant makes unambiguously clear in his brief that his argument is *not* based on "taking all of the plaintiff's factual allegations as true," *id.*; instead, despite the well-established rules limiting this Court's jurisdiction in this interlocutory appeal, Defendant-Appellant's appeal focuses *exclusively* on challenging the genuineness of the factual disputes. Indeed, Defendant-Appellant's own summary of his argument concludes that "this case involves no disputed facts," and that "the District Court erred in finding that disputed facts exist in denying Defendant's Motion for Summary Judgment," plainly calling for review of whether a fact dispute exists—in other words, the genuineness—rather than the materiality of a conceded factual dispute. App. Brief at 7.

To be sure, the language of the Order makes clear that summary judgment was denied based on genuine issues of material fact as to (1) "whether Thomas had reasonable suspicion to search Washington and whether Washington consented to the search[,]" and (2) "whether Thomas' conduct was objectively reasonable in light of clearly established case law governing frisks." ROA.6669-70. The District Court's Order goes on to specifically state that Mr. Washington "carried his burden

of establishing genuine factual issues as to whether Thomas committed a constitutional violation, and whether his conduct violated clearly established law." ROA.6670. "If a factual dispute must be resolved to make the qualified immunity determination, that fact issue is material and [this Court] lack[s] jurisdiction over the appeal." *Manis*,585 F.3d at 843; *Amador v. Vasquez*, 961 F.3d 721, 726-27 (5th. Cir. 2020).

Every argument regarding reasonable interpretation and genuineness of factual disputes in Defendant-Appellant's brief is inappropriate for appeal, as this Court lacks the jurisdiction to review a district court's identification of genuine issues of fact. Defendant-Appellant challenges this factual determination despite the well-established limitation of this Court's jurisdiction to review denials of summary judgment on qualified immunity. *Edwards*, 31 F.4th at 929.[1] As such, this appeal should be denied.

B. *Scott v. Harris* is Inapposite Because the Body Camera Footage Supports Rather Than Discredits Mr. Washington's Version of the Facts

In an attempt to coax this Court into hearing this appeal despite the clear jurisdictional bar, Defendant-Appellant argues that no issues of fact can exist when the underlying incident is recorded on video. But in so arguing, Defendant-

[1] *See also Ducksworth*, 62 F.4th at 212; *Reyes*, 287 F.3d at 350-51 (citing *Behrens*, 516 U.S. at 313 and *Bazan*, 246 F.3d at 490).

Appellant misrepresents *Scott v. Harris*, omitting the Supreme Court's instruction that the *Scott* holding—*i.e.*, that, when there is video evidence, a court should not adopt the Plaintiff's version of the facts—applies ***only*** where a reasonable jury could not believe the non-movant's account of the facts in light of the video evidence. 550 U.S. 372, 380 (2007) ("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.") (emphasis added). Where this blatant contradiction is absent, "the modified rule from *Scott* has no application." *Aguirre v. City of San Antonio*, 995 F.3d 395, 410 (5th Cir. 2021); *see also Crane v. City of Arlington*, 50 F.4th 453, 462 (5th Cir. 2022) (citation omitted). *Scott* is thus "an exceptional case with an extremely limited holding." *Aguirre*, 995 F.3d at 410 ("*Scott* was not an invitation for trial courts to abandon the standard principles of summary judgment by making credibility determinations or otherwise weighing the parties' opposing evidence against each other any time a video is introduced into evidence.").

Despite this unambiguous limitation of *Scott*, Defendant-Appellant boldly represents that "there is a video of the entire incident, and thus there are no facts are [sic] in dispute as everything that happened is portrayed on the video." App. Brief at 20-21. But Defendant-Appellant fails to argue what application of the *Scott* rule would require—because he cannot: that the video here is not "ambiguous," and

instead that it "utterly discredits" or "blatantly contradicts" Plaintiff-Appellee's version of the facts.

"When video evidence is ambiguous or in fact supports a nonmovant's version of events," the *Scott* rule has no application. *Aguirre*, 995 F.3d 395. Here, as recognized by the District Court, the video evidence is *at least* ambiguous. For example, unlike in *Scott*, the body camera footage establishes that Defendant-Appellant's frisk of Mr. Washington occurred mere seconds after Defendant-Appellant issued a threat that Mr. Washington was going to make the stop "go a different way." ROA.6672. The District Court correctly concluded that "[t]he intended meaning of this statement is unclear, but at this stage, the Court must draw all reasonable inferences in Mr. Washington's favor." ROA.6672. The footage does not contradict Mr. Washington's statement of the facts, let alone blatantly, but rather supports the genuineness of the factual dispute.

Defendant-Appellant also misrepresents the holding of *Betts v. Brennan*, which he similarly cites for the proposition that "there are no facts are in dispute [sic] as everything that happened is portrayed on the video." App. Brief at 20-21 (citing 22 F.4th 577 (5th Cir. 2022)). In reading *Betts* to mean that no disputes of fact exist where video evidence is available, Defendant-Appellant has mistaken correlation for causation. The lack of dispute over material fact in *Betts* was because all material facts in that case could be ascertained from the video; the existence of

the video evidence did not automatically result in the absence of disputes of fact in the way Defendant-Appellant claims. *Id.* at 581-82. Here, unlike in *Betts*, disputed material facts exist regarding things not readily observable by sight and sound in the video footage, such as (1) whether Defendant-Appellant had reasonable suspicion to search Mr. Washington, (2) whether Mr. Washington genuinely and voluntarily consented to the search, or if he merely acquiesced to Defendant-Appellant's show of authority, and (3) "whether Thomas' conduct was objectively reasonable in light of the clearly established law governing frisks." ROA.6669-70 (citing *United States ex rel. Parikh v. Brown*, 587 F. App'x 123, 128 (5th Cir. 2014)). The video footage in this case does not resolve these issues of fact, and where *Betts* explains that that case "involves no disputed facts because the encounter was captured on … bodycam," Defendant-Appellant has mistaken the word "because," used in the explanatory sense, to convey legal causality, which it plainly does not. *Betts*, 22 F.4th at 581. It would be facially absurd to suppose that video evidence eliminates factual disputes as to things that video evidence cannot record, such as states of mind of those recorded, the extant circumstances before the video begins, and the reasonableness of the conduct of those recorded, which must each be interpreted by a jury after reviewing the evidence.

