No. 14-108

In the Supreme Court of the United States

DARON WYATT,

Petitioner,

v.

F. E. V., A MINOR, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO ADOLPH ANTHONY SANCHEZ GONZALEZ, BY AND THROUGH HER GUARDIAN AD LITEM DAVID VASQUEZ, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, contrary to this Court's precedent in *Scott v. Harris*, 550 U.S. 372 (2007) and Rule 56 of the Federal Rules of Civil Procedure, the Ninth Circuit erred when it concluded that immaterial discrepancies in a police officer's recollection of a stressful event amounted to a "genuine issue for trial" where the plaintiff offered no contradictory evidence.

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INTERESTS OF *AMICUS CURIAE*[1]

Established in 1935, the International Municipal Lawyers Association (IMLA) is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA is a nonprofit, nonpartisan, professional organization with over 2,500 members. The membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys.

Since its founding, IMLA has served as a national, and now an international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law, through education and advocacy, by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA respectfully submits this brief to stress the urgency of the need for this Court's intervention and to highlight the dangers posed by the majority decision by the Ninth Circuit en banc panel in *Gonzalez v. City of*

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Pursuant to Rule 37.2, counsel for both petitioner and respondent were notified more than 10 days before the due date of the brief of IMLA's intent to file this brief; their written consent is submitted with this brief.

Anaheim, 747 F.3d 789 (9th Cir. 2014) (Appendix ("App.") 1-57) to local, state and national law enforcement agencies and the officers who fill their ranks. Legally, the Ninth Circuit's holding renders Rule 56 of the Federal Rules of Civil Procedure essentially impotent in excessive force cases brought under 42 U.S.C. § 1983. Practically, if the decision is allowed to stand, it will subject law enforcement agencies and individual officers to dramatically increased litigation costs by removing the availability of summary judgment as an effective tool to challenge a civil rights plaintiff's evidence.

Following the Ninth Circuit's holding, in any case where a plaintiff posits *some* alternative explanation of events – whether supported by evidence or even feasible – summary judgment could never be granted in favor of an officer or a law enforcement agency. Rather, law enforcement agencies and individual officers would be forced to incur the otherwise preventable and costly expense of litigating a meritless case through trial or, alternatively, pay hefty cash settlements they can ill afford in cases of questionable merit. Either choice is unsavory to already cash-strapped law enforcement agencies and foists unnecessary hardship on law enforcement officers. Worse, the expense of both choices is borne by the public and the individual officers who serve the public.

Recognizing the immediate danger of the en banc majority's ruling, in his dissent, Ninth Circuit Chief Judge Kozinski beckoned for this Court's review, observing, "[t]he only thing this remand will accomplish is to give plaintiffs a bludgeon with which to extort a hefty settlement. The Supreme Court

should foil the plan with a swift summary reversal." (App.57)

STATEMENT OF THE CASE

Amicus adopts the Statement of the Petitioner with the following additions. When opposing the motion for Summary Judgment, the plaintiffs did not dispute that Gonzalez "stomped" on the gas pedal. (App.49; ER230) The plaintiffs did not dispute that Gonzalez "slapped" the van into drive. (App.49; ER230) The plaintiffs did not dispute that Officer Wyatt yelled at Gonzalez to stop the van, and that Gonzalez ignored the commands. (ER232, 234-235) The plaintiffs did not dispute that, at least twice, Officer Wyatt attempted to disable the vehicle, but Gonzalez hit his hand away. (ER232) Instead, without any evidentiary support and in contradiction of the facts they did not dispute, the plaintiffs argued that the van was not traveling at a speed that would have caused a reasonable officer to believe there was an immediate threat to his safety.

