Case No. 19-10013

In the United States Court of Appeals
Fifth Circuit

Jacqueline Craig
Individually and on behalf of minors J.H., K.H., and A.C.
Brea Hymond
Plaintiffs-Appellees

v.

William D. Martin
Defendant-Appellant

Appeal from the
United States District Court, Northern District of Texas, Fort Worth Division
Hon. John H. McBryde, Presiding
Civil Action No. 4:17-CV-1020-A

Appellees' Petition for Rehearing En Banc

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Certificate of Interested Persons

(1) Case No. 19-10013; *Craig v. Martin*

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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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J.H., K.H., A.C.
Brea Hymond
Plaintiffs-Appellees

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s/ Matthew J. Kita
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FRAP 35 Statement

Appellant Craig Martin arrived in a residential neighborhood to find a Black family asserting that a man had grabbed and choked her seven-year-old child. The man accused of assaulting the boy complained to Martin that the child had been littering. When the boy's mother, Appellee Jacqueline Craig, told Martin that the man did not have the right to put his hands on her son and choke him, Martin responded, "Why not?" Minutes after this provocation, Martin forced Craig to the ground and shoved a taser into her back. Then he grabbed one of Craig's daughters and forced her face toward the ground, hit another daughter in the throat, and kicked the legs of a third daughter into a police car when she was trying to follow Martin's instruction to get into the car. The district court denied Martin's qualified immunity on summary judgment, Martin appealed to this Court, and the panel reversed.

Rehearing en banc is warranted in this case because the panel decision conflicts with the decisions of the Supreme Court of the United States in *Johnson v. Jones*[1] and *Scott v. Harris.*[2] On interlocutory appeal from a denial

[1] *Johnson v. Jones*, 515 U.S. 304 (1995).

[2] *Scott v. Harris*, 550 U.S. 372 (2007).

of qualified immunity on summary judgment, the panel replaced both the plaintiffs' allegations and the district court's interpretation of the video evidence with its own version of the facts. Departures from the plaintiff's version of events and the district courts factual determinations on summary judgment are permissible only when blatantly contradicted by the record. In this case, the panel did not find a blatant contradiction, nor could the panel have done so on the evidence before it.

Rehearing en banc is also warranted because of the departure from a settled rule of law clearly established by this Court's prior jurisprudence. The panel decision must not stand because it contradicts and muddies the clear rule of this Court's prior jurisprudence. Citing prior precedent, this Court has underscored that it is "clearly established that violently slamming or striking a suspect who is not actively resisting arrest constitutes excessive use of force."[3] This Court reiterated that "it was clearly established at the time of [an] incident [in 2015] that pushing, kneeing, and slapping a suspect who is neither fleeing nor resisting is excessive."[4] In this case, Martin

[3] *Darden v. City of Fort Worth*, 880 F.3d 722, 733 (5th Cir. 2018) (citing *Newman v. Guedry*, 703 F.3d 757, 762–63 (5th Cir. 2012); *Bush v. Strain*, 513 F.3d 492, 501–02 (5th Cir. 2008)).

[4] *Sam v. Richard*, 887 F.3d 710, 714 (5th Cir. 2018).

violated "clearly established" law because he tased Craig and forced her to the ground, forced one daughter's face to the ground, and kicked a third daughter even though none of them were resisting in any way.

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Issues Presented

1. On interlocutory appeal from a denial of qualified immunity, did the panel err by discarding the plaintiff's allegations and the district court's determination that the record revealed genuine issues of fact?

2. Did the panel err in determining that Martin's use of force violated the Fourth Amendment and clearly established law?

Statement of Proceedings and Disposition

Chief Judge Owen accurately summarized the proceedings and disposition of this appeal in the first paragraph of the panel's opinion.[5] Appellee Jacqueline Craig and four of her children sued Appellant William D. Martin, an officer with the Fort Worth Police Department, asserting claims for unlawful arrest, bystander injury, and excessive use of force.[6] Martin moved for summary judgment on his qualified-immunity defense to Appellees' excessive-force claims,[7] which the district court denied.[8] This interlocutory appeal followed.[9] A panel consisting of Chief Judge Owen, and Judges Barksdale and Duncan reversed the district court's order and rendered judgment in Martin's favor on these claims.[10]

Importantly for purposes of this petition, Martin's brief in support of his motion for summary judgment on qualified immunity,[11] as well as

[5] Panel Op., p. 1.

[6] ROA.10.

[7] ROA. 316–344.

[8] ROA.465–66.

[9] ROA.485.

[10] Panel Op., p. 1

[11] ROA.316–344.