A review of the record reveals why a reasonable jury viewing the footage could—far from considering it as "blatant[ly] contradict[ory]" of Plaintiff-

Appellee's version of the events—consider it as *corroborative* of Plaintiff-Appellee's version of the events, and supportive of the underlying claims. "It is well established that a defendant's mere acquiescence to a show of lawful authority is insufficient to establish voluntary consent." *United States v. Jaras*, 86 F.3d 383, 390 (5th Cir. 1996) (citing *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968)). Here, a reasonable jury viewing the footage could agree that Defendant-Appellant's statement to Mr. Washington that Mr. Washington was going to make the stop "go a different way" put Mr. Washington in a position where he felt obligated to acquiesce to any subsequent request from Defendant-Appellant, lest the traffic stop escalate. ROA.6672. Whether Defendant-Appellant intended his statement to Mr. Washington to be a threat, whether Mr. Washington was reasonable in interpreting the statement as a threat, and whether the statement would coerce a reasonable person in Mr. Washington's position to acquiesce to any subsequent request by Defendant-Appellant without genuine voluntariness, are *all* examples of material factual issues a jury will have to deliberate on after viewing the body camera footage—the answers to which are not so easy and obvious that the footage "utterly discredits" Mr. Washington's version of events as would be necessary for the rule in *Scott* to have application here.[2]

[2] Of note, in addition to being jurisdictionally barred, Defendant-Appellant's argument that the body camera footage eliminates any factual disputes is forfeited as the argument was

C. The District Court Properly Identified Genuine Disputes of Material Fact That Precluded Summary Judgment

This appeal should be dismissed from the outset because the Defendant-Appellant challenges the District Court's findings of genuine factual disputes, which this Court has reiterated, for over two decades, that it does not have jurisdiction to review. *See, e.g.*, *Johnson v. Jones*, 515 U.S. 304, 313 (1995).[3] But, even if this Court finds that it does in fact have jurisdiction to hear this interlocutory appeal, Plaintiff-Appellee contends that the District Court was correct in denying Defendant-Appellant's motion for summary judgment because genuine issues of material fact exist.

"Summary judgment on qualified immunity grounds is not appropriate when there are facts in dispute that are material to a determination of reasonableness."

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not raised in the first instance in the district court, and arguments raised for the first time on appeal are not appropriate for appellate review. *Rollins v. Home Depot USA*, 8 F.4th 393, 397-98 (5th Cir. 2021). Narrow exceptions to this principle, such as jurisdictional arguments, and instances where failure to consider an argument regarding a pure question of law would result in a miscarriage of justice, do not apply here. *Id.* at 389-99.

[3] *See also Ducksworth*, 62 F.4th at 212; *Edwards*, 31 F.4th at 929; *Kokesh*, 14 F.4th at 390; *Amador*, 961 F.3d at 726; *Samples v. Vadzemnieks*, 900 F.3d 655, 660 (5th Cir. 2018); *Good v. Curtis*, 601 F.3d 393, 397 (5th Cir. 2010); *Lytle v. Bexar Cnty.*, 560 F.3d 404, 408 (5th Cir. 2009); *Freeman*, 483 F.3d at 410; *Flores*, 381 F.3d at 393; *Kinney*, 367 F.3d at 350 (en banc); *Lemoine v. New Horizons Ranch & Ctr., Inc.*, 174 F.3d 629, 633-34 (5th Cir. 1999).

This Court has already explained to counsel for the Defendant-Appellant that it is bound by the rule of orderliness, which prohibits one panel from overturning another panel's decision, "absent an intervening change in law." *See* Oral Argument at 12:13, *Perkins v. Hart*, No. 22-30456 (5th Cir. May 3, 2023), https://www.ca5.uscourts.gov/OralArgRecordings/22/22-30456_5-3-2023.mp3; *see also United States v. Rahimi*, 61 F.4th 443, 450 (5th Cir. 2023).

Keaton v. Fairchild, No. 1:11–CV–410, 2013 WL 1195629, at *18 (E.D. Tex. Jan. 31, 2013) (citing *Palmer v. Johnson*, 193 F.3d 346, 351 (5th Cir. 1999)). Here, the District Court correctly held that a reasonable jury could find that Defendant-Appellant believed "that Washington may have been armed" or that Defendant-Appellant "did not believe that he had the authority to search Washington without consent,"[4] and that the resolution of this dispute was material to whether it was objectively reasonable to search Mr. Washington. ROA.6672.

In its Order, the District Court concluded that "there are genuine issues of material fact as to whether Thomas had reasonable suspicion to search Mr. Washington and whether Mr. Washington consented to the search." ROA.6669. The District Court further held that "there are genuine issues of material fact as to whether Thomas' conduct was objectively reasonable in light of the clearly established law governing frisks." ROA.6669.

Regarding reasonable suspicion, the District Court held that whether, as Defendant-Appellant contends, Mr. Washington was "argumentative, reluctant and evasive and that he refused to comply with initial commands" or, alternatively, "Washington was simply asking legitimate questions as to the basis for the traffic

[4] *See* ROA.3726 (Thomas Dep. 97:6-9) ("Q: Did you have reason to believe that Mr. Washington was going to cause you harm on March 13th, 2021? A: At the moment of the pat-down, no."), ROA.4548 (Thomas Dep. 98:3-98:6) ("Q: Leading up to the pat-down, you didn't have the belief that he presented a current danger? A: At that moment, no.").

stop" and "complying with Thomas' commands" was necessary to determine whether Defendant-Appellant had reasonable suspicion that Mr. Washington was armed and dangerous. ROA.6670. As acknowledged by the District Court, the body camera footage is consistent with an interpretation that Mr. Washington was in fact cooperative, and merely asking legitimate questions regarding the basis of the traffic stop. ROA.6669-6670. A reasonable jury reviewing the body camera footage would note that Mr. Washington was calm and collected, kept his hands in plain view of Defendant-Appellant, and complied with Defendant-Appellant's requests. ROA.2228 (Exhibit 2 to Defendants' Motion for Summary Judgment) ("Thomas Video" at 00:00:38-00:03:20). Where Defendant-Appellant cites to Mr. Washington's statement that "[Thomas is] the one making it go a different way, I'm just saying I know my law," a reasonable jury could understand this as an attempt by Mr. Washington to defuse and deescalate the situation in response to Thomas' threat that Mr. Washington was "going to make this go a different way than it has to be." App. Brief at 31; ROA.6664. Additionally, Defendant-Appellant seeks to use Mr. Washington's disability in support of a finding that Mr. Washington was "argumentative and disgruntled," in flagrant opposition to his assertion that claims of qualified immunity must be evaluated in the light of what the officer knew at the time he acted, not on facts discovered subsequently. App. Brief at 30, 14 (citing *Graham*, 490 U.S. at 396-97).

With respect to consent, the District Court held that there is a genuine dispute as to whether a reasonable jury, after viewing the footage, "would have understood by the exchange between Deputy Thomas and Mr. Washington, that Mr. Washington's actions signaled that he was consenting the [sic] officer safety patdown" or "whether Washington's actions indicated mere acquiescence rather than voluntary consent." ROA.6672. The District Court held that there is a dispute as to the meaning of Defendant-Appellant's statement that Mr. Washington was going to make the stop "go a different way." ROA.6672.

The denial of summary judgment was clearly based on the District Court's determination that there were disputed facts – and not on a conclusion of law. Defendant-Appellant is correct, "[a] question of fact, however, is just that, a question." App. Brief at 44. Indeed – questions that may only be answered by a jury.[5] This Court therefore lacks jurisdiction to hear this appeal.

II. THE DISTRICT COURT PROPERLY DENIED QUALIFIED IMMUNITY

Setting aside that Defendant-Appellant's appeal is beyond this Court's jurisdiction, the District Court properly denied qualified immunity as a matter of

[5] As previously articulated, this Court has jurisdiction to review only whether the issues of fact identified by the District Court are material to the outcome of the case. Defendant-Appellant does not dispute that these issues of fact are material, arguing instead that they should be resolved as a matter of law in his favor. By arguing that resolution of the issues of fact in his favor would resolve the case in his favor, Defendant-Appellant implicitly concedes that all identified issues of fact are material to the outcome of the case.

law. Officers are not entitled to qualified immunity under 42 U.S.C. § 1983 claims when (1) they violate a federal statutory or constitutional right and (2) the unlawfulness of their conduct was clearly established at the time. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). The District Court, as required, construed the disputed material facts in the light most favorable to Mr. Washington to ascertain whether it was clearly established that the Fourth Amendment prohibited Defendant-Appellant's conduct. *See supra* Section I.B. The District Court properly concluded that qualified immunity was not warranted because Defendant-Appellant did not act reasonably when he searched Mr. Washington without his consent or reasonable suspicion that he was armed and dangerous.