Employing elementary math, the plaintiffs argued that if Officer Wyatt was trapped inside the van for approximately 10 seconds and during that time, the vehicle traveled approximately 50 feet, the average speed of the van must have been 3.41 miles per hour. The plaintiffs reached this conclusion by first computing that, because "one mile is 5,280 feet and 50 divided by 5,280 is .009469697," then "50 feet is approximately .009469697 miles." (ER249) Then, based on the premise that "one hour consists of 60 minutes and one minute consists of 60 seconds [and] 10 divided by 60, divided by 60 is .0027777778," the plaintiffs computed that "10 seconds is approximately .0027777778 hours." (ER249) With these two numbers

in hand, the plaintiffs calculated that ".0096469697 miles divided by .0027777778 hours is 3.409." (ER249) Therefore, concluded the plaintiffs, the van "moved approximately 50 feet in 10 seconds, or at an average rate of speed of 3.41 miles per hour." (ER249) The plaintiffs did not attempt to reconcile this fact with the facts they had not disputed, particularly that Gonzalez "stomped" on the gas pedal, and did not offer any expert opinions to support these calculations or to explain the effect of acceleration and deceleration on the equation or how other factors might alter the calculation.

Finding that the plaintiffs had not established the existence of a genuine issue of material fact, the district court granted summary judgment in favor of the City and officers. A three-judge panel of the Ninth Circuit Court of Appeals affirmed. *Gonzalez v. City of Anaheim*, 715 F.3d 766 (9th Cir. 2013) (App.60-80). The majority rejected the plaintiffs' argument that Officer Wyatt's testimony about the vehicle's speed was inconsistent with the evidence. (App.70) The court noted three flaws in the plaintiffs' reasoning:

> First, even assuming that the van was traveling relatively slowly, the threat of acceleration – and the threat to Wyatt's life – remained. [Citation]. Thus, the van's speed is not a material fact, even if it were actually disputed.
>
> Second, the rough estimates of time taken and distance traveled stated in Wyatt's deposition were just that – rough estimates. Wyatt's story is "internally consistent" if we do not ascribe unfounded precision to his estimates. It would be surprising if an officer could recount precise

> quantitative details about an incident which took mere seconds over a year later. A minor inconsistency in officer testimony does not alone create a dispute of material fact. [Citations].
>
> Third, one rough estimate divided by another does not provide meaningful evidence on the speed of the van. We cannot weigh the evidence, but we must look at the record as a whole. Wyatt also testified that, after Gonzalez managed to put the van into drive, he "floor[ed] the accelerator and violently accelerated northbound." This acceleration was fast enough to slam the door shut, trapping Wyatt in the vehicle. Wyatt further testified that when he shot Gonzalez, the van was going about "50 miles per hour." Ellis confirmed this account of events in his deposition and stated in an interview conducted the day after the incident that Gonzalez "stomped down" on the gas pedal, causing the vehicle to accelerate so rapidly that the tires squealed. The most that a rational trier of fact could conclude from this record is that Wyatt is bad at estimating – hardly a reason to send this case to trial.

(App.70-72)

The Ninth Circuit granted en banc review. *Gonzalez v. City of Anaheim*, 733 F.3d 979 (9th Cir. 2013) (App.58-59). In a 7-4 decision, the en banc majority reversed. (App.1-57) Apparently taking the position that the defendants had a heightened burden of proof because Gonzalez was not alive to tell his side of the story, the en banc majority remarked that the defendants should have submitted *more* evidence to

support Officer Wyatt's testimony that the vehicle was rapidly accelerating. (App.11) Thus, the court concluded that summary judgment was improper because there was a material issue of fact concerning the speed the vehicle was traveling at the time Officer Wyatt shot. (App.13)

Amicus submits that the Ninth Circuit erred in elevating the defendants' burden of proof under Rule 56 of the Federal Rules of Civil Procedure and allowing the plaintiffs to escape summary judgment with nothing more than an incomplete and rudimentary calculation of vehicle speed based on an estimate derived from the recollection of a person having been involved in a life threatening and traumatic situation thereby elevating that tenuous estimate to fact.

