No. 22-30456

In the United States Court of Appeals
For the Fifth Circuit

TELIAH C. PERKINS, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF D.J., A MINOR,

Plaintiff – Appellee

v.

KYLE HART; RYAN MORING,

Defendants – Appellants

On Interlocutory Appeal from the United States District Court for the Eastern District of Louisiana, No. 2:21-cv-00879, Honorable Wendy B. Vitter, Presiding

BRIEF OF APPELLEE

Keith Y. Cohan
Ryan M. Goldstein
Sean D. Johnson
REID COLLINS & TSAI LLP
1301 S. Cap. of Tx. Hwy, Suite C-300
Austin, Texas 78746
T: (512) 647-6100
kcohan@reidcollins.com
rgoldstein@reidcollins.com
sjohnson@reidcollins.com

Nora Sam Ahmed
American Civil Liberties Union Foundation of Louisiana
1340 Poydras Street, Suite 2160
New Orleans, LA 70112
T: (504) 522-0628
nahmed@laaclu.org

Counsel for Teliah C. Perkins, individually and as parent and natural guardian of D.J., a minor

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth 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:

Defendants-Appellants and Interested Person:
Deputy Kyle Hart (Defendant-Appellant)
Deputy Ryan Moring (Defendant-Appellant)
St. Tammany Parish Sheriff Randy Smith (Interested Person)

Counsel for Defendants-Appellants and Persons/Entities
MILLING BENSON WOODWARD L.L.P.
68031 Capital Trace Row
Mandeville, Louisiana 70471
Chadwick W. Collings
Sarah A. Fisher

Plaintiff-Appellee
Teliah C. Perkins, individually and as parent and natural guardian of D.J., a minor

Counsel for Plaintiff-Appellee
REID COLLINS & TSAI LLP
1301 S. Capital of Texas Hwy, Suite C-300
Austin, Texas 78746
Keith Y. Cohan
Ryan M. Goldstein
Sean D. Johnson

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF LOUISIANA
1340 Poydras Street, Suite 2160
New Orleans, Louisiana 70112
Nora Sam Ahmed

Interested Entity
OneBeacon Insurance Group LLC by Atlantic Specialty Insurance Company (Liability Insurer to St. Tammany Parish Sheriff's Office)

Counsel for Interested Party
N/A

/s/ *Keith Y. Cohan*
Keith Y. Cohan
Counsel for Plaintiff-Appellee

STATEMENT REGARDING ORAL ARGUMENT

Appellee, Teliah C. Perkins, respectfully requests oral argument. This appeal from a denial of summary judgment on the basis of qualified immunity includes a voluminous factual record, and oral argument may assist the Court in understanding disputed facts and the underlying events that give rise to Appellee's claims.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF JURISDICTION

This is an interlocutory appeal of a district court order and opinion denying Defendants' motion for summary judgment on the basis of qualified immunity. ROA.1093-1134. The district court had jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331 and 1343, and over state law claims pursuant to 28 U.S.C. § 1367.

Pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 528-30 (1985), this Court has limited jurisdiction under the collateral orders doctrine to determine legal issues raised by an interlocutory appeal of the denial of Defendants' motion for summary judgment on the basis of qualified immunity.

This appellate jurisdiction, however, is limited. *See Edwards v. Oliver*, 31 F.4th 925, 929 (5th Cir. 2022). As set forth in additional detail below, on an interlocutory appeal, "[d]istrict court orders denying summary judgment on the basis of qualified immunity are immediately appealable and reviewed *de novo* only if they are predicated on conclusions of law and not genuine issues of material fact." *Kokesh v. Curlee*, 14 F.4th 382, 390 (5th Cir. 2021). "This means that the district court's finding that a *genuine* factual dispute exists is a factual determination that this court is prohibited from reviewing in this interlocutory appeal." *Good v. Curtis*, 601 F.3d 393, 397 (5th Cir. 2010).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does this Court have jurisdiction to consider Defendants' interlocutory appeal of a denial of summary judgment on the basis of qualified immunity where Defendants fail to concede the genuine issues of fact and instead challenge the sufficiency of the evidence?

2. Did the district court correctly conclude that Defendants are not entitled to summary judgment on the basis of qualified immunity on Ms. Perkins' excessive force claim, where the district court properly applied the *Graham* factors and identified particularized and clearly established law?

3. Did the district court correctly conclude that Defendants are not entitled to summary judgment on the basis of qualified immunity on D.J.'s separate excessive force claim, where the district court properly applied the *Graham* factors and identified particularized and clearly established law?

4. Did the district court correctly conclude that Defendants are not entitled to summary judgment on the basis of qualified immunity on D.J.'s First Amendment retaliation claim, where the district court properly analyzed evidence supporting each element of the claim and identified particularized and clearly established law?

STATEMENT OF THE CASE

This case arises from the violent arrest of Teliah Perkins in her own driveway by Saint Tammany Parish Sheriff's Office ("**STPSO**") Deputies Kyle Hart and Ryan Moring (together, "**Deputies**" or "**Defendants**"), in response to an anonymous call that a female was recklessly driving a dirt bike in the neighborhood. Through this lawsuit, Ms. Perkins asserts that Defendants violated her and her son D.J.'s Fourth and Fourteenth Amendment rights through their use of excessive force. Ms. Perkins also asserts that Defendants retaliated against D.J. in violation of his First Amendment rights and asserts related state-law causes of action. The matter comes before this Court on Defendants' interlocutory appeal of the district court order denying Defendants' motion for summary judgment on the basis of qualified immunity.

A. The Lead-Up to the Arrest

On the afternoon of May 5, 2020, Ms. Perkins was at her home at 2018 Jay Street in Slidell, Louisiana with her son, nephew, and bed-ridden cousin for whom she cared. ROA.488. Ms. Perkins was eating on the porch with her nephew when she observed Defendants riding down her street on marked police motorcycles. ROA.509-11. Curious to see what was going on, Ms. Perkins walked to the end of her driveway to get a better look. *Id*.

According to Deputy Moring's testimony and contemporaneous police records, Defendants were responding to an anonymous complaint that a female was recklessly driving a "dirt bike" on Jay Street. ROA.433, ROA.228. After initially passing Ms. Perkins' house, where Defendants say they saw Ms. Perkins standing in the driveway, Defendants turned around to approach her address, which had been identified by dispatch. ROA.434-36. Defendants contend that by the time they turned around at the end of the block, Ms. Perkins had taken her motorcycle out of the driveway into the middle of the road and was in the process of backpedaling it into the driveway with her feet, while not wearing a helmet. ROA.541-42. Ms. Perkins denies that she was on her motorcycle at that time or that she ever operates her motorcycle without a helmet. ROA.511, ROA.403-04, ROA.416.

Without turning on their emergency lights or sirens, Defendants dismounted at Ms. Perkins' home, asked if she had seen anyone riding a dirt bike recklessly, and asked for her driver's license and paperwork. ROA.436, ROA.510-12. As Defendants admit, Ms. Perkins complied with those requests. ROA.548-49, ROA.551-52, ROA.510-12. Ms. Perkins does not own a dirt bike. Her motorcycle was located in her driveway at the time, but Defendants did not touch the motorcycle to see if it was hot from use. ROA.778.

In the months before, STPSO deputies had visited Ms. Perkins' house several times, responding to calls from neighbors that Ms. Perkins believed to be unfounded and racially motivated. Ms. Perkins asked Defendants whether they were at her house because of another false report from her neighbors. ROA.511-12. Defendants quickly became hostile to Ms. Perkins. Ms. Perkins testified that Deputy Hart told her, "Shut the fuck up!" and "This ain't about -- this ain't fucking race!" ROA.517-18 (Perkins Tr. at 73:14-74:6). When a neighbor approached the house, Deputy Moring yelled at her to "stay the fuck back" and said he would "fuckin' arrest" her if she came any closer." ROA.517-18 (Perkins Tr. at 73:14-74:6).

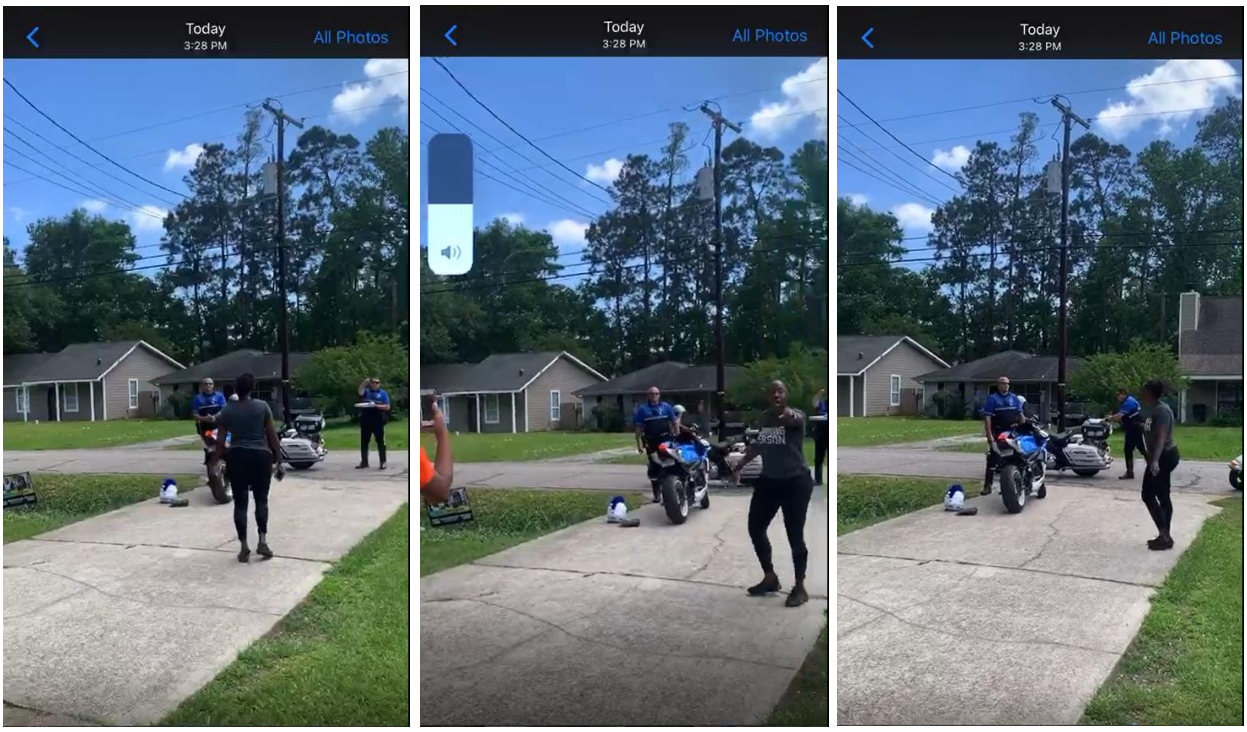
Ms. Perkins acknowledges that she was upset. Defendants were vulgar and aggressive and did not tell Ms. Perkins what violation she had committed. ROA.514-16, ROA.480. Ms. Perkins was so nervous about Defendants' aggression that she herself called 911 and calmly requested that a supervisor come to her house. ROA.779 (Moring Tr. at 54:8-16). Ms. Perkins also called for her son and nephew (both minors) to come outside and record what was transpiring. ROA.513.

