NO. 22-1790

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOYCE DANIELS, ADMINISTRATOR OF THE ESTATE OF MARK DANIELS, DECEASED

Plaintiff-Appellant,

v.

CITY OF PITTSBURGH, et al.,

Defendants-Appellants.

On Appeal from the Final Judgment Order Dated March 30, 2022
No. 2:18-cv-01019-CB

BRIEF OF NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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INTEREST OF AMICUS CURIAE[1]

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address misconduct by law enforcement officers through coordinating and assisting civil rights lawyers. NPAP has approximately 550 attorney members practicing in every region of the United States, including a number of members who represent clients who experience police brutality, including the use of excessive force and deadly force.

Every year, NPAP members litigate the thousands of egregious cases of law enforcement abuse that do not make news headlines as well as the high-profile cases that capture national attention. NPAP provides training and support for these attorneys and resources for non-profit organizations and community groups working on police and corrections officer accountability issues. NPAP also advocates for legislation to increase police accountability and appears regularly as *amicus curiae* in cases, such as this one, presenting issues of particular importance for its members and their clients.

[1] Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting this brief, and no person other than *amicus curiae*, their members, or their counsel contributed money intended to fund preparing or submitting this brief.

INTRODUCTION

Plaintiff-Appellant brought this 42 U.S.C. § 1983 ("Section 1983") action against the City of Pittsburgh and Pittsburgh Police Officer Gino Macioce after Officer Macioce shot her son, Mark Daniels, as he was attempting to flee in the opposite direction, claiming Officer Macioce acted unreasonably and with unjustified excessive force in violation of Mr. Daniels's constitutional rights. The District Court granted summary judgment in favor of the Defendants-Appellees, finding that there were no genuine issues of material fact and that Officer Macioce acted reasonably in shooting Mr. Daniels as he ran in the opposite direction. In reaching its decision on summary judgment, the District Court relied on self-serving statements made by the police officers involved in the shooting, treating their statements as fact, and ignored evidence that contradicted their version of events. Because the District Court inappropriately relied on the officer statements without questioning the credibility of the officers or the veracity of their statements, this Court should reverse the District Court's Order and Opinion granting summary judgment and remand this case for trial, or, in the alternative, for further proceedings.

SUMMARY OF THE ARGUMENT

Police officers who provide statements during internal affairs investigations or in the wake of a critical incident may be incentivized to protect themselves and their fellow officers from suffering the consequences of their misconduct by

constructing a narrative in which their actions were justified. Research has shown that there are some officers who not only misrepresent facts when giving unsworn statements, but do so when giving sworn testimony, including when they apply for warrants and testify during depositions and at trial. Often times, an officer's statement is the only narrative available following a deadly force incident, and when contradictory evidence such as video footage and witness statements are unavailable, it can become the dominant narrative. In a number of recent high-profile cases of police killings and excessive force, evidence released after the critical incident proved that the police statements made after the incidents were completely or partially false. Due to the prevalence of police dishonesty, police statements should not be categorically accepted and trusted, rather, they should be viewed with the same level of scrutiny as any other witness statement.

Defendant officers are not entitled to summary judgment just because their use of excessive force may seem reasonable under their version of events if there is evidence that could support the plaintiff's alternative version of events. In cases where the plaintiff has been killed, it is even more important that the record be reviewed as a whole since the one person most likely to contradict the officer's statement is not there to present their version. Courts must consider whether a rational fact-finder could disbelieve the officer's statements based on all of the evidence. Here, the District Court failed to apply the correct summary judgment

standard because it accepted the officers' self-serving statements without questioning the credibility of the officers or the veracity of their statements.

ARGUMENT

I. Research and Recent High-Profile Police Killings Show Law Enforcement Officers May Lie and Misrepresent Facts in Deadly Force Incidents

Some police officers manage their evidence-gathering, interrogation, and reporting responsibilities without neutrality and impartiality.[2] This is particularly true where police are investigating a critical incident or a situation that involves alleged wrongdoing by an officer.[3] Officers who give statements during internal affairs investigations may be prompted to provide narratives that exonerate themselves and other officers, and have little incentive to provide an account of the situation that would expose their misconduct or that of their colleagues.[4] Even in more formal settings, such as when testifying under oath, the benefits of lying or embellishing may outweigh the potential costs of telling the truth for many