Appellees' brief in opposition,[12] relied heavily on videos of the encounter, one taken from a camera that Martin's wore, one taken from Appellee Hymond's mobile phone, and a compilation video that synchronized the two.[13] In denying summary judgement, the district court stated: "It may well be that a jury would determine that Martin did not use excessive force in the arrests he made on the date in question; however, based on the record, including the video evidence, the court is unable to determine as a matter of law that Martin is entitled to qualified immunity." The District Court explained, "[a]s the Fifth Circuit has recently held, where the video evidence is too uncertain to discount the plaintiff's version of what transpired, the matter should not be determined on motion for summary judgment."[14]

The panel disclaimed authority to review on interlocutory appeal the "genuineness" of "factual disputes," *i.e.*, whether a rational juror could find a legitimate dispute as to a given fact.[15] But then the panel did just that,

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[12] ROA.412–436.

[13] ROA.371. These videos can be viewed at https://tinyurl.com/y79p6a97.

[14] ROA.465-66 (citing *Darden v. City of Fort Worth, Tex.*, 880 F.3d 722, 730 (5th Cir. 2018)).

[15] Panel Op. at 4–5 (emphasis in original) (quoting *Wagner v. Bay City*, 227 F. 3d 316, 320 (5th Cir. 2000)).

rejecting the district court's view that the video gave rise to factual disputes that were genuine and replacing the plaintiffs' version of events and the district courts conclusion that the video was not inconsistent with the plaintiffs' version of events--all on an interlocutory appeal of a denial for qualified immunity on summary judgment.

Statement of Necessary Facts

The panel's opinion stated that the video evidence in the record "blatantly contradict[ed] the [Appellees'] allegations" but did not state which allegations it contradicted.[16] Appellees' complaint, as well as its brief in opposition to Martin's motion for summary judgment contained the following allegations, which are reprinted nearly verbatim here, along with a citation to where the allegations are confirmed on the videos.

Craig called the police after her neighbor, Itamar Vardi, admitted to choking her son for accidentally dropping raisins on the sidewalk in front of Vardi's home. Craig waited for law enforcement to arrive with several members of her household, including her daughter, then nineteen-year-old, Brea Hymond who began recording the encounter. While waiting for law enforcement to arrive, Craig can be seen in the recording preventing another man from confronting Vardi. She reassured the man that she had contacted police and asked that he allow law enforcement to deal with the assault on her son.[17]

[16] Panel Op. at 5, 7–9 (citations and internal quotations omitted).

[17] ROA.421; Hymond Video at 0:00–7:05.

When Martin arrived at the location of the incident, he spoke with Vardi briefly. According to Martin's report, Vardi admitted to committing felony assault on the minor stating he "approached the child and grabbed his arm and told him to pick up the trash." When the child refused, Vardi admitted that he grabbed the child by the back of the neck and demanded that the child pick up the trash.[18]

Martin then turned his attention to Craig who explained that Vardi had assaulted her son. To that, Martin responded, "Why don't you teach your son not to litter?" Plaintiff Craig answered that even if he did litter that did not give a stranger the right to grab or choke her son. Martin responded "Why not?" Craig, upset by this response, stated, "Because it doesn't!" Defendant Martin informed Craig that if she continued to yell at him she would "piss [him] off and then [he would] take her to jail."[19]

Following this statement, then-fifteen-year-old Appellee J.H. turned to her mother with her back to Martin and attempted to end the encounter. Without any explanation or justification, Defendant Martin grabbed J.H. from behind and shoved her to the side. Defendant Martin then grabbed

[18] ROA.421–422; Martin Video at 0:57; Hymond Video at 11:45.

[19] ROA 421–22; Martin Video at 0:57; Hymond Video at 12:00.

Craig and threw her to the ground, drawing his taser gun and shoving it into her back while she lay prostrate on the ground.[20]

Martin then violently grabbed Plaintiff Craig's right arm and pulled it behind her back while pointing his taser at K.H. and instructed her to get down on the ground. As J.H. complied, Martin placed Craig in handcuffs while she lay face down in the street. He then approached J.H., who was lying on the ground as instructed, and straddled the top of her while grabbing the back of her neck and forcing her head to the concrete. Without any explanation or justification, Defendant Martin placed J.H. in handcuffs and lifted her from the ground by yanking her arms.[21]

Defendant Martin then walked Craig and J.H. to his squad car. Without any justification or explanation, Defendant Martin placed J.H. in the back of his car, where she had difficulty maneuvering into the vehicle with her hands cuffed behind her back. Martin grew impatient and shouted "Get in the car!" while kicking J.H.'s legs into the vehicle and slamming the door. Martin also placed Craig in the vehicle on the opposite side of J.H.

[20] ROA 421–22; Martin Video at 2:27; Hymond Video at 13:30.

[21] ROA.422; Martin Video at 2:28; Hymond Video at 13:37.