B. The Arrest

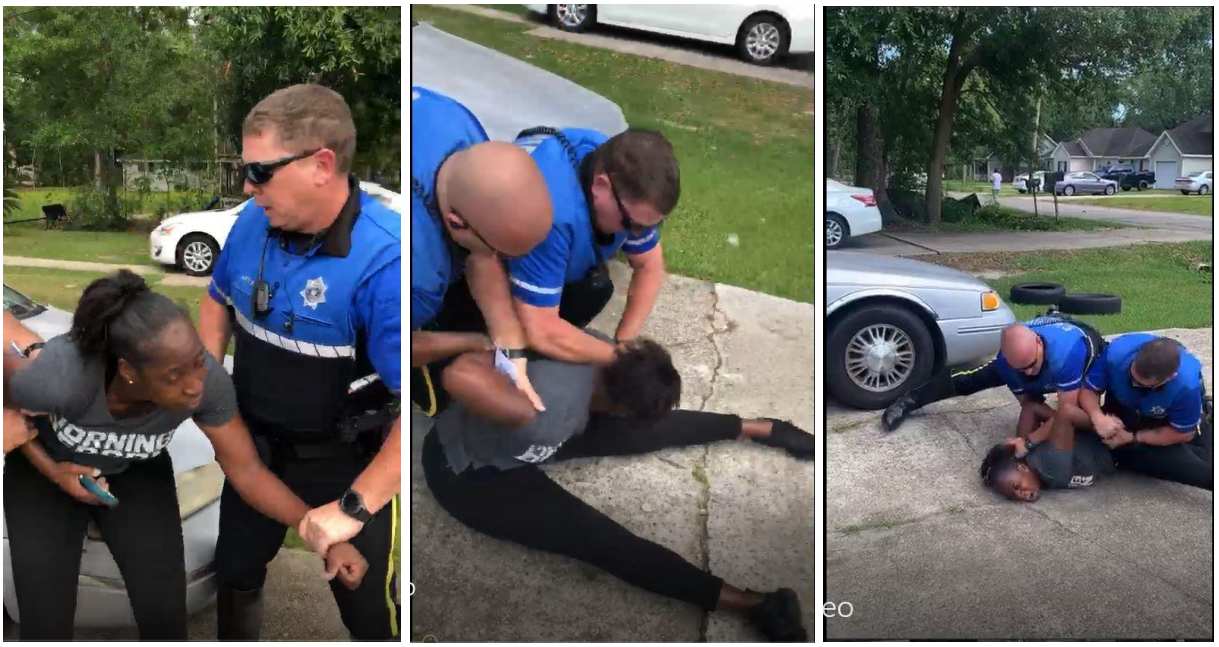
As requested, the boys came out of the house and began recording on their cell phones. *Id*. The boys stood toward the end of the driveway near the porch, Defendants stood at the end of the driveway by the street, and Ms. Perkins paced in

between on the driveway. ROA.720 (D.J. Video at 0:00-0:10); ROA.721 (Nephew Video at 0:04-0:21). Defendants told the boys to go back to the porch. In response, Ms. Perkins told them to "keep recording" and said: "it's their driveway, they don't have to stand on no porch." ROA.720 (D.J. Video at 0:00-0:10); ROA.721 (Nephew Video at 0:04-0:21).

Defendants now admit that Ms. Perkins was right—there was no reason to order the boys to go to the porch. ROA.563 (Hart Tr. at 150:6-22). Nevertheless, before even issuing a citation, Deputy Hart suddenly decided "that's it" and declared that Ms. Perkins was under arrest. ROA.720 (D.J. Video at 0:00-0:10); ROA.721 (Nephew Video at 0:04-0:21); ROA.564 (Hart Tr. at 152:11-25). Contrary to Defendants' rendition of the facts, and as the recordings show, Ms. Perkins was not attempting to flee and did not say "fuck y'all, I'm going inside." ROA.515-16 (Perkins Tr. at 70:20-24, 72:14-22). Instead, as shown in the screenshots below, Ms. Perkins was continuing to pace back and forth on her own driveway when Deputy Hart initiated the arrest. ROA.721 (Nephew Video at 0:04-0:21).



Without declaring the cause for arrest, Defendants advanced up the driveway and seized Ms. Perkins by the arms. *Id*. Ms. Perkins pleaded that she was waiting on her proof of insurance to arrive and tried to hand her phone to D.J., but Defendants forced her to the ground, then pushed her face into the concrete and pinned her to the ground with their knees and elbows as Deputy Hart handcuffed her. ROA.720 (D.J. Video at 0:10-1:11); 721 (Nephew Video at 0:20-1:20). When D.J. asked why they were sending his mom to jail, Deputy Hart responded, "resisting now." ROA.720 (D.J. Video at 0:45-0:50).



Once Deputy Hart handcuffed Ms. Perkins, Deputy Moring stood up and positioned himself between D.J. and his mother (who was still under the weight of Deputy Hart). ROA.720 (D.J. Video at 1:10-1:38); ROA.721 (Nephew Video at 1:20-1:47). As Deputy Moring admitted in his deposition, he intentionally blocked D.J.'s ability to record the ongoing struggle between Deputy Hart and Ms. Perkins. ROA.461 (Moring Tr. at 95:1-10). D.J.'s video shows Deputy Moring getting off of Ms. Perkins, drawing his Taser, approaching D.J., and shoving D.J. backward. ROA.720 (D.J. Video at 1:10-1:17). Although Deputy Moring physically blocked D.J.'s visual recording for over 20 seconds, the video captures audio of Ms. Perkins' garbled noises as she struggles to get any sound out, eventually asking, "why you choking me?!" ROA.720 (D.J. Video at 1:17-1:40). Ms. Perkins'

nephew stood behind D.J. and also recorded the incident. ROA.721.[1] His video is also mostly blocked, but it does show Deputy Hart leaning into Ms. Perkins' throat with his hand or forearm, removing it, and pressing his hand into her throat again. ROA.721 (Nephew Video at 1:33-1:40).

Deputy Hart then lifted Ms. Perkins to her feet from behind by her arms and pushed her toward the street. ROA.721 (Nephew Video at 1:45-1:56). Deputy Hart attempted to push Ms. Perkins' arms backwards over her head to force Ms. Perkins to the ground again. *Id.* Deputy Moring continued standing in front of D.J., drew his Taser again, and continued to point it at D.J., even after Ms. Perkins had been

[1] In full, the nephew's video was too long to share from his phone, so he took a screen-recording of the video that fast-forwards through certain parts. ROA.723-25 (Nephew Decl.). Other than fast-forwarding, the screen recording is not edited. ROA.723-25 (Nephew Decl.). The nephew has searched for the original video but has not been able to locate it. ROA.723-25 (Nephew Decl.).

taken to the side of the road. ROA.720 (D.J. Video at 1:39-2:18); 721 (Nephew Video at 2:02-2:06). As heard on D.J.'s video, when D.J. told Deputy Moring, "you can't Tase a child," the officer responded: "watch me." ROA.720 (D.J. Video at 1:46-1:54).

C. The Aftermath

Following the arrest, Ms. Perkins was transported and booked into St. Tammany Parish Jail, where she was detained overnight. Ms. Perkins was initially charged with resisting a police officer with force or violence (a felony); battery of a police officer (a misdemeanor); driving a motorcycle with no proof of insurance (a misdemeanor); and driving a motorcycle with no safety helmet (a misdemeanor). ROA.711-14. Those charges were later dropped. Ultimately, Ms. Perkins was only prosecuted for a misdemeanor charge of resisting an officer

under L.R.S. 14:108. ROA.243. She was convicted and sentenced to a $50 fine. ROA.244-46.

The day after being released from jail, Ms. Perkins went to the emergency room, where she was treated for injuries to her neck, back, knees, fingers, and wrists. ROA.519-26 (Perkins Tr.). The incident caused Ms. Perkins to endure chronic pain, for which she has received months of occupational therapy, as well as depression, anxiety, and insomnia, for which she has received treatment and medication. *Id*. As a result of the incident, D.J. was diagnosed with post-traumatic stress disorder and has suffered depression, anxiety, and a fear of participating in social life. ROA.491-99 (D.J. Tr.).

D. Procedural History

On May 3, 2021, Ms. Perkins filed her complaint in the U.S. District Court for the Eastern District of Louisiana asserting Section 1983 claims for (1) false arrest; (2) excessive force (on behalf of both herself and her son); (3) unlawful seizure; and (4) First Amendment retaliation (on behalf of her son); and state-law claims for (5) false arrest; (6) excessive force/battery (on behalf of both herself and her son); (7) false imprisonment; (8) malicious prosecution; (9) intentional infliction of emotional distress (on behalf of herself and her son); (10) negligent infliction of emotional distress (on behalf of herself and her son); and (11) assault (on behalf of her son). ROA.11-41. Following her conviction for misdemeanor

resisting, Ms. Perkins dropped her Section 1983 claim for false arrest and parallel state law claims for false arrest, false imprisonment, and malicious prosecution, conceding that those claims would be barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). ROA.377, ROA.1019-20.

On February 6, 2022, Defendants moved for summary judgment based on, *inter alia*, qualified immunity and the *Heck* defense. On July 26, 2022, Judge Vitter issued a 42-page opinion and reasons (the "**Order**") denying Defendants' motion as to all of Ms. Perkins' claims except for the unlawful seizure claim related to her motorcycle. ROA.1093-1134. With trial approaching, Defendants noticed an interlocutory appeal. ROA.1135.