"[T]he usual summary judgment burden of proof is altered in the case of a qualified immunity defense." *Michalik v. Hermann*, 422 F.3d 252, 262 (5th Cir.2005) (citing *Bazan*, 246 F.3d at 489). Once the defense is raised, "the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law." *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). The plaintiff must likewise "adduce[ ] sufficient evidence to raise a genuine issue of material fact suggesting [the defendant's] conduct violated an actual constitutional right." *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008).

In *Tolan v. Cotton*, the Supreme Court stressed that, on a defendant official's summary judgment qualified immunity motion, a federal court (1) may not resolve genuine issues of disputed fact in the favor of the defendant, and (2) must view the facts in the light most favorable to the non-moving party, that is, the plaintiff. *See* 572 U.S. 650, 654-60 (2014) (per curiam). Though the plaintiff bears the burden of negating the availability of qualified immunity, all inferences are still drawn in the plaintiff's favor. *Brown*, 623 F.3d at 253.

Viewing the facts in the light most favorable to Mr. Washington (as the court must at the summary judgment stage), based on the video and testimony of the parties, Defendants-Appellant's search of Mr. Washington was without reasonable suspicion or his consent, and was objectively unreasonable in light of clearly established law.

A. Clearly Established Law Requires Officers to Have Reasonable Suspicion That a Person is Armed and Dangerous Before Conducting a Search of That Person Without Consent

1. Defendant-Appellant misrepresents how courts determine whether a right is "clearly established"

Defendant-Appellant mischaracterizes the "clearly established" prong of the qualified immunity analysis by asserting that a plaintiff is "require[d]…to identify a 'case where an officer acting under similar circumstances as [the defendant] was

held to have violated [a person's constitutional rights].'"[6] App. Brief at 14 (citing *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) and *City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021)). This is a misstatement of the law.

To determine whether an officer is entitled to qualified immunity, courts look for *either* "directly controlling authority . . . establishing the illegality of such conduct" *or* "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Gonzalez v. Huerta*, 826 F.3d 854, 858 (5th Cir. 2016) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). For a right to be clearly established, there need not be a prior case directly on point, but "the unlawfulness of the precipitating acts must be apparent in light of the existing law." *Hassan v. Lubbock Indep. Sch. Dist*., 55 F.3d 1075, 1079 (5th Cir. 1995). Indeed, government officials can be on notice that their conduct violates established law "even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding" and "[t]he same is true of cases with 'materially similar' facts"); *see also Wesby*, 138 S. Ct. at 590 (explaining that the

[6] Defendant-Appellant further seeks to add a requirement for procedurally similar circumstances by arguing, without citing to any authority, that Plaintiff-Appellee must point to a case "where the court denied qualified immunity" in factually identical circumstances. *See* App. Brief at 15-16.

"unlawfulness of the officer's conduct" can be "sufficiently clear even though existing precedent does not address similar circumstances").

2. It is clearly established that conducting a frisk without reasonable suspicion or valid consent is a constitutional violation

It is clearly established that in the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. *Riley v. California*, 573 U.S. 373, 382 (2014). As relevant here, a warrantless search may be justified where (1) there is reasonable suspicion that the person in question is armed and dangerous, *see Arizona v. Johnson*, 555 U.S. 323, 332 (2009), or (2) the searched person has provided valid and voluntary consent to the search. *United States v. Scroggins*, 599 F.3d 433, 440 (5th Cir. 2010).

In the District Court's words, there is "clearly established law that requires officers to have reasonable suspicion that a person is armed and dangerous before conducting a frisk without consent." ROA.6671. And, contrary to Defendant-Appellant's assertions, *see* App. Brief at 14, this is not an "extremely abstract right"; every reasonable officer would know that conducting a pat down of an individual without reasonable suspicion and without consent is unlawful conduct.

Indeed, every reasonable official would know that only "specific and articulable facts suggesting actual physical risk to [the officer] or others" give rise to reasonable suspicion. *United States v. Jenson*, 462 F.3d 399, 407 (5th Cir. 2006).

The determination of "whether it was objectively legally reasonable to conclude that a given search was supported by [reasonable suspicion or consent] will often require examination of the information possessed by the searching officials." *Anderson*, 483 U.S. at 641. The District Court held in its orders denying Defendants' motions to dismiss and for summary judgment on this claim that, at the time of Defendants' conduct, Fifth Circuit case law had "[clearly] established . . . that mere 'uncooperativeness' does not provide a basis for reasonable suspicion that an individual was armed and dangerous." ROA.934, ROA.6671 (citing *Estep v. Dallas Cnty.*, 310 F.3d 353, 359 (5th Cir. 2002)).

A frisk that is not justified by reasonable suspicion may nevertheless be constitutional if there is consent to the search. *United States v. Montgomery,* 777 F.3d 269, 272-73 (5th Cir. 2015). The validity of consent is a question of fact, determined by looking at the "totality of the circumstances," which courts do in hindsight, and officers should do in the moment. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). "[The] careful sifting of the unique facts and circumstances of each case" is the touchstone of the Supreme Court's consent search jurisprudence. *Id.* at 233; *see also United States v. Soriano*, 976 F.3d 450, 455 (5th Cir. 2020).

"The central concept is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and

the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights."' *See Kinney*, 367 F.3d at 350 (quoting *Hope*, 536 U.S. at 740). To require Plaintiffs to point to identical factual situations where consent was found invalid, rather than trust that officers should be able to ascertain something as basic and frequent as consent validity in novel and non-exigent circumstances, implies that law enforcement officials are not able to make reasonable determinations based on the facts available to them, which is quite obviously part of their regular duties and responsibilities.

It is also clear that "[c]onsent is valid only if it is voluntary" and "it is well established that a defendant's mere acquiescence to a show of lawful authority is insufficient to establish voluntary consent." *See United States v. Gomez-Moreno*, 479 F.3d 350, 357 (5th Cir. 2007), *overruled on other grounds by Kentucky v. King*, 563 U.S. 452 (2011) *and Jaras*, 86 F.3d at 390 (citing *Bumper*, 391 U.S. at 548–49; *see also Florida v. Royer*, 460 U.S. 491, 497 (1983) (noting that consent is not established by a showing of "mere submission to a claim of lawful authority"). A reasonable officer would know that any "consent," whether express or implied,[7]

[7] Defendant-Appellant argues that he had Mr. Washington's "implied" consent. Though Mr. Washington disputes that he consented at all (whether expressly or impliedly), the issue here is not whether or not Mr. Washington gave "implied consent," but rather, even if he had given "implied consent," whether it was coerced, and thus invalid.

obtained under coercion is not valid, and that a subsequent search is therefore a constitutional violation.