SUMMARY OF ARGUMENT

If the Ninth Circuit's decision is allowed to stand, it will have two profound and potentially crippling effects on defendants in deadly force cases. First, contrary to Rule 56 of the Federal Rules of Civil Procedure and this court's precedent in *Scott v. Harris*, 550 U.S. 372 (2007), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Ninth Circuit's ruling relieves a plaintiff of the obligation to produce affirmative evidence when opposing a motion for summary judgment and allows a plaintiff to avoid summary judgment by relying on a single and immaterial inconsistency in an officer's version of events.

Second, although this Court has held that the same burden of proof under Rule 56 applies to all types of

cases (*see Anderson*, 477 U.S. at 256; *Matsushita*, 475 U.S. at 587), the Ninth Circuit's generous interpretation of its prior decision in *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994) essentially imposes a greater burden of proof on a defendant moving for summary judgment in deadly force cases. In *Henrich*, the Ninth Circuit urged courts ruling on summary judgment in a deadly force case to be cautious to "ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story – the person shot dead – is unable to testify." *Id.* at 915. However, this Court has never sanctioned that rule nor imposed it upon defendants in deadly force cases.

The impact of the Ninth Circuit's decision will be felt well beyond the immediate concerns of the parties to the case. "In the last decade, more than half a million police were assaulted in the line of duty. More than 160,000 were injured, and 536 were killed – the vast majority while performing routine law enforcement tasks . . ." *Mattos v. Agarano*, 661 F.3d 433, 453 (9th Cir. 2011) (Kozinski, C.J., concurring in part and dissenting in part). Lawsuits arising from these incidents are among the tens of thousands of civil rights cases filed in federal courts every year. *See* The Third Branch News, "Over Two Decades, Civil Rights Cases Rise 27 Percent," http://news.uscourts.gov/over-two-decades-civil-rights-cases-rise-27-percent (reporting that 35,307 civil rights cases were filed in United States district courts in 2013 alone). Local and state governments and law enforcement agencies spend millions of taxpayer dollars each year litigating these cases. Even if the defendants were to ultimately prevail at trial on this case, *certiorari* is necessary to

return summary judgment to its place as "an integral part of the Federal Rules as a whole . . . designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S DECISION CONFLICTS WITH RULE 56, THIS COURT'S PRECEDENT AND THE DECISIONS OF OTHER CIRCUITS ON THE IMPORTANT ISSUE OF THE PLAINTIFF'S BURDEN WHEN OPPOSING A MOTION FOR SUMMARY JUDGMENT.

A. When A Party Bears The Burden Of Proof On A Matter At Trial, To Defeat A Properly Supported Motion For Summary Judgment, The Party Must Establish The Existence Of A Genuine Issue Of Fact Through Significantly Probative Evidence.

A motion for summary judgment is a mechanism by which a court can dispose of all or part of a case without trial 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 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), this Court discussed the vital function of summary judgment as "not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Id.* at 327. The Court reviewed the evolution of Rule 56 and noted that the

role of summary judgment became even more critical after the shift to "notice pleading":

> Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment.

Id.; *see also Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002).

A party moving for summary judgment on an issue on which it does not carry the burden of proof at trial may carry its burden on summary judgment in one of two ways: negating an essential element of the opposing party's claim or defense; or, demonstrating that the opposing party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial. *See* FED. R. CIV. P. 56(c)(1); *Celotex*, 477 U.S. at 325. When the moving party has made a proper showing that no genuine issue of material fact exists, a court lacks discretion to deny the motion. FED. R. CIV. P. 56(a) ("The court *shall* grant summary judgment if the movant shows that there is no genuine dispute as to any material fact.") (italics added).

Once a moving party has met its burden, as the City of Anaheim and its police officers did in the underlying

action, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Celotex*, 477 U.S. at 323-24. Rather, the opposing party must come forward with "significantly probative" evidence that establishes the existence of a genuine dispute of material fact. *Anderson*, 477 U.S. at 249. The opposing party's evidence must be of sufficient "caliber or quantity to allow a rational finder of fact" to find in the opposing party's favor. *Id.* at 254. "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for [the opposing party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Indeed, it has long been established that a plaintiff may not "defeat a defendant's properly supported motion for summary judgment . . . without offering any concrete evidence from which a reasonable juror could return a verdict in his favor." *Id.* at 256.