[2] Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. Crim. L. & Criminology 329, 342–343 (2013).
[3] Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 Harv. L. Rev. Forum 235, 238 (2015).
[4] *Id.* at 238-39; Rachel Moran, *Contesting Police Credibility*, 93 Wash. L. Rev. 1339, 1366 (2018) ("[I]nternal affairs review is often biased—implicitly or, not uncommonly, overtly—in favor of the officers, and conducted with the intent to justify the officers' behavior.").

officers. Although police officers may occasionally be held accountable for perjury through prosecution and for misrepresenting the facts through institutional discipline, the vast majority of misrepresentations advanced by police likely go undiscovered.[5] Therefore, courts reviewing and considering the veracity of police statements must scrupulously question the statements and carefully consider arguments raised by plaintiffs that may indicate inconsistencies and misrepresentations, especially when no video footage or corroborating witnesses are available. When courts accept police statements without recognizing the potential for self-serving embellishments or misrepresentations, there is a significant risk that officers will skirt accountability for constitutional violations.

A. Critical Incident and Internal Affairs Investigations May Be Biased in Favor of Law Enforcement and Not Produce Accurate, Truthful Accounts of Officer Conduct in Police Killings.

The structure of most critical incident investigations has the potential to prompt officers to misrepresent the facts in their initial statements following a use of force incident. First, officers typically benefit from a sympathetic investigator seeking and taking their statement in a critical incident investigation. Most deadly force incidents are investigated internally by the officer's department or a law

[5] Morgan Cloud, *The Dirty Little Secret*, 43 Emory L.J. 1311, 1313 (1994).

enforcement officer from another agency.[6] For example, in his case, Defendant Macioce's statement was taken by law enforcement officers from the Allegheny Police Department.[7] Police investigators from different departments often have close ties to the agency of the officer they are investigating and will be generally inclined to view an incident through the lens of the officer they are tasked with investigating due to their background in law enforcement.[8] In all, police investigators are far from objective, let alone adversarial, when they are taking officer statements. The inherent bias of some police officer investigators makes it unlikely that they will lead the conversation in a direction that will expose the officer's misconduct or press on inconsistencies.[9]

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[6] Moran, *supra* n. 4, at 1365 ("[I]n most police departments, complaints of police misconduct are reviewed by internal affairs units with the same police department."); Richard Rosenthal, *Independent Critical Incident Agencies: A Unique Form of Police Oversight*, 83 Alb. L. Rev. 855, 923-924 (2020) (noting prevalence of independent investigative bodies staffed by former or current police).

[7] In Pittsburgh, the Allegheny Police Department typically investigates deadly force incidents involving officers in the Pittsburgh Police Department. Rich Lord, *When police shoot or kill, who investigates? Pittsburgh, police union wrestle over process*, Public Source (June 11, 2020), https://www.publicsource.org/when-police-shoot-or-kill-who-investigates-pittsburgh-police-union-wrestle-over-process/.

[8] Rosenthal, *supra* n. 6, at 924-925; Moran, *supra* n. 4, at 1366.

[9] *See, e.g.,* Merrick Bobb, *Civilian Oversight of the Police in the United States*, 22 St. Louis U. Pub. L. Rev. 151, 156-57 (2003) ("[M]ore troubling still, investigators, at times, may use leading questions that seem to signal to the officer what he is supposed to say in order to get off the hook."); Katz, *supra* n. 3, at 238.

Additionally, officers are usually accorded significant protections in these investigations, including a cool down period of several days before they are required to provide a statement, the assistance of counsel in preparing any statement, and the opportunity to review other evidence prior to making a statement.[10] The combination of these factors facilitates an officer's ability to construct a favorable narrative that will help them avoid accountability.[11] Fortunately, the increased use of body cameras and civilian cellphone footage has revealed how often police statements made in the early stages of a critical incident investigation are false.

B. Data and High-Profile Incidents Reveal The Prevalence of Police Dishonesty.

Police dishonesty is a prevalent issue across the United States with prosecutors and judges estimating officers committed perjury in up to 20% of the cases in which they testify.[12] They also may make misrepresentations in their

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[10] *See e.g.,* Stephen Rushin, *Police Union Contracts*, 66 Duke L.J. 1191, 1209 (2017); Eli Hager, *Blue Shield: Did you know police have their own Bill of Rights*, The Marshall Project (Apr. 27, 2015), https://www.themarshallproject.org/2015/04/27/blueshield?utm_medium=email&utm_campaign=newsletter&utm_source=openingstatement&utm_term=newsletter-20150428-168.