B. Defendant-Appellant's Objectively Unreasonable Conduct Amounted to a Constitutional Violation of Mr. Washington's Clearly Established Right to be Free from Frisks Absent Reasonable Suspicion or Consent

The Supreme Court has routinely enforced the "axiom" that "in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences drawn in his favor." *Tolan*, 572 U.S. at 651 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Defendant-Appellant's argument that there was no constitutional violation rises and falls on this Court disregarding this axiomatic rule and believing his—the *movant's*—version of the facts.

The operative question in Fourth Amendment cases is "whether the totality of the circumstances justifies [the] particular sort of search." *County of Los Angeles v. Mendez*, 581 U.S. 420, 427 (2017) (citing *Garner*, 471 U.S. at 8-9). Officer-safety pat downs must be justified by either a reasonable suspicion that the searched individual is armed and dangerous, or the valid and voluntary consent of the individual. ROA.6668 (citing *Arizona*, 555 U.S. at 32 and *United States v. Montgomery*, 777 F.3d 269, 272-73 (5th Cir. 2015)). When the unconstitutionality of the challenged conduct is so "obvious" that "any reasonable officer should have [so] realized," qualified immunity does not apply. *Taylor v. Riojas*, 141 S. Ct. 52,

54 (2020) (citation omitted). As discussed below, the unconstitutionality of Defendant-Appellant's search of Mr. Washington was "so obvious" such that qualified immunity does not apply.

1. The totality of the circumstances show that the search was not justified by reasonable suspicion that Mr. Washington was armed and dangerous

To justify a frisk, an officer must have reasonable suspicion that the person in question is armed and dangerous. *Arizona*, 555 U.S. at 332; *Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977). Reasonable suspicion does not require "just 'more than a hunch,'" as Defendant-Appellant contends. App. Brief at 27 (relying on *United States v. Michelletti*, 13 F.3d 838, 840 (5th Cir. 1994) (en banc)). Rather, whether a search is justified by reasonable suspicion is to be "determined by looking to 'the totality of the circumstances—the whole picture.'" *United States v. Jordan,* 232 F.3d 447, 449 (5th Cir. 2000) (quoting *United States v. Sokolow,* 490 U.S. 1, 7-8 (1989)). To overcome the protections of the Fourth Amendment, a police officer must have an "articulable premise," based on "rational inferences" drawn from "cumulative information" to "impute criminality into a lawful range of behavior." *United States v. Monsivais*, 848 F.3d 353, 362 (5th Cir. 2017) (internal quotations omitted). Moreover, an officer must have a "particularized and objective basis for suspecting the particular person." *Monsivais*, 848 F.3d at 361 (internal quotation marks omitted).

Throughout this litigation, Defendant-Appellant has failed to articulate a single particularized premise for suspecting Mr. Washington. At the motion-to-dismiss stage, Defendants' *entire* articulation of the circumstances giving rise to reasonable suspicion that *Mr. Washington* was armed and dangerous was that both he and his cousin were "uncooperative," and that the stop took place at night. *See* ROA.587. However, it is clearly established that generalized "uncooperativeness" cannot, on its own, establish reasonable suspicion. *Estep*, 310 F.3d at 359. This Circuit's case law is similarly clear that "an individual [being] in a high crime neighborhood at night" is insufficient to support an officer's decision to stop or frisk him. *United States v. Rideau*, 969 F.2d 1572 (5th Cir. 1992) (citing *Brown v. Texas*, 443 U.S. 47, 52 (1979)). And while being in a "high crime neighborhood at night" may, *in combination with* "suspicious activity in a high crime area," provide circumstances pursuant to which a frisk would be proper, *Rideau*, 969 F.2d at 1574, *no such circumstances were present here*. *Cf. United States v. Alvarez*, 40 F.4th 339, 343 (5th Cir. 2022) (finding "a Hispanic male who once rode away from police on a bicycle with large handlebars in a particular area" insufficient to give rise to reasonable suspicion, and noting that such an open-ended description—arguably more particularized than here—"would effectively authorize random police stops, something the Fourth Amendment abhors").

Defendant-Appellant's supplemental "factors" at summary judgment and on appeal similarly fail to show circumstances that would justify a reasonable suspicion that Mr. Washington was armed and dangerous. App. Brief at 30. A conclusional statement that a suspect appeared "nervous" is entitled to "little or no weight." *United States v. Portillo-Aguire*, 311 F.3d 647, 656 n.49 (5th Cir. 2002).

At summary judgment and on appeal, Defendant-Appellant seeks to expand on his conclusory statement that Mr. Washington was uncooperative with "five "separate" factors that he argues give rise to reasonable suspicion: (1) the stop took place in a high crime area at night, (2) Mr. Washington was "argumentative and disgruntled," (3) Mr. Washington "refused to comply with Deputy Thomas' initial commands," (4) Mr. Washington was sufficiently nervous and evasive as to support reasonable suspicion, and (5) Defendant-Appellant's experience gave him reasonable suspicion that Mr. Washington might be armed and dangerous based on Mr. Washington's "agitation and argumentative behavior." App. Brief at 34. But four of Defendant-Appellant's "five (5) separate factors" amount to a singular characterization of Mr. Washington as "uncooperative." For example, descriptions of Mr. Washington as "argumentative," "refus[ing] to comply," and displaying "agitation and argumentative behavior" are based on the same set of facts, and are substantively identical. As such, Defendant-Appellant's argument remains the same as at the motion to dismiss stage: that Mr. Washington was "uncooperative" and the

stop "took place at night." ROA.5837. Because this falls woefully short of what a reasonable officer would believe gives rise to reasonable suspicion, as established by *Estep* and *Arizona v. Johnson*, the District Court properly found that qualified immunity must be denied.

Defendant-Appellant argues that the "factors"—despite their complete overlap— "in the aggregate rise to the level of reasonable suspicion." App. Brief at 28 (citing *United States v. Ibarra-Sanchez*, 199 F.3d 753, 759 (5th Cir. 1999)). Defendant-Appellant's improper analysis, yet again, fails to concede the facts in favor of Plaintiff-Appellee, ignoring the genuine disputes of material fact that resulted in the district court's denial of summary judgment. *See Gonzales v. Dallas Cnty.*, 249 F.3d 406, 411 (5th Cir. 2001).

First, Defendant-Appellant asserts that "the stop took place at night in a high crime area." App. Brief at 28. Mr. Washington does not dispute that the stop took place at night, but "the parties dispute . . . the extent that the stop occurred in a high crime area." ROA.6671. Defendant-Appellant has not presented any information to support the contention that the Plaintiff-Appellee was stopped in a high crime area aside from deposition testimony by Defendant-Appellant that "Highway 190 is a high crime area." ROA.2190, 2222. That is not sufficient to establish that Mr. Washington was stopped in a high crime area, which in turn is not sufficient to

establish that Defendant-Appellant had reasonable suspicion to justify the frisk of Mr. Washington. *United States v. Hill*, 752 F.3d 1029, 1036-36 (5th Cir. 2014).

Second, as acknowledged by the District Court, the body camera footage is also consistent with an interpretation that Mr. Washington was in fact cooperative, and merely asking legitimate questions regarding the basis of the traffic stop. ROA.6669-6670. A reasonable jury reviewing the body camera footage would note that Mr. Washington was calm and collected, kept his hands in plain view of Thomas, and complied with Thomas's requests. ROA.2228 (Thomas Video at 00:00:38-00:03:20). Where Defendant-Appellant cites to Mr. Washington's statement that "[Thomas is] the one making it go a different way, I'm just saying I know my law," a reasonable jury could understand this to be an attempt by Mr. Washington to defuse and deescalate the situation in response to Thomas's threat that Mr. Washington was "going to make this go a different way than it has to be." App. Brief at 31; ROA.6664.