As a general principle, when ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all *justifiable* inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255 (emphasis added). However, there are limitations on this general principle. First, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 247-248. Second, the court is only required to draw

reasonable inferences in favor of the nonmoving party. *Matsushita*, 475 U.S. at 587. Third, an unsupported attack on a witness's credibility about an immaterial fact will not allow a party to escape summary judgment. *See Crawford-El v. Britton*, 523 U.S. 574, 600 (1998); *Anderson*, 477 U.S. at 255.

Here, the Ninth Circuit's en banc decision below failed to adhere to these three fundamental principles. The court permitted the plaintiffs to defeat a properly supported summary judgment with nothing more than a single, immaterial factual dispute. The en banc majority failed to recognize that the officer's estimate of speed held little materiality to the question of whether an officer trapped in a vehicle being driven by someone who had already committed dangerous felonies had the right to use deadly force to protect the officer's own safety and the safety of the public. In doing so, the majority disregarded the burdens of proof under Rule 56 and bedrock precedent of this Court.

B. A Party Cannot Escape Summary Judgment By Identifying A Single, Immaterial Inconsistency In The Moving Party's Version Of Events.

This court has uniformly held that only genuine issues of *material* fact can defeat a properly supported motion for summary judgment. *See Anderson*, 477 U.S. at 247-48 ("[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.") (emphasis in original); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) ("To survive petitioners'

motion for summary judgment, respondents must establish that there is a genuine issue of material fact . . . ."); *Scott v. Harris*, 550 U.S. 372, 380 (2007) (same).

Finding that the plaintiffs' representation that Gonzalez's van traveled an average of 3.41 miles per hour during the time Officer Wyatt was trapped inside contradicted Officer Wyatt's recollection that the van was traveling 40 to 50 miles per hour at the time of the shooting, the Ninth Circuit en banc majority concluded that the speed of the van was a genuine issue of material fact that must be decided by a jury. (App.12) ("it was the speed of the minivan . . . that was the key disputed material fact."). The majority did not analyze the threshold question of whether the speed of the vehicle was a *material* fact. Instead, the court disregarded the mandate of materiality and summarily concluded, "as it is our obligation to view the evidence in the light most favorable to the nonmoving parties at summary judgment, we cannot simply dismiss the internal contradictions in Wyatt's testimony." (App.11)

"Factual disputes that are irrelevant or unnecessary" are not considered "material" in nature; rather, "material" facts are only those that "might affect the outcome of the suit." *Anderson*, 477 U.S. at 248. As Judge Trott explained in his dissenting opinion, the van's speed was immaterial:

> The actual or the estimated speed of the van at the moment of the shooting is not material. Neither is the 'average speed' of an accelerating vehicle in flight from the police. What is material is that Gonzalez suddenly accelerated his van away from the traffic stop with Officer Wyatt trapped inside and traveled for a block

> before it crashed. Who cares how fast the van was going? Gonzalez's representatives admit that Gonzalez unexpectedly tried to flee without warning, and that when Officer Wyatt tried to stop him, Gonzalez physically fought him off. I do not comprehend how this constellation of facts fails to demonstrate a real threat of impending harm to Officer Wyatt, as well as to members of the public.

(App.45) The majority in the initial three-judge panel reached the same conclusion: "even assuming that the van was traveling relatively slowly, the threat of acceleration – and the threat to Wyatt's life – remained. [Citation]. Thus, the van's speed is not a material fact, even if it were actually disputed." (App.70-71) Indeed, as this Court recognized in *Sykes v. United States*, —— U.S. ——, 131 S.Ct. 2267 (2011), "[e]ven if the criminal attempting to elude capture drives without going at full speed . . . , he creates the possibility that police will . . . use force to bring him within their custody. A perpetrator's indifference to these collateral consequences has violent—even lethal—potential for others." *Id.* at 2273.