[11] Hager, *supra* n. 10.

[12] Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. Colo. L. Rev. 75, 107 (1992) ("In Chicago, a survey of prosecutors, judges, and defense attorneys

statements to obtain warrants,[13] as demonstrated by the four officers who were recently indicted for providing false statements to conduct the no-knock raid that killed Breonna Taylor.[14] Though the problem exists in both criminal and civil contexts and at every stage of legal proceedings, it is particularly rampant in the wake of a deadly force incident where an officer's conduct is the focal point of the investigation.

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estimated that police officers commit perjury in 20% of the cases in which they testify."); Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. Times (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html ("As part of a recent New York Times investigation, New York City judges and prosecutors identified more than twenty-five occasions between 2015 and 2018 where critical testimony from New York City police officers in trials, grand jury proceedings, and investigations was "'probably untrue.'"); John Kelly and Mark Nichols, *We found 85,000 cops who've been investigated for misconduct. Now you can reach their records.*, USA Today (Apr. 24, 2019), https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/ (records obtained from thousands of law enforcement agencies and prosecutors across the country found "at least 2,227 instances of perjury, tampering with evidence or witnesses or falsifying reports" and "418 reports of officers obstructing investigations, most often when they or someone they knew were targets").

[13] Stephen W. Gard, *Bearing False Witness: Perjured Affidavits and the Fourth Amendment*, 41 Suffolk U. L. Rev. 445, 448 (2008) ("[M]any of the same empirical investigations upon which scholars base their conclusion that police perjury constitutes a serious problem in these other contexts also document widespread perjury by law enforcement officers in warrant affidavits.") (citing studies commissioned by the White House, Congress, Department of Justice, New York City, and Los Angeles on law enforcement lying to obtain warrants).

[14] Nicholas Bogel-Burroughs, *Federal Officials Charge Four Officers in Breonna Taylor Raid*, N.Y. Times (Aug. 4, 2022), https://www.nytimes.com/2022/08/04/us/breonna-taylor-officers-charged.html.

There are a number of high-profile examples of an initial police statement in a deadly force incident being disproven by video footage. Following the 2015 killing of Walter Scott in North Charleston, South Carolina, Officer Michael Slager claimed that Mr. Scott "grabbed [his] Taser" and that he responded to this alleged threat by shooting Mr. Scott in the chest.[15] The North Charleston Police Department initially supported and amplified the officer's account of the facts.[16] It was not until civilian video footage of the incident surfaced that the officer's lies were exposed. As the video revealed, Officer Slager shot Mr. Scott four times in the back while he was running away and then planted the Taser near Mr. Scott's body.[17]

In Chicago, five separate police officers provided statements that Laquan McDonald lunged aggressively towards Officer Jason Van Dyke before Mr. McDonald was shot 16 times. However, dashboard camera footage released 13 months after the incident showed Mr. McDonald made no movements in the direction of any officer at the scene.[18] In fact, Mr. McDonald was trying to walk

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[15] Michael E. Miller, Lindsey Beter, & Sarah Kaplan, *How a Cellphone Video Led to Murder Charges Against a Cop in North Charleston, S.C.*, Washington Post (Apr. 8, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/04/08/how-a-cell-phone-video-led-to-murder-charges-against-a-cop-in-north-charleston-s-c/.

[16] *Id.*

[17] *Id.*

[18] Monica Davey, *Officers' Statements Differ from Video in Death of Laquan McDonald*, N.Y. Times (Dec. 5, 2015),

past the officers and even veered away from them as he passed.[19] Similarly, the Minneapolis Police Department's ("MPD") initial statement following the murder of George Floyd was proven false. MPD characterized Mr. Floyd's death as a "Man Dies After Medical Incident During Police Interaction."[20] The statement did not mention that officers had been restraining Mr. Floyd on the ground, let alone the knee Officer Derek Chauvin forced upon Mr. Floyd's neck and back for over nine minutes. Body camera and witness footage later exposed that MPD's initial statement drastically mischaracterized the officers' misconduct.

While law enforcement is a profession the demands integrity, police officers regularly fall short of the job's expectations for honesty. The prevalence of police dishonesty reveals that police statements should not be unconditionally trusted, particularly when they are made in the context of an internal affairs investigation or critical incident review. Instead, police statements should be held to equal scrutiny to any other witness or party statement, especially where conflicting evidence exists.