SUMMARY OF THE ARGUMENT

This interlocutory appeal does not involve novel facts, legal questions of first impression, or an outlier district court decision. Rather, Ms. Perkins simply seeks to hold Defendants accountable for unconstitutional conduct that the Fifth Circuit has long held violates clearly established rights protected by the Fourth and First Amendments. As detailed in Judge Vitter's 42-page Order, and based on the voluminous evidentiary record, a reasonable jury could find for Ms. Perkins on each of her claims.

On appeal, Defendants attempt to turn Rule 56 on its head by arguing (without support) that the district court's methodical review of the summary

judgment record ignored certain evidence or took as true Ms. Perkins' sworn account over their own countervailing story. On an interlocutory qualified immunity appeal, however, Defendants "must be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the appeal." *Good v. Curtis*, 601 F.3d 393, 398 (5th Cir. 2010) (cleaned up). Because Defendants are effectively challenging the sufficiency of the summary judgment evidence against them, the Court lacks jurisdiction over this appeal, and it should be dismissed. *E.g.*, *Edwards v. Oliver*, 31 F.4th 925, 929 (5th Cir. 2022).

In any event, as set forth in detail in the district court's decision, Ms. Perkins has put forward ample evidence supporting each of her claims and has identified that the Fourth and First Amendment rights that she and D.J. assert were clearly established at the time of the incident in May 2020.

Under the Fourth Amendment, Ms. Perkins and her minor son had a right to be free from excessive force. Defendants violated Ms. Perkins' Fourth Amendment rights when, in effectuating an arrest for minor traffic violations, they physically grabbed her, forced her to the ground with her face on the pavement, and dug their knees and elbows into her legs and back—all while there was no threat to officer safety and no risk of Ms. Perkins fleeing. Defendants further violated Ms. Perkins Fourth Amendment rights when, even after she was handcuffed and subdued face-down on the pavement, Deputy Hart continued to dig his knees into her legs and

then twice pushed down onto her throat while she gasped, "why you choking me?!" As for D.J.—who peacefully recorded the incident and who was not suspected of any crime—Deputy Moring violated his Fourth Amendment rights by pushing D.J. backwards, pointing his Taser directly at D.J., and coldly threatening to use it. And Deputy Moring violated D.J.'s well-established First Amendment right to record the police by intentionally using his body to block D.J. from recording the incident (including the key moment when Deputy Hart pushed down onto Ms. Perkins' throat) and by threatening to tase D.J. if he did not back away.

Defendants' arguments to the contrary simply ignore the factual record or well-settled Fifth Circuit cases. And Defendants are equally wrong that this is an exceptional case where the available video evidence "blatantly contradicts" the evidentiary record. On the contrary, the recordings in the record—to the extent they were not intentionally blocked by Deputy Moring—***corroborate*** sworn testimony by Ms. Perkins and D.J.

Accordingly, for the reasons set forth in Part I below, the Court should dismiss for lack of jurisdiction and remand for trial. To the extent Defendants have raised any legal questions within the Court's narrow jurisdiction on this interlocutory appeal, the Court should affirm and remand for trial.

STANDARD OF REVIEW

"District court orders denying summary judgment on the basis of qualified immunity are immediately appealable and reviewed *de novo* only if they are predicated on conclusions of law and not genuine issues of material fact." *Kokesh v. Curlee*, 14 F.4th 382, 390 (5th Cir. 2021). "This means that the district court's finding that a *genuine* factual dispute exists is a factual determination that this court is prohibited from reviewing in this interlocutory appeal." *Good v. Curtis*, 601 F.3d 393, 397 (5th Cir. 2010). In other words, only "the district court's determination that a particular dispute is *material* is a reviewable legal determination." *Id.* "[T]o avoid an improper review of the genuineness of [a] case's facts, [the Court] consider[s] *only* whether the district court correctly assessed the legal significance—that is, the materiality—of the disputed facts . . . ." *Edwards v. Oliver*, 31 F.4th 925, 929 (5th Cir. 2022).

"[A] defendant challenging the denial of a motion for summary judgment on the basis of qualified immunity," like Defendants here, "must be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the appeal." *Good*, 601 F.3d at 398 (cleaned up). "Within this limited appellate jurisdiction, this court reviews a district court's denial of a motion for summary judgment on the basis of qualified immunity in a § 1983 suit de novo." *Id.* (cleaned up).

Rule 56 of the Federal Rules of Civil Procedure requires summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "In other words, summary judgment is appropriate when the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Edwards*, 31 F.4th at 929 (citation omitted). "In qualified immunity 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." *Id.* (cleaned up). "But, to overcome qualified immunity, the plaintiff's version of those disputed facts must also constitute a violation of clearly established law." *Id.*

With respect to video evidence in the record, "[w]hen 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) (emphasis added). "When video evidence is ambiguous or in fact supports a nonmovant's version of events, . . . the modified rule from *Scott* has no application." *Aguirre v. City of San Antonio*, 995 F.3d 395, 410 (5th Cir. 2021) . "Thus, a court should not discount the nonmoving party's story unless the video evidence provides so much clarity that a reasonable jury could not

believe his account." *Crane v. City of Arlington, Tex.*, 50 F.4th 453, 462 (5th Cir. 2022) (citation omitted).

Where video evidence "does not clearly contradict" the nonmovant's account, the Court "must take [the nonmovant's account] as true," like any other summary judgment determination. *Id.*; *see also, e.g.*, *Aguirre*, 995 F.3d at 410 ("As we have since made clear, *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."). For this reason, this Court has described *Scott* as "an exceptional case with an extremely limited holding" that applies a "demanding" standard. *Aguirre*, 995 F.3d at 410-11; *Darden v. City of Fort Worth*, 880 F.3d 722, 730 (5th Cir. 2018).

ARGUMENT

I. This Court Lacks Jurisdiction Over Defendants' Challenge to the District Court's Determination that Genuine Issues of Material Fact Exist.

Defendants largely ignore the narrow appellate jurisdiction that this Court exercises over an interlocutory appeal of a denial of summary judgment on the basis of qualified immunity. As set forth directly above, a "district court's finding that a *genuine* factual dispute exists is a factual determination that this court is prohibited from reviewing in this interlocutory appeal." *Good v. Curtis*, 601 F.3d

393, 397 (5th Cir. 2010). As far as the voluminous summary judgment record is concerned, the appellate court "consider[s] *only* whether the district court correctly assessed the legal significance—that is, the materiality—of the disputed facts . . . ." *Edwards v. Oliver*, 31 F.4th 925, 929 (5th Cir. 2022).

On appeal, Defendants repeatedly dispute the district court's well-supported and well-reasoned findings of genuine issues of fact. Relying on the evidentiary record—including video evidence, police records, and deposition testimony by Ms. Perkins, D.J., and both Defendants—the district court examined both sides' countervailing evidence concerning core issues in the case in the light most favorable to Ms. Perkins, as is required at the summary judgment stage.

By way of example, the Court examined competing record evidence concerning: (a) the level of force Defendants used after Ms. Perkins was handcuffed; (b) whether Ms. Perkins resisted after she was handcuffed; (c) whether Ms. Perkins attempted to flee the scene; (d) whether Deputy Hart choked Ms. Perkins; (e) whether Ms. Perkins or D.J. posed an immediate threat to Defendants or others; and (f) whether D.J. attempted to interfere with Ms. Perkins' arrest. Based on a full review of the record, the district court repeatedly held that a reasonable jury could find in Ms. Perkins' favor, and therefore denied summary judgment. ROA.1103-1134.

In their appellate brief, Defendants vigorously dispute these factual, summary judgment determinations. They repeatedly argue, for example, that the district court "ignored evidence." *E.g.*, Defs.' Br. at 10, 17-19. Notwithstanding the voluminous evidentiary record, which includes multiple videos and sworn deposition testimony by Defendants and Ms. Perkins, Defendants question why the District Court "took Plaintiffs at their word that they posed no threat to officer safety." *Id.* at 19. Defendants similarly claim that the court improperly credited evidence that Ms. Perkins and D.J. posed little threat "in spite of countervailing record evidence." *Id.* at 21.

These and other similar statements, peppered throughout Defendants' brief, show that "despite giving lip service to the correct legal standard," Defendants' "argument does not take the facts in a light most favorable to the Plaintiff[]." *Reyes v. City of Richmond*, 287 F.3d 346, 351 (5th Cir. 2002). Instead, Defendants' "appeal amounts to a challenge to the sufficiency of the evidence cited by" the district court. *Id.* (dismissing appeal for lack of jurisdiction). Indeed, at no time do Defendants "concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the appeal," as they must for purposes of this interlocutory appeal. *Good*, 601 F.3d at 398. This failure is fatal to their interlocutory appeal.

Moreover, Defendants do not argue that the district court made an improper determination of whether disputed facts were *material*—the only argument

available to Defendants in this interlocutory appeal. And for good reason. This is not an appeal about whether the district court went out of its way to concoct disputed issues of fact on immaterial matters to deny summary judgment. Rather, the core factual issues relevant to Defendants' qualified immunity defense—including both the level of threat that Defendants faced, the amount of force used by Defendants after Ms. Perkins ceased any minor resistance, and Deputy Moring's motivation in blocking D.J.'s recording—are disputed by the parties. *See, e.g.*, *Carroll v. Ellington*, 800 F.3d 154, 177 (5th Cir. 2015) (dismissing interlocutory appeal of denial of summary judgment on excessive force claim for lack of jurisdiction where "we cannot say on this record—rife with inconsistencies and contradictions—at which point plaintiff was subdued and no longer resisting").