Third, Defendant-Appellant asserts that Mr. Washington "fail[ed] to comply with Deputy Thomas' initial commands." This assertion is factually incorrect. Not only did Mr. Washington immediately pull over once the deputies initiated their lights, the body camera footage shows that Mr. Washington complied with all five of Defendant-Appellant's commands prior to the frisk. ROA.2228 (Thomas Video at 00:00:38-00:02:30), ROA.6076, ROA.6117-18. First, Defendant-Appellant

instructed Mr. Washington to tell Mr. Lane to roll down his window; Mr. Washington complied. *See* ROA.2228 (Thomas Video at 0:00:40-0:00:45). Second, Defendant-Appellant commanded Mr. Washington to tell Mr. Lane to open the passenger-side door; Mr. Washington complied immediately after a cordial exchange regarding difficulty with the window mechanism. *See* ROA.2228 (Thomas Video at 00:00:45-00:00:48). Third, Defendant-Appellant ordered Mr. Washington to stay in the vehicle; Mr. Washington complied. *See* ROA.2228 (Thomas Video at 0:01:59-0:02:06). Fourth, Defendant-Appellant requested Mr. Washington's license, registration and insurance information; Mr. Washington complied. *See* ROA.2228 (Thomas Video at 0:00:54-0:01:16). Fifth, Defendant-Appellant ordered Mr. Washington to exit the vehicle; Mr. Washington complied. *See* ROA.2228 (Thomas Video at 0:02:18-0:02:23). Unsurprisingly, then, the District Court found that it was clearly in dispute whether Mr. Washington "immediately refused to comply with initial commands." ROA.6670.

Fourth, Defendant-Appellant asserts that "Mr. Washington was reluctant and evasive in responding to Deputy Thomas' questions." App Brief. at 32. Here, Defendant-Appellant relies yet again on Mr. Washington's legitimate inquiry as to the basis for the stop, and the exercise of his right not to answer questions unrelated to the stop. Defendant-Appellant also states that Mr. Washington's truthful response to the question as to whether he had any weapons on him ("I don't tote weapons")

was "odd." App. Brief at 33. Mr. Washington disputes that he was reluctant and evasive, and the District Court did not agree with Defendant-Appellant that a reasonable jury would have no choice but to conclude such behavior was reluctant and evasive.

Fifth, even though the official's "subjective beliefs about the search are irrelevant," *Anderson*, 483 U.S. at 641, Defendant-Appellant asserts that his "experience as a law enforcement officer led him to believe that there was reasonable suspicion that Mr. Washington was armed and dangerous." However, the District Court agreed that portions of "Thomas' testimony suggest[] that Thomas did not believe he had the authority to search Washington without consent." ROA.6671. In fact, Defendant-Appellant testified that "at the moment of the pat-down" he had "no reason to believe that Mr. Washington was going to cause [him] harm" or that he "presented a current danger."[8] Ultimately, because the "official's subjective beliefs about the search are irrelevant" in the qualified immunity analysis, this "factor" carries no weight.

"Summary judgment on qualified immunity grounds is not appropriate when there are facts in dispute that are material to a determination of reasonableness." *Keaton*, 2013 WL 1195629, at *18 (citing *Palmer*, 193 F.3d at 351). As such,

[8] *See* supra note 4.

whether Defendant-Appellant conducted a warrantless search of Mr. Washington without reasonable suspicion is a material issue of fact reserved for a jury to resolve.

2. No reasonable officer would believe that a search of Mr. Washington in these circumstances would be justified by reasonable suspicion that he was armed and dangerous

The "totality of the circumstances – the whole picture," *see* App. Brief at 28, shows that no reasonable officer would believe that the facts articulated by Defendant-Appellant would give rise to reasonable suspicion that Mr. Washington was armed and dangerous, so no reasonable officer would have considered a search without consent to be lawful conduct. The scant "facts" that Defendant-Appellant attempts to articulate "do not amount to an 'articulable suspicion that [Mr. Washington] ha[d] committed or [was] about to commit a crime'[,]" or even "more than [an (incorrect)] hunch." *Jenson*, 462 F.3d at 405 (*citing Royer*, 460 U.S. at 491, 498). At the motion-to-dismiss stage, Defendant-Appellant argued that reasonable suspicion was warranted "[under these circumstances:] the traffic stop took place at night, beginning at 8:01 PM, and involved both an uncooperative driver and passenger." ROA.556. ROA.587. But the District Court held that "under the clearly established law [in *Estep* and *Arizona v. Johnson*], a reasonable officer would have known that these circumstances did not give rise to reasonable suspicion that Washington was armed and dangerous." ROA.934.

There exists a broad "consensus of persuasive authority" that supports a finding that the aforementioned circumstances are insufficient to rise to reasonable suspicion justifying a warrantless search. An officer must have a "particularized and objective basis for suspecting the particular person." *Monsivais*, 848 F.3d at 361.

Defendant-Appellant's argument rests on (1) Mr. Washington declining to answer questions he is not legally required to indicating unequivocally that he was argumentative, disgruntled, nervous and evasive, (2) Mr. Washington's vocabulary being "odd," and (3) the stop taking place at night in a high crime area. However, a "conclusional statement that a suspect appeared nervous" is entitled to "little or no weight" in the dangerousness calculus. *Portillo-Aguirre*, 311 F.3d at 656 n.49.

Notwithstanding Defendant-Appellant's *own admission* that he did not think Mr. Washington was armed and dangerous, ROA.3275-79, he has failed to point "to specific and articulable [undisputed] facts warranting suspicion that" Mr. Washington was armed and dangerous. *Monsivais*, 848 F.3d at 362 n.3 (discussing the proper articulation in *Michelletti*).

Defendant-Appellant supports the assertion that Mr. Washington was "argumentative and disgruntled" with testimony that Mr. Washington was being "belligerent," App. Brief at 31, and because of Mr. Washington's questions as to "the purpose of the stop." ROA.6664. But Defendant-Appellant also testified that Mr. Washington was "free to refuse to answer" any questions to which Defendant-

Appellant was "not permitted to require" an answer. ROA.4555. No reasonable officer would think it "rational" to infer that an individual is armed and dangerous for declining to answer a question that the officer knows the individual is "free to refuse to answer." *See Monsivais*, 848 F.3d at 362.

Because, at this stage, Mr. Washington's evidence is believed, Defendant-Appellant is only able to point to two facts that support his "hunch" that Mr. Washington was armed and dangerous: (1) that Mr. Washington said "I don't tote weapons" (a truthful statement), and (2) that the stop took place at night. *See* ROA.6140, ROA.6067, ROA.6119. No reasonable officer would believe that those two circumstances amounted to a "particularized and objective basis for suspecting" Mr. Washington. *Monsivais*, 848 F.3d at 361.