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https://www.nytimes.com/2015/12/06/us/officers-statements-differ-from-video-in-death-of-laquan-mcdonald.html.

[19] *Id.*

[20] Eric Levenson, *How Minneapolis Police First Described the Murder of George Floyd, and What We Know Now*, CNN (Apr. 21, 2021), https://www.cnn.com/2021/04/21/us/minneapolis-police-george-floyd-death/index.html.

II. An Officer Cannot Prevail on Summary Judgment Based on Their Version of Disputed Facts, Particularly in Death Cases.

A defendant's motion for summary judgment must be denied if there is a genuine dispute of fact. *Lamont v. New Jersey*, 637 F.3d 177, 181 (3d Cir. 2011) (internal citation omitted). In determining whether a dispute of fact exists, the court reviews the record as a whole and must "draw all reasonable inferences" in favor of the plaintiff. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Abraham v. Raso*, 183 F.3d 279, 287 (3d Cir. 1999). In a police shooting case, an officer is not entitled to summary judgment when their use of force would be reasonable under their version of the events, but evidence exists that could arguably support the plaintiff's version of facts as well. *Emmett v. Armstrong*, 973 F.3d 1127, 1135 (10th Cir. 2020); *Smith v. Finkley*, 10 F.4th 725, 730 (7th Cir. 2021); *Kelley v. O'Malley*, 787 F. App'x 102, 105 (3d Cir. 2019). In cases where the plaintiff died as a result of the challenged use of force, reviewing evidence in the record as a whole becomes particularly important.

A. Officers Making Statements After Deadly Force Incidents May Have Questionable Credibility and Their Statements Should Not Be Instinctively Accepted at Summary Judgment.

On summary judgment, "a court should avoid simply accepting what may be a self-serving account by the officers" and "be cautious to ensure that the officers

are not taking advantage of the fact that the witness most likely to contradict their story—the person shot dead—is unable to testify." *Lamont*, 637 F.3d at 181-82 (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) (internal citations omitted)). As discussed in Section I, *supra*, police officers may not always be telling the whole truth in their statements and courts have incorporated that reality into their summary judgment jurisprudence in deadly force cases.

This Court has considered the veracity of police statements regarding whether a decedent posed a threat to officers at the summary judgment stage in *Lamont v. New Jersey*. 637 F.3d 177 (3d Cir. 2011). In that case, New Jersey state troopers shot and killed a man who they perceived made a threatening, sudden movement to grab a weapon. The troopers insisted that they stopped shooting as soon as the perceived threat had abated. Even though the decedent was not able to provide a conflicting account, the Court acknowledged that it could not simply take officers at their word. *Id.* at 182. Instead, the Court explained the trial court had an obligation to look at circumstantial evidence to determine whether the troopers were reasonably responding to a continued threat. *Id.* One piece of evidence the Court found created a genuine issue of disputed fact of the troopers' account was ballistic evidence of the number of rounds discharged into the man's backside. *Id.* at 184 ("11 of the 18 bullets that struck Quick hit him from behind. The troopers

try to explain this by saying that Quick spun around and fell to the ground as the final shots were fired. Frankly, this explanation sounds a bit far-fetched.").

The Second Circuit has applied similar scrutiny in deadly force cases. In *O'Bert v. Vargo*, the Second Circuit rejected multiple self-serving officer accounts in favor of circumstantial evidence that could be found in other places in the summary judgment record. 331 F.3d 29 (2d Cir. 2003). Two officers provided deposition testimony that they believed that the decedent was armed based on the fact that his right hand was not visible at the time they fired the fatal shots. The Court first noted that the summary judgment standard required they accept the plaintiff's version of the events, not the defendants' version as outlined in their deposition testimony. *Id.* at 38 ("To the extent that Vargo's version of the events is disputed by plaintiff, Vargo's version forms no proper basis for this appeal…"). Next, the Court looked at all of the evidence that could support plaintiff's version of the events, including the logistic feasibility of the decedent being able to acquire a weapon between when he was initially observed unarmed and when the officer fired the shots. Even though the officers argued certain facts were immaterial, including whether the officer or decedent lunged at the other first, the Court looked at the totality of the evidence in developing the plaintiff's version of the facts and found a jury could believe that evidence over defendant's testimony. *Id.* at 40 ("On plaintiff's version of the facts, in which Vargo shot to kill O'Bert while knowing

that O'Bert was unarmed, it is obvious that no reasonable officer would have believed that the use of deadly force was necessary.").