Finally, with respect to the video evidence in the record, Defendants did not argue in the trial court that *Scott v. Harris*, 550 U.S. 372 (2007) controls, and have therefore forfeited or waived the argument on appeal.[2] *See Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021) ("A party forfeits an argument by failing to raise it in the first instance in the district court—thus raising it for the first time on appeal . . . ."). In any event, this is not an "exceptional case" in which the video evidence taken by Ms. Perkins' family members "blatantly contradicts" the record

[2] Defendants did not cite *Scott v. Harris* or any Fifth Circuit case examining *Scott* in either their opening brief in support of summary judgment or their reply brief. ROA.203-277; ROA.799-820.

or eliminates any feasible claim. *See Aguirre v. City of San Antonio*, 995 F.3d 395, 410-11 (5th Cir. 2021) ("Only when the record eliminates any feasible claim that the nonmovant's account of events is true may a court disregard the normal summary judgment rule that it must credit that party's account if it is supported by sufficient evidence."). On the contrary, the recordings of Ms. Perkins' arrest taken by D.J. and Ms. Perkins' nephew *corroborate* other evidence in the record, including Ms. Perkins' and D.J.'s sworn accounts of what happened. *See id.* ("When video evidence is ambiguous or in fact supports a nonmovant's version of events, . . . the modified rule from *Scott* has no application.").

Moreover, Deputy Moring admitted that he intentionally blocked D.J.'s ability to record the ongoing struggle between Deputy Hart and Ms. Perkins. ROA.461. Defendants cannot argue, on the one hand, that the video evidence "blatantly contradicts" the record, when, on the other hand, they intentionally obfuscated that very recording. *See, e.g.*, *Crane v. City of Arlington, Tex.*, 50 F.4th 453, 462 (5th Cir. 2022) (rejecting reliance on *Scott* where dashcam video recording was partially blocked). The Court should therefore swiftly reject Defendants' invitation, raised for the first time on appeal,[3] to conduct a plenary

[3] In support of their position on appeal, Defendants cite only *Scott v. Harris*, 550 U.S. 372 (2007) and *Chacon v. Copeland*, 577 F. App'x 355 (5th Cir. 2014). As explained in detail above, *Scott* sets forth a "demanding" standard and only applies where the nonmovant's evidence is blatantly contradicted by video evidence—not the case here. And *Chacon* is an unpublished opinion that

review of the video evidence under *Scott* and outside of the traditional summary judgment framework. *See, e.g.*, *id.*; *Aguirre*, 995 F.3d at 410-11; *Darden v. City of Fort Worth*, 880 F.3d 722, 730 (5th Cir. 2018) (each rejecting argument that video evidence blatantly contradicted record in interlocutory appeal of denial of summary judgment).[4]

Accordingly, because Defendants' arguments rely on this Court ignoring genuine issues of disputed fact identified by the district court, Defendants' appeal should be dismissed for lack of jurisdiction, with instructions that the case be remanded for trial.

II. Defendants Are Not Entitled to Qualified Immunity on Ms. Perkins' Excessive Force Claim.

The district court correctly denied summary judgment on qualified immunity grounds, because Ms. Perkins presented evidence "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Timpa v. Dillard*, 20 F.4th 1020, 1029 (5th

---

pre-dates *Aguirre*, *Darden*, *Crane*, and *Edwards*. In any event, *Chacon* supports Ms. Perkins, since the Court *affirmed* the denial of summary judgment where, as here, two recorded videos did "not clearly reveal the officers' version of events to be correct." 577 F. App'x at 359.

[4] To be clear, the Court, like the district court, may review the video evidence as part of the summary judgment record. *See* ROA.1115-16 (district court describing video evidence in detail). But contrary to Defendants' argument, this is not an "exceptional case" where the Court may rely *solely* on the video evidence or disregard the district court's factual determinations.

Cir. 2021) (quoting *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc)).

A. The district court properly applied the *Graham* factors in determining the Deputies' force was objectively unreasonable.

Although Defendants quibble with which pieces of evidence the district court cited, Defendants concede that the court applied the proper legal framework in reaching its decision. As the district court articulated, the Fourth Amendment provides citizens with the right to be free from excessive force. ROA.1108. A claim for excessive force exists when the plaintiff suffers an injury as a direct result of force by a law enforcement officer that was clearly excessive and unreasonable. *Cooper v. Brown*, 844 F.3d 517, 522 (5th Cir. 2016). Excessive force claims are "necessarily fact-intensive." *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009). The reasonableness inquiry is an objective one and involves the "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." *Timpa*, 20 F.4th at 1028.

Whether the use of force was clearly excessive and clearly unreasonable is evaluated under the three *Graham* factors: (1) the severity of the crime, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether the suspect is actively resisting or trying to evade arrest. *Cooper*, 844 F.3d at 522 (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

Here, the district court thoroughly analyzed the *Graham* factors upon an extensive review of the record in concluding that Defendants' actions were unreasonable at this stage of the litigation, when disputed issues of material fact remain, such as the amount of force used by Defendants while attempting to arrest Ms. Perkins after she had been handcuffed. ROA.1108-18.

Severity of the Crime. The district court correctly concluded that—given the minor nature of Ms. Perkins' alleged traffic crimes—the first *Graham* factor weighed in favor of determining that the force was excessive and unreasonable. As Defendants admit, they were at the scene in response to a complaint of an unknown female recklessly operating a dirt bike on Jay Street. ROA.228. Defendants did not witness Ms. Perkins operating a dirt bike recklessly but say that they saw her backpedaling her motorcycle into her driveway without a helmet, which was the cause for their stop and the subject of the initial confrontation. ROA.544 (Hart Tr. at 83:8-12). Defendants themselves conceded at their depositions that riding a motorcycle without a helmet is a misdemeanor offense and "not a serious crime." ROA.464-65 (Moring Tr. at 119:24-120:5); ROA.544-45 (Hart Tr. at 83:19-84:3).

Their common-sense admission accords with Fifth Circuit precedent holding that when the crime is a minor traffic violation, "the need for force [is] substantially lower than if [the suspect] had been suspected of a serious crime." *Deville,* 567 F.3d at 167 (rejecting qualified immunity defense with respect to

excessive force claims where plaintiff was stopped for a minor traffic violation, was never asked to sign a traffic ticket, and refused to comply with officer instructions); *see also* ROA.606 (expert opinion of Roger Clark, who has spent 27 years in law enforcement, that "[i]n light of the nature of the alleged infractions (even if Ms. Perkins committed them), Deputy Hart and Deputy Moring were not justified in using any amount of physical force on Ms. Perkins under the totality of the circumstances").

Defendants' argument that the district court "considered the wrong crimes"—by analyzing the severity of the alleged traffic violations instead of the severity of the resisting charge—is unavailing both factually and legally. As an initial matter, the "severity of the crime" inquiry concerns the reason for seizing someone in the first place, and not the arrestee's subsequent resistance, as evidenced by the fact that a separate *Graham* factor considers the arrestee's level of resistance.[5]

Additionally, the premise of Defendants' argument—that the level of force was reasonable in light of the fact that plaintiff was unlawfully trying to terminate

[5] *See also Deville*, 567 F.3d at 167 (considering the plaintiff's "minor traffic violation" under the first *Graham* factor); *Bagley v. Kolb*, 2021 WL 3376830, at *6 (W.D. La. Aug. 3, 2021) (considering the offense to which the officers were "initially responding" in analyzing the first *Graham* factor and noting that "the fact that [the] alleged offenses were misdemeanors 'militat[es] against the use of force'" (citation omitted)); Federal Law Enforcement Training Centers, *Use of Force – Part II* (discussing *Graham* factors and noting "[t]he 'severity of the crime' generally refers to the reason for seizing someone in the first place"), *available at* https://www.fletc.gov/use-force-part-ii.

a traffic stop—only highlights a genuine issue of material fact. Although Defendants contend that "Plaintiff was *actually* arrested for attempting to unilaterally terminate a traffic stop," Defs.' Br. at 18, Ms. Perkins has presented evidence allowing a reasonable jury to conclude that Defendants *actually* initiated their arrest (and concurrent use of force) against Ms. Perkins based on either Ms. Perkins' instruction to her son and nephew that they could continue recording from their driveway, or the alleged traffic violations. Not only did Ms. Perkins testify that Deputy Hart "got upset and [] arrested me" after she instructed the kids that they did not have to go inside, ROA.513, but the clear video evidence shows that Ms. Perkins was merely pacing back-and-forth (and not fleeing to her home) when Deputy Hart arrested her. ROA.721 (Nephew Video at 0:04-0:21). In other words, even though Ms. Perkins was ultimately charged *only* with misdemeanor resisting, the evidence shows that resisting was not the crime for which she was originally seized.

In any event, the resisting offense for which Ms. Perkins was ultimately charged was also a misdemeanor and thus did not justify the substantial force Defendants exerted. *E.g.*, *Reyes v. Bridgwater*, 362 F. App'x 403, 407 n.5 (5th Cir. 2010) (unpublished) (finding that the "severity" factor militated against use of force where the crime at issue was a misdemeanor); *see also Trammell v. Fruge*, 868 F.3d 332, 340 (5th Cir. 2017) (noting that public intoxication is a

misdemeanor and "thus is a minor offense militating against the use of force"). Although Ms. Perkins admittedly pulled her arms away when Deputy Hart tried to arrest her, that resistance did not entitle Defendants to apply the force that they did, which included twisting Ms. Perkins' arms, bringing her to the ground, pressing her face into the pavement, digging their knees and elbows into her back and legs, and, in the case of Deputy Hart, placing his hands on her neck two separate times. *See* ROA.1113 (Order citing to video evidence).

Threat to Safety. The district court correctly found that the second *Graham* factor weighed in Ms. Perkins' favor. The evidence clearly shows—or, at the very least, reflects a genuine issue of material fact—that Ms. Perkins did not pose any immediate threat to the safety of the officers, the public, or herself. Again, Defendants' position that Ms. Perkins' "attempt to flee the scene . . . posed an immediate threat to officer safety," Defs.' Br. at 19, is directly refuted by the record evidence, including video footage showing that Ms. Perkins was pacing back-and-forth (and not fleeing) when Deputy Hart arrested her. ROA.721 (Nephew Video at 0:04-0:21); *see also* ROA.607 (expert opinion that neither Ms. Perkins nor her son or nephew posed a reasonable credible threat). As the district court pointed out, "while Plaintiff can be heard shouting and cursing, there is no evidence whatsoever that Plaintiff threatened the Defendants or made any reference to a weapon in her home." ROA.1115.