In essence, Defendant-Appellant is asking this Court to find that this evidence—these *two* undisputed facts—"[are] so one-sided that one party must prevail *as a matter of law*." *Anderson*, 477 U.S. at 252 (emphasis added). In other words, Defendant-Appellant seeks a holding that would authorize law enforcement officers to violate individuals' Fourth Amendment right to be free from unlawful searches based solely on the language they use to *truthfully answer* questions, and the time of the encounter. The Fifth Circuit has held that the government cannot "justify a warrantless search or seizure with nothing more than incantations about the "'proverbial 'high crime' area,'" and it should not now allow it to with nothing

more than incantations about "odd" vocabulary choices after sunset. *Hill*, 752 F.3d at 1035; ROA.2214 (Thomas Dep. 89:20).

The District Court correctly found that a jury could find that Defendant-Appellant's search of Mr. Washington was not justified by reasonable suspicion, and that no reasonable officer would believe that the undisputed facts articulated by Defendant-Appellant would give rise to reasonable suspicion. As a result, Defendant-Appellant's search of Mr. Washington was clearly prohibited by the Fourth Amendment.

3. It was not objectively reasonable for Defendant-Appellant to believe he had Mr. Washington's consent to search

Whether a person validly consented is a question of fact to be determined under the totality of the facts and circumstances of the case. *See Schneckloth*, 412 U.S. 218. "[The] careful sifting of the unique facts and circumstances of each case" is the touchstone of the Supreme Court's consent search jurisprudence. *Id.* at 233; *see also Soriano*, 976 F.3d at 455. Voluntary consent is an "objective inquiry that asks 'what would the typical reasonable person have understood by the exchange.'" *United States v. Bogomol*, No. 18-11486, 2021 WL 3620444, at *4 n.6 (5th Cir. Aug. 13, 2021) (unpublished) (quoting *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)), *cert. denied*, 142 S. Ct. 2678 (2022); *see also United States v. Tompkins*, 130 F.3d 117, 120 (5th Cir. 1997). The question is not, as Defendant-Appellant intimates, whether Defendant-Appellant's conduct was reasonable if he believed he had Mr.

Washington's *implied* consent, but whether it was objectively reasonable to understand the exchange as one involving a request for and provision of valid and voluntary consent. *Bogomol*, 2021 WL 3620444, at *4 n.6 (citing *Jimeno*, 500 U.S. at 251).

Defendant-Appellant focuses exclusively on two facts: Mr. Washington (1) not saying no to this "request" and (2) assuming the same position as incarcerated individuals when subjected to searches to justify that no reasonable jury could find that Mr. Washington did not voluntarily consent to the search. ROA.3726. Defendant-Appellant off-handedly refers to the allegedly "long established legal maxim, *qui tacet, consentire videteur*" as an appropriate justification for interpreting Mr. Washington's submission to the search as consent. *See* App. Brief at 8. However, consent is not established by a showing of "mere submission to a claim of lawful authority." *See Royer*, 460 U.S. at 497; *see also Jaras*, 86 F.3d at 390 ("It is well established that a defendant's mere acquiescence to a show of lawful authority is insufficient to establish voluntary consent." (citing *Bumper*, 391 U.S. at 548-49 (further citations omitted))).

Rather than rely on thirteenth-century papal legislation,[9] the Fifth Circuit considers six factors in determining whether consent to a search is voluntary: (1) the

[9] *See* Boniface VIII, *Liber Sext Decretalium*, lib. 5, tit. 12, De Regulis Iuris, reg. 43 (1298) ("Qui tacet, consentire videtur.").

voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. *United States v. Hernandez*, 279 F.3d 302, 307 (5th Cir. 2002), *Tompkins*, 130 F.3d at 121. No factor is determinative. *United States v. Shabazz*, 993 F.2d 431, 438 (5th Cir. 1993). The District Court, applying the six-factor voluntariness analysis to the totality of the circumstances, correctly concluded that a reasonable jury could find that any consent Mr. Washington may have given (which he did not) was not voluntary, thus precluding summary judgment as a matter of law.

a) Mr. Washington did not consent, but merely submitted to Defendant-Appellant's claim of lawful authority to search him

When a law enforcement officer claims authority to search, he announces in effect that the occupant has no right to resist the search. *See Bumper*, 391 U.S. at 550. Consent cannot be held voluntary if, in fact, no real options are perceived. *See United States v. Colbert*, 474 F.2d 174, 181 (5th Cir. 1973) (citing *Bumper*, 391 U.S. at 543). The presence of threats,[10] commands, or "even an authoritative tone of

[10] For discussion of Defendant-Appellant's threat that the stop was "going to go a different way" if Mr. Washington continued to inquire into its basis, see section II.B.3.b.ii, *infra.*

voice" are factors for the court to consider. *United States v. Drayton*, 536 U.S. 194, 195 (2002). While Defendant-Appellant states that it is *undisputed* that he allegedly "*requested* Mr. Washington's consent to perform an officer safety pat down by *asking* 'do you mind if I pat you down for officer safety?'[,]" the record is clear that "the parties dispute whether this statement was a question." ROA.6664; App. Brief 39. The District Court's Order records Defendant-Appellant's utterance as "Thomas *responded*, 'do you mind if I pat you down for officer safety.'" ROA.6664.

It is clear from the footage that Defendant-Appellant's utterance did not have the rising intonation of a question, nor did he indicate that he would not proceed with the frisk had Mr. Washington said no. *See* ROA.2228 (Thomas Video at 0:02:25-0:02:28). Most importantly, Defendant-Appellant communicated that he wished to pat Mr. Washington down "for officer safety." *See* ROA.2228 (Thomas Video at 0:02:26-0:02:27). As Defendant-Appellant has made clear, concern for officer safety could justify a pat down *without consent*. As such, Defendant-Appellant was making the "claim of lawful authority" that he had the right to search Mr. Washington with or without his consent. *Bumper*, 391 U.S. at 549. Mr. Washington understood that if he said no, Defendant-Appellant would have patted him down anyway, or used it as an excuse to bring him into the station.[11]

[11] *See* ROA.6119 (Plaintiff declaring that "[Defendant-Appellant] asked if I had any weapons. I never carry weapons and so I told him that. He then said that if I didn't mind

A reasonable jury could find, based on the video of the encounter and Mr. Washington's testimony, that Mr. Washington merely submitted to Defendant-Appellant's claim of lawful authority.

b) The Fifth Circuit's voluntariness factors indicate that any consent was involuntary and invalid

Defendant-Appellant misstates the law, intimating that if Mr. Washington gave *implied* consent (which he did not), there is no need to turn to the voluntariness analysis. However, any consent, whether express or implied, must still be *voluntary* to be valid. The Fourth Amendment requires that "consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is

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he would pat me down. I did not want him to but I knew that if I said no, he would pat me down anyway, because me saying no would be the reason for him to pat me down. In the past when I've said no, they pat me down anyway . . . If I said no, I think they would have called more police and made up something to take me to the station. They have done this to me before and I have seen them do this to other people. I have experienced this all my life, ever since I was young. I knew it was not a real question . . . I did not consent to that search. I did not feel that I could have said no. I did not really want him to search me but I knew he would have anyway.").

Defendant-Appellant seeks to discredit Mr. Washington's declaration, certified under penalty of perjury pursuant to 28 U.S.C. §1746, as "directly contradict[ing]" his previous testimony "in an attempt to manufacture a disputed material fact issue." App. Brief at 46.