Appellee K.H., witnessing the assault on her mother and sister, attempted to intervene by placing herself in Martin's path in an attempt to block him from any further assault on members of her family. Martin, in turn, struck then fourteen year-old plaintiff, K.H., in the throat.[22]

Martin then, suddenly and without provocation, rushed Hymond, who stood at a safe distance, recording the arrest. Martin handcuffed Hymond's arms behind her back and questioned her about her age. When she failed to respond suitably, Martin hyper-extended her handcuffed arms by flexing them above her head in order to cause pain. When other officers arrived, Hymond was placed in the back of a police vehicle.[23]

[22] ROA.423; Martin Video at 4:40; Hymond Video at 16:14..

[23] ROA.423–424; Martin Video at 5:10.

Argument and Authorities

I. The panel's opinion contradicts precedent from the Supreme Court and this Court regarding the appealability of interlocutory orders.

This Court should grant this petition for en banc reconsideration because the panel did not have jurisdiction to conduct an interlocutory review of the district court's assessment of the facts in the summary-judgment record. The record does not blatantly contradict--and indeed supports--the district court's determination that genuine issues of fact exist. In its 1995 opinion in *Johnson v. Jones*, the Supreme Court unanimously held that when a district court concludes that the summary-judgment record raised a genuine issue of fact, such a decision is not subject to interlocutory appeal.[24]

Although the panel's opinion cited *Scott v. Harris* for the proposition that "if there is video evidence that 'blatantly contradicts' the plaintiffs' allegations, the court should not adopt the plaintiffs' version of the facts,"[25] there is no blatant contradiction here. As shown by the parallel citations to

[24] *Johnson v. Jones*, 515 U.S. 304, 319–20 (1995).

[25] Panel Op., p. 5 & n.7 (citing *Scott v. Harris*, 550 U.S. 372, 380–81 (2007)).

the video and plaintiff's allegations in the facts section, the two are fully consistent here.

The panel opinion deviates from Supreme Court precedent and Circuit law by treating *Scott* as a license to throw out the plaintiffs' allegations and the district court's construction of the record--and to paint a new version of the facts on a blank canvas, all on interlocutory appeal. Correcting this departure from precedent requires the full Court's intervention. As this Court noted last year, *Scott* was not a broad expansion of interlocutory review but "an exceptional case with an extremely limited holding."[26] As the Court explained in 2020, "we do not second-guess the district court's determination that there are genuine disputes of material fact, as we otherwise might . . .[W]e do not evaluate whether the district court correctly deemed the facts to be sufficiently supported; that is, whether the evidence in the record would permit a jury to conclude that certain facts are true."[27] Thus, "[w]e may not disregard Plaintiffs' version of the facts unless it is 'blatantly contradicted by the record . . .' The video evidence does not eliminate Plaintiffs' narrative that the officers knew

[26] *Aguirre v. City of San Antonio*, 995 F.3d 395, 410 (5th Cir. 2021).

[27] *Joseph v. Bartlett*, 981 F.3d 319, 331 (5th Cir. 2020).

excessive force was being applied. . .”[28] In addition, Judge Higginson’s recent dissent in *Tucker v. City of Shreveport* underscores the need for the full Court’s attention to the scope of factual review on interlocutory appeal:

> I regret not having persuaded the majority. I hope, however, our disagreement highlights the importance of recent attention given to the issue of qualified immunity and violent police-citizen encounters. From my perspective, it is not our role to second guess a district court’s assessment of factual disputes, here pretermitting resolution of uncertainties about excessive force . . . .”[29]

The full Court should take up the invitation in this case because of Appellees’ allegations regarding Martin’s actions are *confirmed* by the video evidence in the record.[30]

II. The panel erred when concluding that case law is not “clearly established” enough to put Martin on notice that his actions were unconstitutional.

This Court should also grant this petition to address the panel’s analysis of whether Martin’s actions violated the law, in the first instance, and whether the law was “clearly established” in the second. Although the panel concluded that Martin did not violate *any* law, it went on to assert that

[28] *Joseph*, 981 F.3d at 345 (citing *Scott*, 550 U.S. at 380).

[29] *Tucker v. City of Shreveport*, 998 F.3d 165, 186–87 (5th Cir. 2021) (Higginson, J., dissenting) (internal citations omitted).

[30] *See supra*, pp. 5–8.

Martin also did not violate clearly established law. And because the panel did so in a *published* opinion, it has created binding authority in this circuit that lacks a logical foundation.

Because demonstrating success on the "clearly established" law requirement—as Appellees did here—necessarily demonstrates the panel's error on both prongs, this discussion focuses on the clearly established law that placed Martin on notice about the unconstitutionality of his behavior against Appellees. In 2018, this Court *reiterated* in *Darden v. City of Fort Worth, Texas*, that "a constitutional violation occurs when an officer tases, strikes, or violently slams an arrestee who is not actively resisting arrest."[31] And later that same year in *Sam v. Richard*, this Court held that it is clearly established that "pushing, kneeing, and slapping a suspect who is neither fleeing nor resisting is excessive."[32] Notably, this holding is consistent with the law in the majority of other circuits, which have held that "force may not legitimately be used against an individual who is compliant and poses no ongoing threat to himself or others, or who is not resisting arrest, *even if he*

[31] *Darden*, 880 F.3d at 731..