By failing to assess whether the single alleged factual dispute crossed the threshold of materiality, the Ninth Circuit erred and created dangerous precedent. Under this precedent, any plaintiff in the Ninth Circuit will be able to escape summary judgment by focusing on a single, inconsequential, possible factual discrepancy.

C. A Party Cannot Escape Summary Judgment By Relying Exclusively On Circumstantial Evidence If The Inferences Arising From That Evidence Are Implausible Or Unreasonable.

As this Court held in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, "if the factual context renders [the opposing party's] claim implausible – if the claim is one that simply makes no [] sense – [the opposing party] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* at 587; *see also Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 468-69 (1992) ("If the plaintiff's theory is . . . senseless, no reasonable jury could find in its favor, and summary judgment should be granted."); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968) (stating that a defendant meets his burden under Rule 56(c) when he "conclusively show[s] that the facts upon which [the plaintiff] relied to support his allegation were not susceptible of the interpretation which he sought to give them"). Moreover, when a party's "version of events is so utterly discredited by the record that no reasonable jury could have believed" the version, a court should not rely on what is nothing more than "visible fiction." *Scott v. Harris*, 550 U.S. at 380-81.

In *Matsushita*, a group of American corporations that manufactured or sold televisions filed a lawsuit against a group of Japanese corporations, alleging that the Japanese were engaged in a conspiracy to maintain artificially high prices for their products in Japan while selling their products below cost in the United States,

in the hopes of expanding their market share in the United States. This Court held that summary judgment should have been granted in favor of the Japanese corporations. Noting that the Japanese corporations had every incentive *not* to engage in the alleged conspiratorial conduct – a theory that would have required them to purposefully sustain losses for decades with no foreseeable profits – the Court found an "absence of any rational motive to conspire." *Id.* at 597. The Court concluded that it could not reasonably or rationally infer the existence of a conspiracy because the plaintiffs' theory of predatory pricing made no practical sense, was "speculative," and was not "reasonable." *Id.* at 588, 590, 593, 595, 597.

When the en banc panel of the Ninth Circuit ruled that summary judgment had been improperly granted in favor of the defendants, it accepted, without reservation, the plaintiffs' crude calculations of the van's speed and concluded that Officer Wyatt's recollection that the van "violently accelerated" was "not entirely consistent with Wyatt's other testimony." (App.9) The court reasoned:

> His story was that the minivan moved 50 feet in five to ten seconds but was going 50 miles per hour when he shot.
>
> That combination of facts appears to be physically impossible. There are three pieces to this puzzle: the speed of the minivan at the time of the shot, the distance it traveled, and the time that elapsed. These pieces don't fit together. As plaintiffs argued to the district court, a vehicle that traveled 50 feet in ten seconds would have an average speed of only 3.4 miles per hour. If

> the time period is cut to five seconds, the average speed increases only to 6.8 miles per hour. Even accepting that the minivan would be gaining speed while accelerating, an average speed of 3 to 7 miles per hour appears inconsistent with Wyatt's testimony as to the speed of the vehicle and with the testimony of both Wyatt and Ellis that Gonzalez floored or stomped down on the gas.

(App.9-10)

Even more troubling, the court went so far as to, itself, *create* a dispute over a fact the plaintiffs had not disputed. (App.11-12) Indeed, although the plaintiffs did not dispute that Gonzalez "stomped" on the accelerator, the court ignored this concession and found that a jury could accept the plaintiffs' argument that the "minivan was moving slowly [and] could reasonably infer that Gonzalez did not stomp on the accelerator." (App.12-13) It mattered not to the court that the plaintiffs had agreed that Gonzalez stomped on the accelerator; the court still found that a jury might not believe that Gonzalez "stomped" on the accelerator.