Indeed, substantial evidence—well beyond what is required at summary judgment—shows that there was no safety threat. For instance:

- Deputy Moring admitted that Ms. Perkins "wasn't a danger to the public" and that he "d[idn't] believe she was" a danger to herself. ROA.465 (Moring Tr. at 120:6-17).
- Deputy Moring admitted that neither of the minors posed a threat to the officers or the public, and that their voices remained calm as they recorded. ROA.441, ROA.456 (Moring Tr. at 55:12-16, 83:12-18).
- When Defendants arrived, Ms. Perkins identified herself and provided her driver's license, which showed that she was at her residence. ROA.548-49 (Hart Tr. at 96:10-97:4).
- Defendants knew, at the time, that there were no outstanding warrants for Ms. Perkins' arrest and had no reason to assume she was a suspect in a crime. ROA.438 (Moring Tr. at 51:20-25).
- Neither Ms. Perkins nor any observer verbally threatened Defendants with force or touched Defendants. ROA.439, ROA.444-46 (Moring Tr. at 52:6-15, 60:15-17, 61:19-62:11).
- Neither Ms. Perkins nor any observer made any sudden movements toward Defendants, and D.J. was not even wearing shoes. ROA.720 (D.J. Video); 721 (Nephew Video); 444 (Moring Tr. at 60:10-14).

- Neither Ms. Perkins nor any observer displayed a weapon. ROA.444, 462-63 (Moring Tr. at 60:18-19, 99:13-17, 100:4-6).
- Ms. Perkins herself called 911 to request a supervisor because she feared for her own safety. ROA.228 (Dispatch Log); 440 (Moring Tr. at 54:8-16).
- The event occurred in broad daylight. ROA.720-21.
- According to Defendants, Ms. Perkins approached and/or entered her home on one or two occasions during the interaction before the arrest, without retrieving a weapon and without Defendants arresting her or fearing for their safety. ROA.473-74 (Moring Tr. at 201:2-202:7); ROA.561-62 (Hart Tr. at 136:16-137:13).
- Ms. Perkins' expert opined that "neither Ms. Perkins, her son D.J., nor her nephew [] posed a reasonable 'credible threat' whatsoever to either Deputy Hart or Deputy Moring . . . ." ROA.607.

Under these facts, a jury could reasonably find that Ms. Perkins did not pose a threat to Defendants.[6]

Active Resistance / Evading Arrest. The final *Graham* factor—whether Ms. Perkins was actively resisting or attempting to evade arrest—also supports a denial

[6] Additionally, a reasonable officer could not have concluded that Ms. Perkins posed an immediate threat by "questioning their presence" at her residence. *Ramirez v. Martinez*, 716 F.3d 369, 378 (5th Cir. 2013). "Pulling [her] arm out of [Defendants'] grasp, without more, is insufficient to find an immediate threat to the safety of the officers." *Id.*

of summary judgment. Although Ms. Perkins admits that she pulled her arm away, the level of resistance was limited: as Deputy Hart testified, Ms. Perkins resisted by "[p]ulling away, turning away." ROA.566 (Hart Tr. at 160:9-15). Such limited resistance did not justify the level of force used, especially where Defendants do not contend that it posed any threat to their safety. *See, e.g.*, *Ramirez v. Martinez*, 716 F.3d 369, 378 (5th Cir. 2013) (pulling arm away from officer does not demonstrate that arrestee is a threat); *Trammell*, 868 F.3d at 341-43 (pulling away from officers did not justify tackling subject face first into the pavement); *Bagley*, 2021 WL 3376830, at *7 (holding that jury could reasonably conclude that plaintiff who flailed his arms then curled up in a fetal position was "merely passively resisting arrest"); *see also Crane v. City of Arlington*, 50 F.4th 453, 465 (5th Cir. 2022) (holding that third *Graham* factor favored plaintiff who "was compliant with [the officer's] initial requests [but] refused to comply once the officers attempted to arrest him").

Moreover, the force that Deputy Hart used *after* he handcuffed and subdued Ms. Perkins on the ground is especially egregious under *Graham*. The video evidence shows that Deputy Hart continued to kneel on Ms. Perkins' legs after she was handcuffed, while she remained face-down on the pavement and screamed in agony that he was hurting her. ROA.720 (D.J. Video at 1:00-1:24); ROA.1113. Then, after turning her onto her back, Deputy Hart pushed down on Ms. Perkins'

throat using his hand and arm while Ms. Perkins lay on the ground handcuffed, causing her to breathlessly yell "why you choking me?!" ROA.721 (Nephew Video at 1:33-1:40); 1113.

During the timeframe after Ms. Perkins was handcuffed, both Deputy Hart's level of force and Ms. Perkins' level of resistance are disputed issues of material fact. ROA.1117. Ms. Perkins contends that, after she was handcuffed, she was no longer resisting and that Deputy Hart intentionally applied pressure to her throat. Defendants do not argue that intentionally choking Ms. Perkins after she was handcuffed would constitute reasonable force; in fact, both Deputy Hart and the STPSO acknowledged that applying pressure to somebody's throat is potentially fatal. ROA.576 (Hart Tr. at 184:2-10); ROA.700 (STPSO Tr. at 42:8-16). Instead, Defendants claim that Ms. Perkins kicked Deputy Hart's leg, causing him to fall onto her with one hand "near her clavicle area." Defs.' Br. at 26-27. Ms. Perkins has repeatedly disputed (and continues to dispute) this slanted, after-the-fact rendition of the event. *See* ROA.380, 387 (Pl.'s Mem. Opp. Defs.' MSJ (citing ROA.721, 715-19)); ROA.417-18 (Pl.'s Counterstatement of Material Facts (citing ROA.721)); ROA.721 (Nephew Video at 1:33-1:51).

Despite Deputy Moring's efforts to block the recording of the incident, the video footage supports Ms. Perkins' rendition of the facts and shows that Deputy Hart's explanation is dubious. Specifically, the recording shows that, over the

course of several seconds (from the 1:33 to 1:39 mark of the nephew's video, ROA.721), Deputy Hart had his hand or forearm on Ms. Perkins' throat, removed his hand for a brief moment, then reapplied force to Ms. Perkins throat:

Additionally, Ms. Perkins can be heard on the video making garbled noises and saying, "why you choking me," and her nephew can be heard saying "y'all are choking a lady." ROA.721 (Nephew Video at 1:33-1:51); ROA.720 (D.J. Video at 1:25-1:41). Deputy Hart's explanation is particularly suspect given that he did not mention the incident (or Ms. Perkins' comment that she was choked) in the arrest report that he wrote and filed, even though the STPSO mandates inclusion of such statements and uses of force. ROA.715-19 (Arrest Report); ROA.702-03 (STPSO Tr. at 47:5-48:13).

In any event, Defendants—not Ms. Perkins—moved for summary judgment, so the evidence must be viewed in the light most favorable to Ms. Perkins. *See Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 272 (5th Cir. 1987); *see also Joseph v. Bartlett*, 981 F.3d 319, 334-36 (5th Cir. 2020) (affirming denial of summary judgment where there was a dispute as to whether officers employed "measured and ascending actions corresponding to" the threat posed by the plaintiff). And based on the evidence in the record, a reasonable jury could conclude that Defendants' force was clearly unreasonable and excessive. Fifth Circuit law "has long been clearly established that an officer's continued use of force on a restrained and subdued subject is objectively unreasonable." *Timpa v. Dillard*, 20 F.4th 1020, 1034 (5th Cir. 2021) (collecting cases); *see also Fairchild v. Coryell Cnty.*, 40 F.4th 359, 368 (5th Cir. 2022) (discussing common features of objectively unreasonable force that mirror the facts of the instant case); *Bush v. Strain*, 513 F.3d 492, 501-02 (5th Cir. 2008) (the use of certain force after an arrestee has been restrained and handcuffed is excessive and unreasonable).

Accordingly, under *Graham*, Defendants engaged in excessive force both during their initial takedown of Ms. Perkins and after she was handcuffed.

B. Defendants' arguments merely establish the existence of a genuine issue of material fact.

Defendants attempt to turn Rule 56 on its head by arguing that reversal is warranted because the district court opinion "ignored" certain evidence. To be

clear, the district court opinion was thorough in its analysis and included over 50 citations to record evidence, including many citations to the video footage.[7] But more important, the proper question is not whether Ms. Perkins' claims are uncontroverted, but whether there is "no genuine issue of material fact," when drawing all reasonable inferences in favor of the nonmovant. *Phillips Oil*, 812 F.2d at 272 (citations omitted); *see also Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (reversing holding that officer did not violate clearly established law when the appellate court "failed to view the evidence at summary judgment in the light most favorable to [plaintiff] with respect to the central facts of the case").

None of the evidence that Defendants cite in support of their appeal entitles them to summary judgment; at best, they show that *Ms. Perkins* is not entitled to summary judgment at this stage. For instance:

- Threat to Officer Safety: Defendants argue that the district court ignored evidence, which Defendants say supports their position that Ms. Perkins and D.J. posed a threat and that Ms. Perkins was attempting to flee.

[7] Because the district court here did not reach a "bare conclusion that fact issues exist," Defendants' cited cases are inapposite on this point. *See Watson v. Bryant*, 532 F. App'x 453, 457 (5th Cir. 2013) (unpublished); *Thompson v. Upshur Cnty.*, 245 F.3d 447, 456 (5th Cir. 2001). Indeed, those cases instruct that when a district court's order "explains what facts the plaintiff may be able to prove at trial," such an order "allow[s] this Court to focus on the aforementioned purely legal issues." *Thompson*, 245 F.3d at 455-56 (noting that "this Court does not have jurisdiction to review the district court's finding that particular factual issues are 'genuine'"). For the reasons discussed above, *see* Part I, this Court lacks jurisdiction over this appeal to the extent that Defendants are challenging the district court's identification of genuine issues of material fact.

Defs.' Br. at 19-22. But Ms. Perkins presented countervailing record evidence—including video footage, Defendants' testimony, and an expert report—showing that Ms. Perkins was not attempting to flee the scene and that she and her 14-year-old barefoot son did not pose a threat. *See, supra*, at 27-29. Ms. Perkins denies that she said "fuck y'all, I'm leaving," as Defendants suggest. ROA.515-16 (Perkins Tr. at 70:20-24, 72:14-22).