[32] *Sam v. Richard*, 887 F.3d 710, 714 (5th Cir. 2018).

was initially non-compliant."[33] The panel opinion therefore not only contradicts Fifth Circuit law, but also creates a circuit split.

In this case, Martin repeatedly used force on people who were behaving lawfully, not resisting, and heeding his commands. For example:

- After provoking the entire encounter with the offensive and demeaning suggestion that it was acceptable that someone had choked Craig's young son, Martin escalated the encounter physically by putting his hands on fifteen-year-old J.H. *and* Craig to physically separate the mother and her daughter. As noted above, it is clear from the video evidence that at this point, no member of the family had done anything illegal, resistant, or non-compliant.

- Even after Martin insulted her and put his hands on both her and one of her children to force them apart, Craig did not resist in any way. Martin nonetheless forced her to the ground, shoved a taser into her back, and handcuffed her. While it appears that one of Craig's daughters, K.H. attempted to push Martin after he forcibly separated Craig and J.H., not even the panel suggest that *Craig* did anything that could justify Martin's brutality toward her.

- Martin ordered K.H. to "get on the ground," then shoved K.H's face toward the ground after she complied, then handcuffed her. At no time did K.H. resist Martin's attempt to arrest her.

- Martin kicked J.H's legs to force her into the police car. It was taking J.H. a second to get her feet into the police car not because she was resisting or failing to comply but because she was a 15-year old who did

[33] *Anthony v. Seltzer*, 696 F. App'x 79, 82 (3d Cir. 2017) (emphasis added) (citing *Edwards v. Shanley*, 666 F.3d 1289, 1295-96 (11th Cir. 2012); *Cyrus v. Town of Mukwonago*, 624 F.3d 856, 863 (7th Cir. 2010); *Krout v. Goemmer*, 583 F.3d 557, 566 (8th Cir. 2009); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902 (6th Cir. 2004); *LaLonde v. County of Riverside*, 204 F.3d 947, 960-61 (9th Cir. 2000); *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999)).

> not know how to maneuver herself into a car while handcuffed. Indeed, just before Martin kicked her, J.H. asked him: "How do I get in here?"[34]

Although these actions violate well-settled precedents from this Court that prohibit police from using *any* type of force on non-threatening, compliant individuals, the panel distinguish those decisions on the basis that they involved officers who engaged in more egregious and violent conduct.[35]

As the Supreme Court held in its 1997 opinion in *United States v. Lanier*, although "a very high degree of prior factual particularity *may* be necessary…when an earlier case *expressly* leaves open whether a general rule applies to the particular type of conduct at issue," such particularity is *not* necessary when "a general constitutional rule already identified in the decisional law applies with obvious clarity to the specific conduct in question."[36] It then poignantly stated:

> There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow

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[34] K.H.'s question and the kick she received in response can be seen at the 4:30-4:38 mark of the Martin video and the 15:42-15:43 mark of the Hymond video.

[35] Panel Op., pp. 9–14 (citing *Joseph*, 981 F.3d at 326–27, 342; *Sam*, 887 F.3d at 712, 714(5th Cir. 2018); *Darden*, 880 F.3d at 722; *Krout v. Goemmer*, 583 F.3d 557 (8th Cir. 2009); *Bush v. Strain*, 513 F.3d 492 (5th Cir. 2008)).

[36] *United States v. Lanier*, 520 U.S. 259, 271 (1997) (emphasis added).

> that if such a case arose, the officials would be immune from damages liability.[37]

And again in its 2002 decision in *Hope v. Pelzer*, this Court cautioned against the "danger of a rigid, overreliance on factual similarity," especially in a case like this one, where the unlawfulness of an officer's conduct is obvious.[38] The Court reaffirmed *Hope* and *Lanier* very recently, explaining in 2020 that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question."[39]

Because it *is* clearly established that Martin committed a constitutional violation when he made physical contact with Appellees in the absence of any reasonable suspicion that they had committed a crime, this Court, sitting en banc, should revisit its analysis of this issue, which is of obvious consequence to its qualified-immunity jurisprudence.

Conclusion

This Court should grant this petition for rehearing en banc and, after doing so, vacate the panel's opinion and judgment, and affirm the district

[37] *Lanier*, 520 U.S. at 271.

[38] *Hope v. Pelzer*, 536 U.S. 730, 742 (2002).

[39] *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (quoting *Hope*, 536 U.S. at 741).

court's order denying Martin's motion for summary judgment on qualified immunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I served a copy of this Petition on the following counsel of record via CM/ECF on March 17, 2022:

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Certificate of Compliance

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 3,313 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac in 14-point Equity Text B typeface.