If Gonzalez were being charged with reckless driving or with speeding, the speed of the vehicle would be material; if Gonzalez had heeded the officers' commands to stop and the vehicle was not moving, that would be a material fact, but instead Gonzalez did not stop, he fought off the officers and attempted to flee with Officer Wyatt trapped in the van threatening the officer's life regardless of his speed of flight. Thus, speed was immaterial to the question of whether use of force met constitutional muster.

D. A Party Cannot Escape Summary Judgment By Simply Arguing That The Moving Party's Version Of Events Is Not Credible.

This Court has long held that credibility determinations are improper functions of the court when ruling on motions for summary judgment. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255; *see also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (holding similarly in ruling on a Rule 50 motion, which, the Court noted, is governed by a standard that "mirrors" the standard applied to Rule 56 motions). However, it is also well-established that a plaintiff cannot defeat summary judgment by simply attacking the credibility of the defendants' witnesses. "[I]f the defendant[] has made a properly supported motion, the plaintiff may not respond simply with general attacks upon the defendant's credibility, but rather must identify affirmative evidence from which a jury could find that the plaintiff has carried his or her burden of proving the pertinent motive." *Crawford-El*, 523 U.S. at 600. Likewise, a plaintiff may not "defeat a defendant's properly supported motion for summary judgment . . . by merely asserting that the jury might, and legally could, disbelieve the defendant's" testimony. *Anderson*, 477 U.S. at 256. Thus, a plaintiff cannot avoid summary judgment simply by challenging a witness's credibility generally; there must be some affirmative evidence that would allow the jury to infer that the testimony was incorrect.

This legal principal is uniformly followed by circuits throughout the country. *See, e.g.*, *Gardner v. Buerger*, 82 F.3d 248, 252 (8th Cir. 1996) (noting that a plaintiff may not stave off summary judgment "armed with only the hope that the jury might disbelieve witnesses' testimony"); *Estate of Smith v. Marasco*, 318 F.3d 497, 514 (3d Cir. 2003) ("To defeat summary judgment, and may not rely simply on the assertion that a reasonable jury could discredit the opponent's account."); *Favorito v. Pannell*, 27 F.3d 716, 721 (1st Cir. 1994) ("[A] *bare assertion* that the opposing party's uncontroverted evidence might be disbelieved is insufficient to resist judgment as a matter of law on an issue as to which the party resisting judgment bears the burden of proof.") (italics in original); *Curl v. Int'l Bus. Machs. Corp.*, 517 F.2d 212, 214 (5th Cir. 1975) ("The party opposing [judgment as a matter of law] must be able to point to some facts which may or will entitle him to judgment, [but] the opposing party may not merely recite the incantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof."); *Modern Homes Inst., Inc., v. Hartford Accident Indem. Co.*, 513 F.2d 102, 110 (2d Cir. 1975) ("If the most that can be hoped for is the discrediting of defendants' denials at trial, no question of material fact is presented.").

The Ninth Circuit's en banc opinion below stands in direct contrast to these legal principals and this Court's precedent. After conducting a de novo review of the undisputed evidence, the en banc majority essentially concluded that summary judgment was improperly granted because a jury could choose not to believe part of the officer's story. Specifically, the en banc majority found that the officers' testimony regarding the speed

and rapid acceleration of Gonzalez's vehicle was inconsistent with the officers' estimate that the vehicle traveled 50 feet in five to ten seconds. (App.9) In reaching this conclusion, the majority adopted plaintiffs' argument that the officers' version of events was "physically impossible" because a vehicle traveling 50 feet in five to ten seconds would only have an average speed of 3.4 to 6.8 miles per hour. (App.9-10) Based solely on that premise, the majority held that summary judgment should not have been granted because a jury could choose to discredit part of the officer's testimony (i.e., that the vehicle was traveling at speeds of 40 to 50 miles per hour) and, as a result, conclude that the officer did not reasonably perceive an immediate threat of death or injury. (App.11-12)

However, as this court has held, an unsubstantiated argument that a jury *could* discredit a witness's version of events is not sufficient to defeat summary judgment. *Anderson*, 477 U.S. at 256.