- Reason for Arrest: Defendants argue that the district court ignored that Ms. Perkins was actually arrested for attempting to flee and unilaterally terminate a traffic stop. But Ms. Perkins presented evidence—including video evidence and deposition testimony—that she was not terminating the stop when arrested. ROA.721 (Nephew Video at 0:04-0:21). Defendants' account that Ms. Perkins was attempting to flee is particularly absurd in light of the fact that *Ms. Perkins* called 911 to request a supervisor on scene. ROA.779 (Moring Tr. at 54:8-16).
- Adherence to Training and Protocols: Defendants argue that the district court ignored evidence showing that Defendants followed proper training and protocols. Defs.' Br. at 23-25. But Ms. Perkins presented record evidence—including an expert report, STPSO testimony, and the STPSO "Use of Force" manual—showing that (1) Defendants' use of force was

unreasonable, (2) Defendants violated Louisiana Code of Criminal Procedure Article 218 and STPSO SOP 0200:02.125 by failing to inform Ms. Perkins of the cause of arrest before placing her under physical custody, (3) Deputy Moring used the second highest level of force under STPSO guidelines by threatening D.J. with his Taser, and (4) Deputy Hart violated STPSO policies by excluding statements regarding his use of force in his arrest report. ROA.585-616 (Expert Report); 676-83 (Use of Force Policies and Procedures); ROA.702-03 (STPSO Tr. at 47:5-48:13).

- Choking vs. Slipping: Defendants argue that the district court ignored video evidence showing that Deputy Hart accidentally fell onto Ms. Perkins' "clavicle area" for less than two full seconds. But the video of is ambiguous because Deputy Moring intentionally blocked the recording, and, in any event, the video shows Deputy Hart applying pressure to Ms. Perkins' throat for several seconds. *See*, *supra*, at 31-32.
- Resistance After Handcuffing: Defendants argue, without citation, that Ms. Perkins "continued to resist throughout the entire encounter, even after she was handcuffed." Defs.' Br. at 25. But that portion of the video is obfuscated by Deputy Moring, and, to the extent visible, simply shows

that Ms. Perkins was not resisting, but wriggling in pain from Deputy Hart digging his knees into her legs. ROA.720; ROA.721.

In sum, Defendants' brief does nothing more than identify genuine issues of material fact for a jury to decide at trial.

C. Defendants' actions violated particularized and clearly established law.

Contrary to Defendants' cursory analysis of Fifth Circuit jurisprudence, Defendants' conduct was unreasonable in light of clearly established law as of the date of the incident, May 5, 2020. Although Defendants are correct that "clearly established law" should square with the facts at issue and not be defined at a high level of generality, the existing law need not be identical and there may be "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." *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (en banc) (quoting *Hope v. Pelzer*, 536 U.S. 730, 740 (2002)). Here, controlling authority clearly established that Defendants' level of force was unreasonable both (1) when they initially detained Ms. Perkins and (2) when Deputy Hart continued to apply force after she was handcuffed.

First, it is clearly established law in the Fifth Circuit that a police officer violates the Fourth Amendment when he causes serious injury to an arrestee who was merely "pulling away" from the officer, which is exactly how Deputy Hart

described Ms. Perkins' level of resistance here. ROA.566 (Hart Tr. at 160:9-15). The decision in *Trammell v. Fruge*, 868 F.3d 332 (5th Cir. 2017), is on point. There, this Court confirmed that even where officers had probable cause to arrest the plaintiff for a "minor offense," and the plaintiff resisted the officers by "pulling away from an officer after the officer grabbed the plaintiff's arm," it was "objectively unreasonable" and a violation of the plaintiff's Fourth Amendment rights to tackle him to the ground. *Id.* at 341-43. The Court concluded that the arrestee was only passively resisting, because he "was not fleeing, not violent, [and] not aggressive," and that the plaintiff's "minor offense militat[ed] against the use of force." *Id.* at 343, 340. The Court also held that the officers had fair warning that their actions were unconstitutional based on a prior, similar Fifth Circuit case, *Goodson v. City of Corpus Christi*, 202 F.3d 730 (5th Cir. 2000), which denied qualified immunity for officers who tackled a plaintiff because he was pulling his arms away from an officer and moving backward. *Id.* at 343.

Trammell and *Goodson* are not alone in establishing that a police officer does not have carte blanche to apply force to an arrestee who is refusing to comply with instructions or pulling away. For instance, in *Deville v. Marcantel*, 567 F.3d 156, 167-69 (5th Cir. 2009), the police officers applied force during a traffic stop by pulling the plaintiff out of her car and tightly applying handcuffs after the plaintiff used profanity and refused to comply with instructions. After conducting

the *Graham* analysis—in which it emphasized that the plaintiff was stopped for a minor traffic violation and that she was never asked to sign a citation—the Court concluded that the plaintiff "had a clearly established right to be free from excessive force, and it was clearly established that the amount of force that the officers could use 'depended on [the *Graham* factors].'" *Id.* (citations omitted); *see also Ramirez v. Martinez*, 716 F.3d 369, 378 (5th Cir. 2013) (no qualified immunity for officers who tased and tackled plaintiff in response to his resistance of "pulling his arm out of [the officer's] grasp"); *Tarver v. City of Edna*, 410 F.3d 745, 753-54 (5th Cir. 2005) ("[I]t was clearly established that [plaintiff] had a constitutional right to be free from excessive force during an investigatory stop or arrest." (citation omitted)); *Westfall v. Luna*, 903 F.3d 534, 549 (5th Cir. 2018) (holding that plaintiff "had a clearly established right to be free from excessive force" under the *Graham* factors and that a reasonable jury could conclude that it was unreasonable for officers to slam plaintiff to the ground in response to her interference with public duties).

Second, Fifth Circuit precedent at the time of the incident clearly established that Deputy Hart violated Ms. Perkins' constitutional rights by continuing to kneel on her and then choking her after she was handcuffed and subdued.[8] At that point

[8] Based on his admitted failure to intervene or prevent Deputy Hart from choking Ms. Perkins, Deputy Moring is also liable for this clearly established constitutional violation. ROA.466-67

in the arrest, Ms. Perkins was not resisting or attempting to flee; instead, she was prone, on the ground, and handcuffed. *See* ROA.720-21.

"Within the Fifth 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 v. Dillard*, 20 F.4th 1020, 1034 (5th Cir. 2021) (collecting cases); *see also Carroll v. Ellington*, 800 F.3d 154, 177 (5th Cir. 2015) ("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."); *Bagley*, 2021 WL 3376830, at *8 ("It has been clearly established since at least 2013 that after handcuffing and subduing a suspect, it is unreasonable for an officer to strike an arrestee." (collecting cases)); *Joseph v. Bartlett*, 981 F.3d 319, 340 (5th Cir. 2020) (holding that it is clearly established that an officer cannot "increase[] the force applied at the same time the threat presented by [the suspect] decrease[s]" (citation omitted)).

The principle largely derives from *Bush v. Strain*, in which this Court held that it was objectively unreasonable for an officer to force a subject's face into a car after the subject had been handcuffed and thus was "restrained and subdued."

(Moring Tr. at 165:20-166:4); *Harger v. City of W. Monroe*, 2015 WL 5518979, at *5 (W.D. La. Sept. 17, 2015) ("Where an officer fails to [prevent fellow officers from violating a citizen's constitutional rights], the observing officer is jointly liable to the victim under Section 1983."). In any event, Defendants do not raise (and have forfeited) this issue on appeal. *Rollins v. Home Depot USA*, 8 F. 4th 393, 397 (5th Cir. 2021).

513 F.3d 492, 501-02 (5th Cir. 2008). In *Fairchild v. Coryell County*, this Court recently noted that courts have "reaffirmed this principle again and again," and discussed common features in those cases, including that the seized individual: "was suspected of only a minor offense," "initially resisted," "was obese and forced to lie prone on the stomach with hands restrained and bodyweight force applied to the back," and "most importantly[,] was subdued, unable to flee, and non-threatening during the continued use of force." 40 F.4th 359, 368 (5th Cir. 2022) (cleaned up) (quoting *Timpa*, 20 F.4th at 1035-36).

Despite the plethora of clearly established law, Defendants complain that the district court did not cite cases "in which it was held unconstitutional for officers to arrest a suspect who attempted to unilaterally terminate a traffic stop after failing to produce proof of liability insurance." Defs.' Br. at 39.[9] But, as discussed at length above, Ms. Perkins denies (and the evidence disproves) that she tried to unilaterally terminate the traffic stop. And, in any event, those prior decisions certainly gave Defendants reasonable warning that their conduct violated

[9] Ironically, Defendants cite to LSA – R.S. 32:863.1, which provides that the operator of a motor vehicle "shall be issued a notice of noncompliance" when the operator is unable to provide proof of liability insurance. Defs.' Br. at 39 n.12. Here, Ms. Perkins told Defendants that she was "waiting on her insurance," ROA.438 (Moring Tr. at 51:2-5), and Defendants never issued a "notice of noncompliance" or other citation but instead chose to exert force in arresting Ms. Perkins.

constitutional rights. *Bagley*, 2021 WL 3376830, at *8 ("[T]he cases relied upon need not be identical." (citing *Kinney*, 367 F.3d at 350)).

Similarly unpersuasive is Defendants' gripe that the district court ignored evidence that "Ms. Perkins continued to lash out and aggressively resist even after she was handcuffed." Defs.' Br. at 39. Again, Ms. Perkins (with video support) disputes that she was lashing out or aggressively resisting after she was handcuffed. Rather, Ms. Perkins was squirming in pain from Deputy Hart forcefully and needlessly digging his knees into her legs, before she was flipped to her back when Deputy Hart pressed down on her throat. ROA.720 (D.J. Video at 1:00-1:30) (Ms. Perkins screaming "get off my leg, you putting a cramp in my leg, get off my leg . . . get off me, you got the cuffs on me"). Particularly given that Deputy Moring was obfuscating the recording, Ms. Perkins' rendition of the facts must be credited at this stage. *See Crane*, 50 F.4th at 462.