Signed this 17th day of March, 2022.

s/ Matthew J. Kita
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United States Court of Appeals for the Fifth Circuit

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No. 19-10013

JACQUELINE CRAIG, INDIVIDUALLY AND ON BEHALF OF MINORS J.H., K.H., AND A.C.; BREA HYMOND,

Plaintiffs—Appellees,

versus

WILLIAM D. MARTIN,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CV-1020

Before OWEN, *Chief Judge*, and BARKSDALE and DUNCAN, *Circuit Judges*.

PRISCILLA R. OWEN, *Chief Judge*:

This case concerns the denial of qualified immunity to a police officer accused of using excessive force. Jacqueline Craig and four of her children sued Officer William D. Martin asserting claims for unlawful arrest, bystander injury, and excessive use of force. The district court denied Martin's motion for summary judgment on the excessive force claims on qualified immunity grounds. This interlocutory appeal followed. We reverse the district court's denial of qualified immunity on the excessive force claims

and render judgment in Martin's favor as to those claims. We express no opinion on the district court's dismissal of the plaintiffs' other claims, which are not part of this appeal.

I

Officer Martin received a call dispatching him to a "disturbance" in the South Division of Fort Worth. The initial 9-1-1 call came from a middle-aged male, stating that several people were on his property arguing, had refused to leave, and were intentionally throwing trash in his yard. A subsequent 9-1-1 call came from the man's neighbor Jacqueline Craig, complaining that the man had grabbed her son by the neck because the boy had allegedly littered.

Martin responded to the call alone. He activated his body camera as soon as he arrived at the scene. One of Craig's daughters, Brea Hymond, also recorded the event on her cell phone. Martin first spoke with the male complainant; Martin then approached Craig to obtain her version of the events. Craig told Martin that the man had grabbed her son, A.C., after A.C. had allegedly littered. In response, Martin asked: "Why don't you teach your son not to litter?" Craig, visibly agitated, told Martin that it did not matter whether her son had littered; the man did not have the right to put his hands on her son. Martin replied: "Why not?"

Craig started to shout at Martin after this provocation. Martin asked why she was shouting at him, to which Craig responded: "Because you just pissed me off telling me what I teach my kids and what I don't." Martin replied in a calm voice: "If you keep yelling at me, you're going to piss me off, and I'm going to take you to jail." Immediately after this exchange, J.H., Craig's fifteen-year-old daughter, stepped between Craig and Martin and put her hands on Craig's forearms. Martin grabbed J.H. and pulled her away from her mother.

Moments later, K.H., Craig's fourteen-year-old daughter, began to walk around Martin's right side; K.H. then pushed Martin in the left side of his back, using most—if not all—of her body weight. Martin pulled his taser and yelled, "Get on the ground!" Martin then allegedly "shov[ed]" his taser into the middle of Craig's back and "threw her to the ground." Craig claims that, as she was going to the ground, her "left arm and shoulder blade [were] still suspended in [Martin's] grip—causing [her] severe pain." The video does not show any throwing or slamming motion; however, it does show Martin holding Craig's left arm and releasing it as Craig slowly descends to the ground.

Martin handcuffed Craig and then walked over to J.H. Again, he shouted: "Get on the ground!" J.H., who was initially still standing, squatted to the ground as Martin moved closer to her. Martin approached her, grabbed her left arm and the back of her neck, and placed her on the ground.

Martin then walked Craig and J.H. to his vehicle. As Martin approached the rear passenger door of the vehicle, K.H. appeared from behind the back of the vehicle. She stood in front of the passenger door in an apparent attempt to block Martin from placing Craig and J.H. in the vehicle. Martin shouted: "Get back, or you're going to jail too," to which K.H. responded: "I don't care." Martin allegedly "struck" K.H. in the throat, moving her out of the way. Martin then attempted to get J.H. into the vehicle. J.H. resisted, leaving her left leg hanging out of the vehicle. Martin repeatedly told her to get in the police cruiser, but she refused. He then allegedly "kick[ed]" J.H.'s left leg into the vehicle.

Martin next went to arrest Hymond, who had been verbally harassing him throughout his arrests of Craig and J.H. Martin grabbed Hymond by the wrist, put her up against the side of the police vehicle, and attempted to wrangle her cell phone out of her hands. He handcuffed her and then put her

up against the vehicle a second time. Hymond refused to respond to Martin's questions about her name and age, so Martin raised her handcuffed arms behind her back in an attempt to obtain compliance. Hymond claims this maneuver caused "[e]xcruciating pain"; however, the video shows that the maneuver had little to any effect on Hymond. She continued to yell at Martin as he raised her arms and immediately after he lowered them. Martin then escorted Hymond into a second police vehicle that had just arrived at the scene.