But Mr. Washington has alleged from the outset that he believed that "he was not free to decline the deputy's request [and] submitted to Defendant Thomas' show of authority under coercion. This belief in part arose from [the] previous threat that the traffic stop could "go a different way than it has to be." ROA.33.

directed." *Schneckloth*, 412 U.S. at 228. When the government "seeks to rely upon consent to justify the lawfulness of a search, [it] has the burden of proving that the consent was, in fact, freely and voluntarily given." *Bumper*, 391 U.S. at 548. The Fifth Circuit has previously been "unable to conclude on the basis of [a] videotape alone whether . . . consent was voluntary and valid." *United States v. Cavitt*, 550 F.3d 430, 440 (5th Cir. 2008).

"[W]hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227. "Voluntariness of consent is an objective inquiry that asks 'what . . . the typical reasonable person [would] have understood by the exchange.'" *Bogomol*, 2021 WL 3620444, at *4 n.6 (quoting. *Jimeno*, 500 U.S. at 251). Further, "in examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Schneckloth*, 412 U.S. at 229.

The District Court held that a factfinder, applying the voluntariness analysis to the totality of the circumstances, could reasonably conclude that Mr. Washington's "actions indicated mere acquiescence rather than voluntary consent." ROA.6672. Applying the Fifth Circuit six-factor analysis to the totality of the circumstances as enumerated below, and accepting the nonmovant's version of the

facts as true, a reasonable jury could conclude that any consent Mr. Washington may have given was not voluntary and that it was not objectively reasonable to believe otherwise.

i. Mr. Washington's Custodial Status Was Not Voluntary

Voluntariness of custodial status turns on whether a reasonable person in the defendant's position would feel free to terminate the encounter. *Yardborough v. Alvarado*, 541 U.S. 652, 662-63 (2004). Critically, prior to and during the search, Defendant-Appellant retained possession of Mr. Washington's license. When an officer is in possession of an individual's identification, "[an officer] ask[ing] for 'permission' to search suggest[s] coercion[.]" *Cavitt*, 550 F.3d at 439 (citing *United States v. Chavez-Villarreal*, 3 F.3d 124, 128 (5th Cir.1993). Defendant-Appellant seeks to distinguish this matter from *Chavez-Villarreal* because, there, the retained identification was an alien registration card rather than a driver's license. But the Fifth Circuit has also held that possession of a *driver's license* implicates whether consent to custodial conduct was voluntary. *See Soriano,* 976 F.3d at 455-456 ("Whether an investigating officer has returned a defendant's license . . . [is] relevant to whether a reasonable person would feel free to terminate the encounter.") (citing *Cavitt*, 550 F.3d at 439)).

Additionally, Defendant-Appellant erroneously relied on *United States v. Bessolo,* 269 F. App'x. 413 (5th Cir. 2008), arguing that "the Fifth Circuit has

previously found the custodial status of individuals such as Mr. Washington, who are subject to a routine traffic stop to be minimal and no more onerous than the temporary detention any motorist suffers when stopped for an infraction." App. Brief at 43. Defendant-Appellant mischaracterizes the case.

First, whether Mr. Washington's stop was "no more onerous than" other similar traffic stops is irrelevant here, because the search occurred well before the conclusion of the traffic stop. *Cf. Bessolo*, 269 F. App'x. 413; *see also* discussion *infra* pp. 48-49. The question at issue is whether "a reasonable person in the defendant's position would feel free to terminate the encounter." *Soriano*, 976 F.3d at 455.

Moreover, *Bessolo* is easily distinguishable from the facts of this case. In that case, this Court merely credited the magistrate judge's determination that Bessolo's traffic stop was no more onerous than a routine traffic stop because Bessolo had been pulled over, warrant-checked, and issued a citation before the officer requested to search his vehicle. Unlike in *Bessolo*, Mr. Washington's stop was not routine. He and his cousin had been ordered out of the vehicle – a far more onerous experience than that of a motorist stopped for a traffic infraction. That Mr. Washington had "not been arrested or handcuffed," App. Brief. At 43, is wholly irrelevant; no reasonable person in similar circumstances would have believed that he was free to get in his car and drive away – and neither did Mr. Washington.

ii. Defendant-Appellant's Threat That Failure to Obey Every Request Would Make The Stop "Go a Different Way"

The District Court disagreed with Defendant-Appellant's contention "that 'any objective, reasonable person, after reviewing the body camera footage, would have understood by the exchange between Defendant-Apellant and Mr. Washington, that [Mr. Washington's actions] signaled that he was consenting the officer safety patdown." ROA.6671-72.[12] The court noted, as an example, that "the frisk occurred just after Thomas told Washington that Washington was going to make the stop "go a different way,'" finding the "intended meaning of this statement . . . unclear, but at this stage, the Court must draw all reasonable inferences in Washington's favor." ROA.6672 (citing *Anderson,* 477 U.S. at 255). Relying on the video footage and Mr. Washington's testimony, the District Court determined that a reasonable jury could infer that statement as a threat, in which case no reasonable officer could have believed that Mr. Washington's consent was voluntary. It was objectively unreasonable to believe that any "consent" obtained moments after threatening that a traffic stop would "go a different way" absent total compliance was voluntary. ROA.6672.

[12] Importantly, as discussed previously at length, *see supra* Section I, this Court lacks jurisdiction to review the District Court's determination that there are genuine factual dispute as to the meaning of the statement.

Defendant-Appellant argues that Plaintiff must point to a case "wherein a Court denied qualified immunity due to the intended meaning of an officer's statement being 'unclear.'" App. Brief at 44. In other words, Defendant-Appellant argues that plaintiffs must point to a case discussing whether the intended meaning of an officer's statement is a disputed material fact – the hallmark of any denial of summary judgment, including those based upon a denial of qualified immunity. Defendant-Appellant's reliance on the Eleventh Circuit's *Hudson v. Hall* illustrates this very point and undercuts his own argument that a reasonable officer would not have known that his own statement was coercive. App. Brief. at 44. In that case, the Eleventh Circuit "accept[ed], given all of the circumstances, that Officer Hall's statement actually was coercive and did render Meadows' consent involuntary." *Hudson v. Hall*, 231 F.3d 1289, 1297 (11th Cir. 2000). After Meadows denied Officer Hall consent to search him, Officer Hall responded, "if you don't want to be searched, start walking [away from me]." *Id*. at 1292. If anything, Hall's statement implies the freedom (or instruction) to leave, whereas Defendant-Appellant's statement implied escalation in the event of noncompliance or further questioning of the relevance of Defendant-Appellant's inquiries.

In three of the cases that Defendant-Appellant relies on to show that statements that do not "involve[e] direct, explicit threats of violence" are categorically "insufficient to raise a genuine issue of material fact of coercion," App.

Brief at 44-45, the officer was threatening to *obtain a warrant* to search if the person did not consent – wholly distinguishable from threatening to escalate an already onerous traffic stop, or perhaps worse.[13]

The other cases cited by Defendant-Appellant are distinguishable, as the officer statements in question similarly do not convey an ambiguous threat in the way that Defendant-Appellant's "go a different way" statement does. For example, Defendant-Appellant cites to *Maria S. ex rel. E.H.F. v. Garza*, where a Customs and Border Protection Agent mocked a migrant and told them that they "had to go back to Mexico," which the court found was not enough to raise a material fact issue of coercion. 912 F.3d 778, 786 (5th Cir. 2019). This is distinguishable, again, as the statement does not contain a conditional threat predicated on non-compliance in any way comparable to Defendant-Appellant's threat.