Finally, the only case law that Defendants cite to support their position—*Buehler v. Dear*, 27 F.4th 969 (5th Cir. 2022)—is distinguishable in myriad ways. First, in *Buehler*, the Court found that the officers' conduct was "measured and ascending," because the plaintiff "relentlessly followed around officers for hours, disobeying their repeated and unambiguous commands that he step back at least arm's length away so as not to block the Officers' field of vision." *Buehler*, 27 F.4th at 984-85. Unlike the officers in *Buehler*, who repeatedly warned that they

would arrest the plaintiff if he continued interfering, Deputy Hart arrested Ms. Perkins without warning, immediately after she told her son and nephew that they could continue recording the incident from their driveway. *Id.* at 977-78; ROA.721 (Nephew Video at 0:04-0:21). Indeed, had Defendants given Ms. Perkins a warning for operating a motorcycle without a helmet (like the officers warned Buehler to stop his unlawful conduct), then the whole incident would have been avoided. Moreover, unlike in *Buehler*, it was *Defendants* who escalated the confrontation by telling Ms. Perkins to "Shut the fuck up! This ain't about fucking race," causing *Ms. Perkins* to call 911 to request a supervisor for her own safety. ROA.517-18 (Perkins Tr. at 73:14-74:6); ROA.228 (Dispatch Log).

Second, the *Buehler* Court relied heavily on the fact that the plaintiff's injuries (alleged mental pain and "essentially invisible" abrasions and bruises) were "comparatively negligible" and thus distinguishable from other cases where the "suspect visited the hospital later that day for treatment." *Buehler*, 27 F.4th at 986 (citing *Hanks v. Rogers*, 853 F.3d 738, 743 (5th Cir. 2017)). In contrast, here, Defendants do not contest Ms. Perkins' injuries. Unlike in *Buehler*, Ms. Perkins went to the emergency room upon being released from jail and was diagnosed with neck, back, knee, and hand injuries, and prescribed medication. ROA.519-26 (Perkins Tr.). Defendants do not contest that Ms. Perkins (unlike Buehler): endured chronic pain that left her unable to perform her job; received months of physical

therapy to recover from her injuries; and suffered from, and received treatment for, depression, anxiety, and lack of sleep. *Id.*

Third, the *Graham* analysis was materially different in *Buehler* based on the threat posed to officer safety and the risk of the suspect fleeing. For example, unlike the events in *Buehler*—which occurred during the "wee hours" of the night "on crowded Sixth Street in downtown Austin"—the instant events took place in broad daylight at Ms. Perkins' residence. *Buehler*, 27 F.4th at 976. Additionally, unlike Ms. Perkins, who was pacing back-and-forth on her own driveway, the *Buehler* plaintiff made a "sudden motion" and "lurched forward in an attempt to get away" into a crowded downtown area. *Id.* at 984. Ms. Perkins was clearly not trying to "get away" because she was at her home with nowhere to flee and had even called 911 to request a supervisor on scene.

In sum, Defendants' conduct violated clearly established constitutional rights.

III. Defendants Are Not Entitled to Qualified Immunity on D.J.'s Excessive Force Claim.

The district court correctly rejected Defendants' argument that they are entitled to qualified immunity on D.J.'s excessive force claim.

A. The district court properly applied the *Graham* factors in determining that Deputy Moring's use of force was objectively unreasonable.

D.J.'s excessive force claim is governed by the same three *Graham* factors discussed above. The district court correctly held that a reasonable jury could find for D.J. on each factor.[10] First, Defendants did not accuse D.J. of any crime while he was recording the incident from his own driveway. ROA.720. Second, the evidence—including the video recording that D.J. himself took—clearly reflects that he "was an unarmed minor who did not threaten Deputy Moring's physical safety or the safety of another police officer or the general public." ROA.1121. Indeed, Deputy Moring admitted that he had no reason to believe that D.J. had a weapon. ROA.462-63. And, as the district court recognized, although Deputy Moring later claimed that D.J. slapped his hand away, the video recording does not reflect this, and in fact shows Deputy Moring shoving D.J. backwards. ROA.720 (D.J. Video at 1:10-1:50). Third, the video reflects that D.J. did not resist, evade, or interfere with the arrest of his mother beyond filming it and narrating what was going on in a calm voice. ROA.720.

[10] On appeal, Defendants abandon their argument that D.J.'s claim is barred because he suffered only psychological or emotional harm. The Fifth Circuit has made clear that "as long as a plaintiff has suffered some injury, even relatively insignificant injuries and purely psychological injuries will prove cognizable when resulting from an officer's unreasonably excessive force." *Alexander v. City of Round Rock*, 854 F.3d 298, 309 (5th Cir. 2017) (internal quotation marks and citation omitted).

An analysis of the *Graham* factors clearly demonstrates that Defendants had a minimal interest in using force against D.J., rendering their use of force objectively unreasonable and excessive. As the district court below and other courts have recognized, it is "objectively unreasonable for a police officer to forcefully brandish a deadly weapon at citizens whom he could not reasonably have perceived to be dangerous." *Flores v. Rivas*, 2020 WL 563799, at *7 (W.D. Tex. Jan. 31, 2020) (holding that officer's actions were objectively unreasonable where he "brandished his weapon at a group of compliant children" who were unarmed and were not interfering); *see also, e.g.*, *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) ("A police officer who terrorizes a civilian by brandishing a cocked gun in front of that civilian's face may not cause *physical* injury, but he has certainly laid the building blocks for a section 1983 claim against him."); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1193 (10th Cir. 2001) (rejecting qualified immunity defense and explaining that "[p]ointing a firearm directly at a child calls for even greater sensitivity to what may be justified or what may be excessive under all the circumstances").

On appeal, Defendants concede that "courts have held that it is often unconstitutional for an officer to brandish a deadly weapon, particularly a firearm, at a minor or at an individual who is not perceived as a danger." Defs.' Br. at 40. But, according to Defendants, because a Taser can be used as a non-lethal weapon,

it is objectively reasonable as a matter of law to point one at a minor—and threaten to use it—even if that minor is not perceived as a danger and not accused of any crime. That cannot possibly be right, and at the very least, this is a fact issue for the jury to decide. Indeed, the STPSO's designee testified that pointing a Taser at a subject and threatening to use it is, in fact, a use of force. ROA.698-99 (STPSO Tr. at 40:8-41:12). In any event, as the district court also recognized, even if a Taser can be characterized as a non-deadly weapon, "all force, deadly and non-deadly, must be justified by the need for the specific level of force employed." ROA.1124. Here, because the need for force was minimal, even the threat to use a so-called non-lethal (but still very dangerous) weapon was objectively unreasonable.

Moreover, beyond his display and verbal threat to use his Taser, Deputy Moring admitted that he physically pushed D.J. in the chest. ROA.459-60 (Moring Tr. at 91:25-92:7). Defendants begrudgingly concede this fact on appeal. *See* Defs.' Br. at 41 n.15. Putting aside Defendants' argument about the display of the Taser, Deputy Moring physically pushing D.J. on its own supports a finding by a jury that Deputy Moring's actions were objectively unreasonable. *See, e.g.*, *Flores*, 2020 WL 563799, at *7 ("It is clearly established in the Fifth Circuit that even the use of relatively minor force, such as 'pushing, kneeing, and slapping' is excessive when deployed against 'a suspect who is neither fleeing nor resisting arrest.'" (quoting *Sam v. Richard*, 887 F.3d 710, 714 (5th Cir. 2018)).

B. Defendants' actions violated particularized and clearly established law.

Defendants' use of force against D.J. violated clearly established law. It has long been the law that "using force against someone who is not actively resisting arrest is in violation of clearly established law." *Muslow v. City of Shreveport*, 491 F.Supp.3d 172, 189 (W.D. La. 2020); *Konrad v. Kolb*, 2019 WL 3812883, at *9 (W.D. La. Aug. 13, 2019) (same). The Fifth Circuit has clearly established "that pushing, kneeing, and slapping a suspect who is neither fleeing nor resisting is excessive." *Sam*, 887 F.3d at 714. Here, not only was D.J. neither fleeing nor resisting, but he was not even suspected of any crime.

Moreover, with respect to Deputy Moring's display and threat to use his Taser, "[a]t least seven circuits have denied qualified immunity to police officers alleged to have brandished a firearm at compliant suspects or innocent bystanders." *Flores*, 2020 WL 563799, at *8 (surveying cases). Indeed, courts around the country have reached a "consensus" that "clearly establishes that where, as here, all *Graham* factors counsel against the use of force, it is objectively unreasonable for a police officer to brandish a deadly weapon at bystanders or compliant suspects." *Id.* at *9; *see also, e.g.*, *Baird v. Renbarger*, 576 F.3d 340, 346 (7th Cir. 2009) (rejecting qualified immunity defense and noting that "these cases so often involve children because they are much less likely to present the police with a credible threat").

IV. Defendants Are Not Entitled to Qualified Immunity on D.J.'s First Amendment Claim.

With respect to D.J.'s First Amendment retaliation claim, the district court correctly denied summary judgment on qualified immunity grounds.

A. The district court properly held that D.J.'s First Amendment rights were violated.

The elements of a First Amendment retaliation claim are (1) that the plaintiff was engaged in a constitutionally protected activity, (2) the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in the activity, and (3) the defendant's actions were substantially motivated against the plaintiff's exercise of that activity. *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002); *see also Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017) (holding that "a First Amendment right to record the police does exist"). The district court correctly held that genuine issues of material fact preclude summary judgment for Defendants on any element. On appeal, Defendants only address the first element.

Constitutionally Protected Activity. The district court held that D.J. was engaged in a constitutionally protected activity when filming the police while on his family's private property. ROA.1126. Defendants challenge this conclusion, arguing that "there is a line between filming the police, which is legal, and

hindering the police, which is not." Defs.' Br. at 34 (quoting *Buehler v. Dear*, 27 F.4th 969, 976 (5th Cir. 2022)).

Defendants' argument fails for multiple reasons. Most notably, with respect to a First Amendment retaliation claim, *Buehler* actually confirms the well-established principle that "the First Amendment guarantees, subject to reasonable limitations, a right to publicly film police." 27 F.4th at 992. *Buehler* did not hold that the plaintiff's conduct "exceeded the bounds of the First Amendment," as Defendants appear to argue. Defs.' Br. at 33. Rather, *Buehler* held that, at the time of the incident (in August 2015), Fifth Circuit law was not yet clearly established, thus entitling the defendants to qualified immunity. *Id.* at 992-93. After the August 2015 incident at issue in *Buehler* (and years before Ms. Perkins' arrest), the Fifth Circuit solidified clearly established law with respect to First Amendment retaliation claims. *See id.* (citing *Turner*, 848 F.3d 678). *Turner* described "for the future" the clearly established law "that First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions." 848 F.3d at 688. There is no dispute that D.J. was exercising his First Amendment right to record the police, and therefore the first element of the retaliation claim is easily satisfied.