Craig, individually and on behalf of her minor children—J.H. and K.H.—and Brea Hymond (collectively plaintiffs) sued Martin for unlawful arrest and excessive use of force. Craig also sued Martin on behalf of her minor child A.C. alleging injuries suffered as a bystander to the incident. The district court dismissed A.C.'s claim as incognizable; it dismissed all of the remaining plaintiffs' claims for unlawful arrest, holding Martin was entitled to qualified immunity as to those claims. However, the district court denied Martin qualified immunity on the excessive force claims, concluding that the video evidence submitted by Martin was "too uncertain" to determine whether he was entitled to qualified immunity on that claim. Martin's interlocutory appeal accordingly concerns only the excessive force issue.

II

"The denial of a motion for summary judgment based on qualified immunity is immediately appealable under the collateral order doctrine 'to the extent that it turns on an issue of law.'"[1] "[W]e can review the *materiality* of any factual disputes, but not their *genuineness*."[2]

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[1] *Flores v. City of Palacios*, 381 F.3d 391, 393 (5th Cir. 2004) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)).

[2] *Wagner v. Bay City*, 227 F.3d 316, 320 (5th Cir. 2000).

"We review the materiality of fact issues *de novo*."[3] When the district court does not specify what fact issues precluded a grant of summary judgment, as is the case here, "[w]e can either scour the record and determine what facts the plaintiff may be able to prove at trial and proceed to resolve the legal issues, or remand so that the trial court can clarify the order."[4] Given the limited record in this case and the availability of video evidence capturing the incident, we have reviewed the record rather than remanding, in order to "resolv[e] immunity questions at the earliest possible stage in litigation."[5]

Normally, "[t]he plaintiff's factual assertions are taken as true to determine whether they are legally sufficient to defeat the defendant's motion for summary judgment."[6] However, if there is video evidence that "blatantly contradict[s]" the plaintiffs' allegations, the court should not adopt the plaintiffs' version of the facts; instead, the court should view those facts "in the light depicted by the videotape."[7] At oral argument, plaintiffs' counsel conceded that the uses of force at issue are captured in the video evidence.[8]

Once a defendant properly pleads qualified immunity, the burden of proof shifts to the plaintiffs to negate the defense.[9] To meet this burden, the

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[3] *Melton v. Phillips*, 875 F.3d 256, 261 (5th Cir. 2017).

[4] *Thompson v. Upshur Cnty.*, 245 F.3d 447, 456 (5th Cir. 2001).

[5] *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam); *see also Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009).

[6] *Manis*, 585 F.3d at 843.

[7] *Scott v. Harris*, 550 U.S. 372, 380-81 (2007); *see also id.* at 378.

[8] Oral Argument at 33:08-33:35.

[9] *King v. Handorf*, 821 F.3d 650, 653 (5th Cir. 2016).

plaintiffs must establish "(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."[10]

III

The plaintiffs allege that Martin's use of force violated their Fourth Amendment right to be free from excessive force during a seizure. To prevail on a Fourth Amendment excessive force claim, a plaintiff must show "(1) an injury (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable."[11] "Excessive force claims are necessarily fact intensive; whether the force used is 'excessive' or 'unreasonable' depends on 'the facts and circumstances of each particular case.'"[12]

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[13] "Factors to consider include, 'the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.'"[14] "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are

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[10] *Gibson v. Kilpatrick*, 773 F.3d 661, 666 (5th Cir. 2014) (internal quotation marks omitted) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)).

[11] *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009) (quoting *Freeman v. Gore*, 483 F.3d 404, 416 (5th Cir. 2007)).

[12] *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

[13] *Graham*, 490 U.S. at 396.

[14] *Deville*, 567 F.3d at 167 (quoting *Graham*, 490 U.S. at 396).

tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[15] Viewing the evidence in the light most favorable to the plaintiffs, Martin's use of force against each plaintiff was not objectively unreasonable.

We first consider Martin's use of force against Craig. Martin initially grabbed Craig as he was attempting to restrain J.H., after J.H. had stepped in between Martin and Craig. Martin physically separated J.H. and Craig and let go of them both. Right then, Martin was pushed from behind by K.H. Immediately after, Martin grabbed Craig again, drew his taser, and pushed her toward the ground while maintaining a grip on her arm. As Craig went to the ground, Martin shoved the taser into her back. Although Craig initially pled that Martin "threw" her to the ground, Craig's affidavit states that Martin "shov[ed]" her to the ground, and the video of the incident shows Martin pushing Craig onto the ground while maintaining a hold on her arm. Under the circumstances, it was not objectively unreasonable for Martin to grab Craig and force her to the ground to effectuate her arrest. Martin was the only police officer at the scene, he had just been pushed from behind, and he was facing numerous people who were shouting and jostling as he attempted to separate Craig from the crowd and arrest her.

With regard to J.H., the plaintiffs argue that Martin violated J.H.'s Fourth Amendment rights when he took her to the ground, and when he allegedly kicked her leg into the police vehicle. In both instances, J.H. was not complying with Martin's commands. Physical force may be necessary to ensure compliance when a suspect "refus[es] to comply with instructions."[16] However, "officers must assess not only the need for force, but also 'the

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[15] *Graham*, 490 U.S. at 396-97.