When analyzing circumstantial evidence, courts consider whether a rational fact-finder could disbelieve the officer's testimony based on direct or circumstantial evidence. *See Lamont*, 637 F.3d at 181-82 (the court "must also look at the circumstantial evidence that, if believed, would tend to discredit the police officers' story, and consider whether this evidence could convince a rational fact finder that the officers acted unreasonably") (quoting *Scott*, 39 F.3d at 915) (internal citation omitted); *O'Bert v. Vargo*, 331 F.3d 29, 37 (2d Cir. 2003) (same); *Elix v. Synder*, No. CIV-09-170-C, 2011 U.S. Dist. LEXIS 115185, at *16-18 (W.D. Okla. July 22, 2011) (circuit courts have embraced "the importance of circumstantial evidence at the summary judgment stage to determine whether a rational fact-finder could disbelieve part or all of the officer's version of events"). For example, the court may review medical reports, contemporaneous witness statements, physical evidence, expert testimony proffered by the plaintiff, and any other evidence in the record in the light most favorable to the plaintiff to determine whether a reasonable fact-finder would disbelieve the officer's testimony. *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994).

Further, a court must consider the various ways in which an officer's statements may benefit the officer, fellow officers, or the officer's agency. *See,*

e.g., Stephens v. N.J. State Police (In re Gibbons), 969 F.3d 419, 433 n.134 (3d Cir. 2020) (McKee, J., dissenting) (finding officer's testimony to be self-serving even though it undermined his qualified immunity claim because it was given "to establish that he exercised reasonable care before shooting"). Here, as in *Lamont* and *O'Bert*, officer statements must be acknowledged for what they are: self-serving accounts that present the defendant's version of the facts. Moreover, circumstantial evidence that casts doubt on a defendant's version of the events must be credited. Similar to *Lamont*, the summary judgment record in the District Court had ballistic evidence that Officer Macioce fired at Plaintiff when he was running in the opposite direction. That evidence is material because a reasonable fact-finder could view it and disbelieve Officer Macioce's account that he reasonably believed Plaintiff was armed and posed an immediate threat to safety. Moreover, as discussed in *O'Bert*, the question of who moved first, whether a gun was visible, and a number of other disputed facts supported by evidence in this case, all could lead a jury to disbelieve Officer Macioce's statement.

B. The Lower Court Incorrectly Applied the Summary Judgment Standard.

Here, the District Court incorrectly applied the summary judgment standard in several ways because it uncritically accepted the officers' self-serving statements. The Court should not have made a determination about the plausibility

of the Plaintiff's version of events simply because it preferred the version of events presented in the officers' self-serving statements. As this Court in *Abraham* stated, "a court should not prevent a case from reaching a jury simply because the court favors one of several reasonable views of the evidence. The judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 183 F.3d 279, 287 (3d Cir. 1999) (internal citation omitted). Yet, the District Court commented that the Plaintiff's narrative was "seeming[ly] implausib[le]," Final Judgment Order of March 30, 2022 (ECF 118) at 3 n. 4, and stated that the Plaintiff's formulation of the rights the officers violated "bear[ed] little resemblance to the facts and determinations" made by the officers. ECF 118 at 9. However, whether a plaintiff's version of events is "considered plausible or implausible" will depend "on the believability of the witnesses when they testify," not whether the District Court finds a narrative implausible at the summary judgment stage. *Elix* at *20; *see also Darchak v. City of Chicago Board of Education*, 580 F.3d 622, 631 (7th Cir. 2009) ("[The plaintiff's] testimony presents specific facts, even if that testimony may be less plausible than the opposing litigant's conflicting testimony (a question we need not-nay, cannot-reach)."). The District Court erred by acting as fact-finder in making determinations about the plausibility of the Plaintiff's version of events.

The District Court also erred by acting as fact-finder when making credibility determinations about the disputed self-serving officer statements. When considering the summary judgment motion, the District Court not only erroneously determined that the Plaintiff's version of events was implausible when weighed against the evidence presented by the officers, but that the evidence presented—self-serving statements made during officer interviews—was credible.[21] Both determinations should be left for the fact-finder. *Suarez v. City of Bayonne*, 566 F. App'x 181, 186 (3d Cir. 2014) (finding that the district court's grant of summary judgment "amounted to a determination that [the plaintiff's] deposition testimony was not credible and that the evidence in the Detectives' favor outweighed that in favor of [the plaintiff], two determinations that it was not permitted to make at summary judgment."); *see also Washington v. Haupert*, 481 F.3d 543, 549 (7th Cir. 2007) (stating that "whether the [plaintiffs'] story is 'implausible' rests on whether they are credible, and we are not in a position to make that assessment").