Moreover, Defendants' argument improperly jettisons the district court's identification of genuine issues of material fact. These facts include that D.J. was not committing any crime, "was an unarmed minor who did not threaten Deputy Moring's physical safety or the safety of another police officer or the general public," and did not do "anything to resist, evade, or interfere with the arrest of [Ms. Perkins] beyond filming and standing relatively close to the arrest." ROA.1121-22. In other words, if "there is a line between filming the police, which is legal, and hindering the police, which is not," as Defendants argue, the disputed facts here do not establish that D.J. was "hindering the police." On the contrary, D.J. was calmly and peacefully exercising his First Amendment rights, in broad daylight, at his own home.

Causation. The district court correctly held (and Defendants do not contest) that a reasonable jury could conclude that Deputy Moring's actions would chill a person of ordinary firmness from continuing to engage in the First Amendment activity. ROA.1127; *see Weaver v. Puckett*, 896 F.2d 126, 128 (5th Cir. 1990) (noting that a failure to adequately brief an issue constitutes abandonment). The district court relied on record evidence showing that "Deputy Moring pointed his taser at D.J. and verbally threatened him while he was filming the arrest." ROA.1127. Just as an officer detaining a plaintiff and drawing a gun might chill that plaintiff from continuing to engage in protected First Amendment conduct, so

too does pointing a Taser at a teenager peacefully recording an incident, and then openly threatening to use it. *E.g.*, *Keenan*, 290 F.3d at 259.

Substantial Motivation. The district court correctly held (and Defendants do not contest) that a reasonable jury could find that Deputy Moring's actions were substantially motivated against D.J.'s exercise of his First Amendment rights. Again, Defendants do not address this element on appeal. In any event, the district court properly credited Deputy Moring's sworn admission "that he intentionally stood in front of D.J. and blocked D.J. from recording Plaintiff's arrest by stepping in front of the camera." ROA.1127-28. The summary judgment evidence supporting this element could not be clearer.

Accordingly, a reasonable jury could find that Deputy Moring retaliated against D.J.'s exercise of his First Amendment rights.

B. Defendants' actions violated particularized and clearly established law.

Defendants do not meaningfully address the Fifth Circuit's clearly established law with respect to First Amendment retaliation claims. Instead, and as discussed above, they rely solely on *Buehler*, 27 F.4th 969. That decision, which analyzed an August 2015 incident, held that the officers were entitled to qualified immunity, since the Fifth Circuit's law on First Amendment retaliation was not yet clearly established at the time of the incident. *Id.* at 992-93 (explaining that the

Buehler plaintiff engaged in constitutionally protected First Amendment activity but that the law was not clearly established at the time of the incident).

The problem for Defendants is that in 2017 (*i.e.*, after the 2015 incident at issue in *Buehler*), the Fifth Circuit pronounced clearly established law on First Amendment retaliation in *Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017). And D.J.'s First Amendment claim arose in May 2020—the time of Ms. Perkins' arrest. Thus, *Buehler*'s backward-looking analysis of clearly established law as of 2015 has no relevance to the analysis here, for an incident that occurred in 2020. Instead, *Turner* (a 2017 decision) directly controls, including its express holding that for all cases "henceforth," it is clearly established law in the Fifth Circuit "that First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions." 848 F.3d at 688; *see also, e.g.*, *Flores v. Rivas*, 2019 WL 5070182, at *16 (W.D. Tex. Aug. 11, 2019) (recognizing that *Turner* set forth clearly established law for First Amendment retaliation claims going forward); *Gray v. City of Denham Springs*, 2021 WL 1187076, at *7 (M.D. La. Mar. 29, 2021) (recognizing that, under *Turner*, a child has "First Amendment rights to record his [mother's] traffic stop, and to be free from retaliation when doing so").

Turner is directly on point. There, the Court explained in clear terms that First Amendment principles protect a citizen's right to record police engaged in official activities. 848 F.3d at 688-90. That is precisely what D.J. attempted to do when he recorded his mother's arrest from his family's own private residence.[11] There should be nothing surprising about this result. In fact, Deputy Moring testified that he *knew* at the time of the incident that "individuals have a constitutional right to record interactions with the police," and the STPSO testified that deputies are trained on that fact at police academy. ROA.560 (Hart Tr. at 131:9-18); ROA.706 (STPSO Tr. at 85:10-22).

Accordingly, Defendants are not entitled to qualified immunity on D.J.'s First Amendment retaliation claim.

V. Ms. Perkins' Claims Are Not Barred by *Heck*.

In their motion for summary judgment, Defendants asserted that Ms. Perkins' claim for excessive force was barred by *Heck v. Humphrey*, due to Ms. Perkins' underlying misdemeanor conviction for resisting. *See Heck*, 512 U.S. 477, 486-87 (holding that a plaintiff who has been convicted of a crime cannot bring a § 1983 claim challenging the constitutionality of his conviction unless that conviction has been reversed, expunged, or declared invalid). The district court

[11] Defendants do not contend—nor could they—that D.J. violated any reasonable time, place, and manner restrictions.

rejected the *Heck* defense, because, *inter alia*, Ms. Perkins was not challenging her conviction or denying that she resisted but rather was asserting that Defendants' use of force during the arrest was excessive. ROA.1104-08. The district court quoted well-established Fifth Circuit precedent holding that *Heck* does not bar claims that are "temporally and conceptually distinct from the conviction" and that "a claim that excessive force occurred after the arrestee has ceased his or her resistance would not necessarily imply the invalidity of a conviction for the earlier resistance." ROA.1106 (quoting *Lee v. Ard*, 785 F. App'x 247, 248 (5th Cir. 2019) (unpublished); ROA.1108 (quoting *Bush v. Strain*, 513 F.3d 492, 498 (5th Cir. 2008)).

Defendants have forfeited their *Heck* defense on appeal: although they make a few passing references to *Heck*, Defendants do not include it in their Statement of Issues Presented for Appeal, do not challenge the district court's legal application of *Heck*, do not devote a section of their brief to *Heck*, do not discuss controlling authority, and make no request for relief related to *Heck*. *See* Defs.' Br. at 2, 43-44; Fed. R. App. Proc. 28(a)(5), (8), and (9) (requiring appellant's argument to contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which appellant relies" and requiring conclusion "stating the precise relief sought"); *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021) ("A party forfeits an argument by . . . failing to adequately brief the

argument on appeal." (citing *Norris v. Causey*, 869 F.3d 360, 373 n.10 (5th Cir. 2017)).

Nevertheless, out of an abundance of caution, Ms. Perkins notes that there was no error in the district court's ruling. Despite repeatedly admitting that the *Heck* analysis is necessarily "fact-intensive," Defs.' Br. at 28-29, Defendants do not grapple with the specific facts of Ms. Perkins' arrest. As the district court found, Ms. Perkins' excessive force claim does not require Ms. Perkins to deny that she resisted a legal arrest and so is not barred by *Heck*.[12]

First, *Heck* does not preclude Ms. Perkins' claim that Defendants' decision to force her to the ground and pin her against the concrete was excessive because her level of resistance did not justify that amount of force. A plaintiff's conviction for resisting arrest is "distinct" from a § 1983 claim that the level of force used to overcome plaintiff's resistance was excessive. *See Champagne v. Martin*, 2019 WL 3430457, at *5 (E.D. La. 2019). "The fact that a suspect or arrestee is resisting does not give the arresting officers free [rein] to abuse the limits of the Fourth Amendment." *Marquar v. Allen*, 2013 WL 11522048, at *3 (S.D. Miss. Apr. 2, 2013).

[12] Defendants are wrong that the district court "disregarded" the video evidence. Defs.' Br. at 29. To the contrary, the district court cited the videos throughout its Order and reached its *Heck* ruling "based on the evidence before the Court."

Second, *Heck* does not bar Ms. Perkins' claim based on the force used by Deputy Hart after she stopped resisting. Deputy Hart applied potentially lethal force to Ms. Perkins throat after she was handcuffed and had ceased resisting, at a time when Deputy Hart admits she was "not a danger" and "not a flight risk." ROA.571-72 (Hart Tr. at 169:19-170:10). Thus, Ms. Perkins' claim is not *Heck* barred, because it is "temporally and conceptually distinct" from the conviction. *Bush*, 513 F.3d at 498; *see also Sampy v. Rabb*, 2021 WL 5279480, at *6 (W.D. La. Aug. 26, 2021) (R&R) ("Plaintiff's claims arising out of officer conduct which commenced after Plaintiff ceased resisting (whenever the jury determines that to be) are not *Heck* barred."), *adopted in relevant part*, 2021 WL 4471621, at *1 (W.D. La. Sept. 29, 2021).

CONCLUSION

For the foregoing reasons, Ms. Perkins respectfully requests that the Court affirm the denial of summary judgment and remand this interlocutory appeal for trial.

Dated: December 14, 2022

Respectfully submitted,

/s/ *Keith Y. Cohan*
Keith Y. Cohan
Ryan M. Goldstein
Sean D. Johnson
REID COLLINS & TSAI LLP
1301 S. Capital of Texas Hwy, Suite C-300
Austin, Texas 78746
T: (512) 647-6100
F: (512) 647-6129
kcohan@reidcollins.com
rgoldstein@reidcollins.com
sjohnson@reidcollins.com

Nora Sam Ahmed
American Civil Liberties Union Foundation of Louisiana
1340 Poydras Street, Suite 2160
New Orleans, LA 70112
T: (504) 522-0628
nahmed@laaclu.org

Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

Pursuant to FED. R. APP. 25, I certify that on December 14, 2022, the foregoing document was served upon all counsel of record for all parties, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/, upon the following registered CM/ECF users, at the following email addresses:

Chadwick W. Collings	ccollings@millinglaw.com
Sarah A. Fischer	sfisher@millinglaw.com

Counsel also certifies that on December 14, 2022, the foregoing instrument was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/.

/s/ *Keith Y. Cohan*
Keith Y. Cohan
Counsel for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 12,975 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Word in 14 point Times New Roman font.

Date: December 14, 2022

/s/ *Keith Y. Cohan*
Keith Y. Cohan
Counsel for Plaintiff-Appellee