[16] *Deville*, 567 F.3d at 167.

relationship between the need and the amount of force used.'"[17] A use of force is reasonable if an officer uses "'measured and ascending actions' that correspond[] to [a suspect's] escalating verbal and physical resistance."[18]

Martin's actions were sufficiently measured in relation to J.H.'s resistance. Martin had commanded J.H. and others to get on the ground. Although J.H. initially complied, she stood back up while Martin was handcuffing Craig. Martin approached J.H. and again ordered her to get on the ground, at which point J.H. squatted. Martin then took J.H. to the ground, applying the necessary force to restrain and handcuff her. With regard to the alleged "kicking," Martin had commanded J.H. to get into the police vehicle. J.H. continued to argue with Martin and kept her left leg outside of the vehicle. Martin used his foot to force J.H.'s leg into the vehicle because he was holding Craig with one arm and the door of the vehicle with the other. There is no indication that Martin's use of force was excessive. The plaintiffs do not allege that J.H. suffered any injury as a result of the kick. Martin's use of force in response to J.H.'s resistance was not objectively unreasonable.

We reach a similar conclusion with respect to K.H. The relevant conduct occurred just as Martin was attempting to place Craig and J.H. into his police cruiser. K.H. appeared from behind the vehicle and placed herself immediately in front of Martin, preventing Martin from placing Craig and J.H. in the vehicle. Martin yelled, "Get back, or you're going to jail, too!" K.H. stood her ground, responding, "I don't care." After this response, Martin allegedly struck K.H. in the throat. Martin's use of force moved K.H.

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[17] *Id.* (quoting *Gomez v. Chandler*, 163 F.3d 921, 923 (5th Cir. 1999)).

[18] *Poole v. City of Shreveport*, 691 F.3d 624, 629 (5th Cir. 2012) (quoting *Galvan v. City of San Antonio*, 435 F. App'x 309, 311 (5th Cir. 2010) (unpublished) (per curiam)).

out of his way, but otherwise had limited visible effect on her. On these facts, Martin's use of force was not objectively unreasonable. K.H. had assaulted Martin—pushing him in the back—earlier in the altercation, and she was interfering with the lawful arrests of Craig and J.H. at the time Martin made physical contact with her. K.H. refused to move and Martin used a relatively minimal amount of force to move her out of the way. Such conduct does not violate the Fourth Amendment.

Nor did Martin violate Hymond's Fourth Amendment rights. Hymond was shouting at Martin throughout the entire confrontation. She did not comply with any of Martin's commands or instructions. Only after Hymond refused to provide Martin with her name did Martin employ any force against her. Martin's use of force—lifting Hymond's handcuffed arms behind her back—was relatively minimal. Hymond continued to verbally deride Martin while Martin was lifting her arms and immediately after he put her arms down. Given Hymond's continued resistance, Martin's use of force against Hymond was not objectively unreasonable.

In sum, Martin's conduct in this case was not objectively unreasonable and did not violate any of the plaintiffs' respective Fourth Amendment rights. On this basis alone, Martin is entitled to qualified immunity. However, even assuming the plaintiffs could show that Martin committed a constitutional violation, Martin is nonetheless entitled to qualified immunity under the second step of the qualified immunity analysis.

IV

At the second step of the qualified immunity analysis, we consider whether Martin's use of force "violated clearly established statutory or

constitutional rights of which a reasonable [officer] would have known."[19] For a right to be clearly established, "existing precedent must have placed the . . . constitutional question beyond debate."[20] "[N]o reasonable officer could believe the act was lawful."[21] "That is because qualified immunity is inappropriate only where the officer had 'fair notice'—'in light of the specific context of the case, not as a broad general proposition'—that his *particular* conduct was unlawful."[22] Thus, "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue."[23] "[S]pecificity is especially important in the Fourth Amendment context, where . . . it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts."[24]

Here the plaintiffs have failed to provide any controlling precedent showing that Martin's particular conduct violated a clearly established right. Instead, they have pointed to several cases that discuss the excessive force issue at a "high level of generality"—precisely what the Supreme Court has

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[19] *Bush v. Strain*, 513 F.3d 492, 500 (5th Cir. 2008) (quoting *Flores v. City of Palacios*, 381 F.3d 391, 395 (5th Cir. 2004)).

[20] *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011).

[21] *Darden v. City of Fort Worth*, 880 F.3d 722, 727 (5th Cir. 2018); *see also Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019) (explaining that "the law must be *so* clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know . . . immediately" that the conduct was unlawful).

[22] *Morrow*, 917 F.3d at 875 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)).

[23] *Id.* at 876 (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam)).