Defendant-Appellant also cites to *United States v. Santos-Garcia*, where the officer said that "Santos' children would be driving by the time he was released from prison" and the Court found the statement not coercive enough to deprive Santos of his ability to "make an unconstrainted decision to confess." 313 F.3d 1073, 1079

[13] *United States v. Compton*, 704 F.2d 739, 742 (5th Cir. 1983) ("[I]ntent[] to obtain a warrant if he did not consent"); *Tompkins*, 130 F.3d at 119 (advising defendant his hotel room would be secured and a search warrant for the room would be obtained when informing defendant of the consequences of his refusal to consent.); *United States v. Yu-Leung*, 51 F.3d 1116, 1119 (2d Cir. 1995) (police tell a person that they will remain in the apartment until they obtain a search warrant).

(8th Cir. 2002). This again does not contain the same conditional element or imminent threat that Defendant-Appellant's "go a different way" implied to Mr. Washington, should he not have submitted to Defendant-Appellant's questions. In both cases, the statements by the defendant are purely declaratory and describe the defendant's view of the situation, whereas Defendant-Appellant's statement was intended, according to his deposition testimony, to get Mr. Washington "to chill out for a second," apparently by warning him that continuing to question Defendant-Appellant would escalate the traffic stop. ROA.4536-37. Defendant-Appellant's statement was thus uniquely directed and intended towards changing Mr. Washington's behavior in a way that the statements from the defendants of the other cited cases were not.

iii. The Coercive Presence of Three Deputies

The District Court also found that "the presence of three deputies during the traffic stop, as supported by the body camera footage" weighed against a finding of voluntariness. The Fifth Circuit has held that "presence of multiple officers can be a factor in determining coerciveness." *Soriano,* 976 F.3d at 456 (citing *United States v. Perales,* 886 F.3d 542, 548 (5th Cir. 2018)). In *Perales,* the Fifth Circuit found that the number of officers directly involved in a traffic stop affects the level of coerciveness. 886 F.3d at 548. Defendant-Appellant relies on dated case law from wholly different circumstances in an attempt to argue that the Fifth Circuit has held

consent to be voluntary in cases involving the presence of officers "in even greater numbers." App. Brief at 47. However, no one factor in the voluntariness analysis is determinative. *See Shabazz*, 993 F.2d at 438. It is axiomatic that consent may be found voluntary in the presence of any number of police officers based on any combination of the other five factors.

In *United States v. Gonzales*, the voluntariness analysis was conducted *at a suppression hearing (*where the trial court is empowered to make credibility assessments, unlike in this civil case), and this Court properly affirmed that the "evidence introduced at the suppression hearing . . . adequately demonstrates that the officers did not coerce Olivares into giving his consent."[14] Here, the District Court properly found that Defendant-Appellant did not meet his burden of establishing voluntariness by merely "claim[ing]—without applying the voluntariness factors set out above—that 'any objective, reasonable person, after reviewing the body camera footage, would have understood by the exchange between Deputy Thomas and Mr. Washington, that Washington's actions signaled

[14] 121 F.3d 928, 939 (5th Cir. 1997). In fact, the following three sentences are the entirety of this Court's voluntariness analysis in *Gonzales*: "Olivares contends that his consent was involuntary. The ultimate determination whether consent was voluntary is a question of fact to be determined from the totality of the circumstances; no single factor is dispositive. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047-48, 36 L.Ed.2d 854 (1973). The evidence introduced at the suppression hearing, when viewed in the light most favorable to the government, adequately demonstrates that the officers did not coerce Olivares into giving his consent." *Gonzales*, 121 F.3d at 939.

that he was consenting to the officer safety patdown.'" ROA.6671-72 (quoting Defendant-Appellant's summary judgment pleadings).

As it did in *Gonzales*, this Court should not disturb the voluntariness finding—a question of fact—of the lower court. In *United States v. Solis,* this Court, again "crediting the district court's credibility determinations" at a suppression hearing, declined to set aside a finding of voluntariness based on the number of officers present, citing *Gonzales* for the proposition that it had upheld consent as voluntary "even in the face of greater shows of force than the presence here of seven officers." 299 F.3d 420, 438 (5th Cir. 2002). Most critically, in both *Gonzales* and *Solis*, the consenting individuals were not in any form of involuntary custody. Mr. Washington, by virtue of being the driver of a lawfully stopped vehicle (in addition to being dispossessed of his identification), was not free to terminate the encounter.

c) The Other Voluntariness Factors Do Not Weigh in Defendant-Appellant's Favor

Defendant-Appellant's arguments that the other voluntariness factors weigh in his favor are unavailing. For example, Defendant-Appellant cannot credibly argue that it was both objectively reasonable to believe that Mr. Washington was argumentative and disgruntled prior to the search (thus justifying reasonable suspicion) and that he was very cooperative, as proof of voluntary consent. App. Brief at 49. Moreover, Mr. Washington maintains that he did not "cooperate" with the search; he acquiesced to it, clearly shaking his head. ROA.2228 (Thomas Video

at 00:02:25-00:02:30), ROA.6119. *Contra United States v. Malagerio*, 49 F.4th 911, 917 (5th Cir. 2022) (finding individual "very cooperative" and "cordial" prior to the search weighed in favor of the government), *cert. denied*, No. 22-6575, 2023 WL 3046174 (U.S. Apr. 24, 2023).

At best, Defendant-Appellant merely underscores the genuineness of the dispute as to the reasonable interpretation of the circumstances, further showing that the district court's denial of summary judgment was proper.

d) The genuine dispute of material fact as to whether it was objectively reasonable to construe Mr. Washington's actions in light of the circumstances and clearly established law precludes summary judgment

"Summary judgment on qualified immunity grounds is not appropriate when there are facts in dispute that are material to a determination of reasonableness." *Keaton*, 2013 WL 1195629, at *18 (citing *Palmer*, 193 F.3d at 351). Consent is measured under the Fourth Amendment by objective reasonableness. *See Jimeno*, 500 U.S. at 251. Whether the law enforcement officer was objectively reasonable is determined by whether the factual circumstances would lead a reasonable person to believe he had received consent to search. *Id.*

Because a reasonable jury could conclude that Mr. Washington's actions indicated mere acquiescence rather than consent, there is a genuine issue of material fact as to whether it was objectively reasonable for Defendant-Appellant to believe—based on Mr. Washington's actions and the surrounding circumstances—

that he had the requisite consent for a frisk, thus precluding the grant of qualified immunity at summary judgment.

CONCLUSION

WHEREFORE, Plaintiff-Appellee respectfully asks that this interlocutory appeal be dismissed for want of jurisdiction or alternatively, ask that this Court decline to revisit the District Court's factual findings, and affirm the District Court's denial of summary judgment, and allow Plaintiff-Appellee's claim to proceed to trial, and the merits be determined by a jury.

Dated: May 10, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2023, a true and correct copy of the foregoing Brief for Plaintiff Appellee was served via electronic filing with the Clerk of Court and all registered ECF users.

Upon acceptance by the Court of the e-filed document, 7 paper copies will be filed with the Court within the time provided in the Court's rules via Federal Express.

Dated: May 10, 2023

/s/ Elizabeth M. Raulston

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5), and 5th CIR. R. 32.1 and the type-style requirements of FED. R. APP. P. 32(a)(6) because:

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/s/ Elizabeth M. Raulston