It is clear from the District Court's recitation of the facts that it determined that the officers' self-serving statements were credible and, as such, relied upon them in making its decision. *See e.g.,* ECF 118 at 2 (claiming the "veracity of

[21] The District Court repeatedly refers to the officer statements as "unrefuted" evidence, ECF 118 at 3, 8 n. 7, 9-10, even though Plaintiff has either provided evidence disputing the officers' self-serving statements or has not been given an opportunity to further develop evidence that would do so because the request to extend discovery was denied.

[Officer Macioce's] statements" was confirmed by his "sworn affidavit"). Further, the District Court repeatedly refers to the officers' version of events as "true" or "a given." ECF 118 at 5-6 (stating that the Plaintiff attempting to evade arrest by flight is "true in this case" and that it is "a given" that the Plaintiff was "violent or dangerous"). The District Court erred when it acted as fact-finder and made determinations about the credibility of the officers' statements.

Finally, the District Court failed to consider evidence that would have discredited the self-serving statements made by officers. Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment should only be granted after the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" have been reviewed and "show that there is no genuine issue as to any material fact." *Washington*, 481 F.3d at 547; Fed. R. Civ. P. 56. Following the fundamental principle that reasonable inferences must be drawn in favor of the nonmoving party, courts "should [] acknowledge[] and credit[]" such evidence presented by the plaintiff to the extent that evidence contradicts the self-serving statements made by officers. *Tolan v. Cotton*, 572 U.S. 650, 660 (2014). In this case, however, Plaintiff was not given an opportunity to extend discovery and collect additional evidence that would raise further doubt about the officers' version of events. In deadly force cases, in particular, video

evidence like body camera, dashboard camera, and bystander footage, and witness testimony have become crucial for contradicting officer statements and reports.

The value of Plaintiff being able to gather this evidence for the court's review cannot be overstated. For instance, in *Abraham*, this Court found that a "reasonable jury could decide [an officer] embellished" her deposition testimony after video tape evidence suggested, and her own statement given after a shooting indicated, that she simply moved out of the way of a car rather than dramatically "jump[ed]" out of the way. 183 F.3d at 293. If the video tape had not been available to the Court, it would have only had the officer's own version of events to rely upon. This Court further found that "a reasonable jury could reject [] witnesses' recollections" of a car colliding forcefully with another car as "inaccurate" based on photographs of the car that showed no damage. *Id.* Again, without the photographs, the Court would have accepted the defendants' version of events. This Court, refraining from making a credibility determination, concluded that between the physical evidence and inconsistencies in the officers' testimony, a jury could "reasonably decide to reject the security officers' testimony." *Id.* ("A jury might not believe the officers' testimony that [plaintiff] was simultaneously in front of the car, being struck by it, jumping out of the way, and firing through the driver's side window.").

Similarly, in *Jefferson v. Lias*, this Court found that after reviewing the video footage, a jury could determine that an officer was "not in danger" when a car passed by the officer, and that the officer's decision to shoot at the driver through the driver's side window "was not justified by any objective threat that [the plaintiff] posed to him or others in the area." 21 F.4th 74, 79 (3d Cir. 2021). *See also Scott*, 39 F.3d at 918 (finding plaintiff's expert testimony "specifically controverts" deposition testimony given by police officers and "creates a battle of experts on a material issue of fact, which cannot be decided at summary judgment as a matter of law"). The District Court erred when it failed to consider evidence that could have contradicted or discredited the officers' statements.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiff-Appellant's brief, this Court should reverse the District Court's Order and Opinion granting summary judgment and remand this case for trial, or, in the alternative, for further proceedings.

Respectfully submitted this 30th day of August, 2022.

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable type-volume limit and typeface requirements. Excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 4,728 words, and has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: August 30, 2022

/s/ Lauren Bonds

Lauren Bonds

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on August 30, 2022. I certify that all participants in the case that require service are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 30, 2022

/s/ Lauren Bonds
Lauren Bonds