[24] *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (per curiam) (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam)); *see also City of Tahlequah v. Bond*, 142 S. Ct. 9, 11-12 (2021) (per curiam).

repeatedly advised courts they cannot do in analyzing qualified immunity claims.[25]

The first case the plaintiffs identify is *Sam v. Richard*.[26] In *Sam*, the plaintiff presented evidence that he was on the ground with his hands behind his head when the officer slapped him across the face, kneed him in the hip, and then pushed him against a patrol car.[27] The court concluded such a use of force on a compliant suspect was "excessive and unreasonable," noting that "it was clearly established at the time of the incident that pushing, kneeing, and slapping a suspect who is neither fleeing nor resisting is excessive."[28]

The second case the plaintiffs rely on to show that Martin's particular conduct violated clearly established law is *Darden v. City of Fort Worth*.[29] In *Darden*, an officer threw a suspect to the ground after the suspect had placed his hands into the air in surrender.[30] Officers tased the man multiple times.[31] They choked him and repeatedly punched and kicked him in the face.[32] Not long after these actions, the man's body fell limp.[33] He had suffered a heart attack and died.[34] The court concluded that the officers' particular conduct

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[25] *See, e.g.*, *Kisela*, 138 S. Ct. at 1152-53 (quoting *City and Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 613 (2015)).

[26] 887 F.3d 710 (5th Cir. 2018).

[27] *Id.* at 712, 714.

[28] *Id.* at 714 (citing *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008)).

[29] 880 F.3d 722 (5th Cir. 2018).

[30] *Id.* at 725.

[31] *Id.* at 725-26.

[32] *Id.* at 726.

[33] *Id.*

[34] *Id.*

violated a clearly established right.[35] The court concluded that it was clearly established at the time of the incident that "a police officer uses excessive force when the officer strikes, punches, or violently slams a suspect who is not resisting arrest."[36]

The plaintiffs also cite *Joseph ex rel. Estate of Joseph v. Bartlett*.[37] In *Joseph*, multiple police officers physically struck Joseph twenty-six times.[38] The officers also tased him twice.[39] During the incident, Joseph was lying in the fetal position, was not resisting, and was continuously calling out for help.[40] Joseph eventually became unresponsive and died in the hospital two days later.[41] The court concluded that the officers used excessive force, and that their conduct violated a clearly established right.[42] The court noted that "*Darden* repeated what had long been established in our circuit: Officers engage in excessive force when they physically strike a suspect who is not resisting arrest."[43]

None of these decisions, nor any of the other decisions identified by the plaintiffs, provided Martin fair notice that his particular conduct was unlawful. The decisions in *Sam*, *Darden*, and *Joseph* would not have provided fair notice because the plaintiffs in each case were not resisting arrest when

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[35] *Id.* at 731-33.

[36] *Id.* at 732.

[37] 981 F.3d 319 (5th Cir. 2020).

[38] *Id.* at 327.

[39] *Id.* at 326-27.

[40] *Id.*

[41] *Id.* at 327.

[42] *Id.* at 342.

[43] *Id.*

the alleged unlawful conduct occurred. In all three cases, the plaintiffs had either signaled their surrender by placing their hands in the air and ceasing further movements or were lying on the ground before the alleged unlawful conduct occurred. In contrast, the plaintiffs in this case—except for Craig—were still resisting when the alleged unlawful conduct occurred. J.H. refused to get into the police vehicle when Martin allegedly kicked her leg into the vehicle. K.H. was intentionally obstructing Martin's access to the back door of his vehicle when he pushed her out of the way. Hymond was cursing, shouting, and twisting throughout Martin's attempt to effectuate her arrest. The clearly established law as identified in *Sam*, *Darden*, and *Joseph* is applicable only in situations in which the suspect is not resisting arrest. That is not the case for J.H., K.H., or Hymond here.

Martin's use of force in this case is also far less severe than the use of force in any of the cases the plaintiffs have identified. For instance, the plaintiffs point to a case from this court in which the officer slammed a nonresistant suspect's face into a nearby vehicle, breaking two of her teeth.[44] They point to a decision from another circuit in which multiple officers punched, kneed, and kicked a suspect—while he was handcuffed on the ground—severely enough to fracture the suspect's neck.[45]

Although the plaintiffs need not point to a factually identical case to demonstrate that the law is clearly established, they nonetheless must provide some controlling precedent that "squarely governs the specific facts at issue."[46] The plaintiffs have not provided such precedent here and thus

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[44] *Bush v. Strain*, 513 F.3d 492, 496 (5th Cir. 2008).

[45] *Krout v. Goemmer*, 583 F.3d 557, 561-63 (8th Cir. 2009).

[46] *Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019) (internal quotation marks omitted) (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018)).

fail to show that the law clearly established that Martin's particular conduct was unlawful at the time of the incident. They have not overcome Martin's qualified immunity defense.

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For these reasons, we REVERSE the district court's denial of qualified immunity on the excessive force claims and RENDER summary judgment in Martin's favor as to those claims.