II. IF CERTIORARI IS NOT GRANTED, A HEIGHTENED BURDEN OF PROOF WILL BE IMPOSED ON DEFENDANTS MOVING FOR SUMMARY JUDGMENT IN DEADLY FORCE CASES.

This Court has held that the standard under Rule 56 is "universally applicable" and that "there is no room for a thumb on the scale against summary judgment in any class of cases." *Gordon v. United Airlines, Inc.*, 246 F.3d 878, 896 (7th Cir. 2001) (Easterbrook, J., dissenting), *citing Anderson*, 477 U.S. at 256; *Matsushita*, 475 U.S. at 587.

Scott v. Henrich, held that a court ruling on summary judgment in a deadly force case should be cautious to "ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story – the person shot dead – is unable to testify." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). Although the *Henrich* court did not explicitly impose a heightened burden of proof on police officers in deadly force cases, it left that door open and, in this case, the en banc majority walked right through.[2] Analyzing *Scott v. Henrich*, the Third Circuit explained:

> This is not to say that the summary judgment standard should be applied with extra rigor in deadly-force cases. Rule 56 contains no separate provision governing summary judgment in such cases. [Citation]. Just as in a run-of-the-mill civil action, the party opposing summary judgment in a deadly-force case must point to evidence – whether direct or circumstantial –that creates a genuine issue of material fact, "and may not rely simply on the assertion that a reasonable jury could discredit the opponent[s'] account." [Citation]. Our conclusion on this score is reinforced by decisions refusing to ratchet up the summary judgment standard for other types of cases. [Citations].

Lamont v. New Jersey, 637 F.3d 177 (3d Cir. 2011).

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[2] Although this principle would seem to apply to any case wherein a key witness was unavailable to testify, such as wrongful death or negligence actions, the Ninth Circuit has singled out police officer witnesses in deadly force cases for skeptical treatment.

The en banc majority's opinion and its critical view of the defendants' evidence were based on its broad reading of *Scott v. Henrich*. The court began its opinion by stating, "Because Gonzalez is dead, the police officers are the only witnesses able to testify as to the events that led to Gonzalez's death. In such a circumstance, we must carefully examine the evidence in the record to determine whether the officers' testimony is internally consistent and consistent with other known facts." (App.2) The court did not find that the motion for summary judgment was not properly supported by evidence. Rather, finding that the plaintiffs' rough speed calculations were enough to create a material issue of fact about the van's speed, the court suggested that the burden was on the defendants to produce *more* evidence because Gonzalez was not alive to tell his side of the story. (App.11) ("There was plenty of time after the episode took place to check how far the minivan traveled. It seems likely that there would have been an incident report that would have included descriptions and precise measurements taken afterwards, but defendants did not offer anything like that into evidence."). In other words, the court improperly imposed a heightened burden of proof on the defendants, finding that Officer Wyatt's recollection of time, distance and speed during the "tense, uncertain, and rapidly evolving" situation was not enough evidence.

CONCLUSION

Obtaining summary judgment in cases where there are no material factual disputes serves the interests of the courts and of the parties. In terms of the human toll, police officers when sued are under a cloud, within

their department, in the community and in their personal lives. One can only guess at the pressures this uncertainty imposes on the officer's life. Anecdotally, we know that, despite the low interest environment over the past seven years, Officer Plumhoff (the defendant the *Plumhoff v. Rickard*, -- U.S. --, 134 S.Ct. 2012 (2014)) was forced to pay interest on a mortgage loan at a rate of about 8% due to the cloud of litigation hanging over his head.

The nature of law enforcement requires officers to engage people in tense situations and targets them for suit and claims of harassment, brutality, excessive force, and discrimination among other things. Yet, few of these claims prove to be true and most suits are resolved in the officers' favor. Nevertheless, while the suits linger, the officers' lives are affected and bringing speedy resolution to meritless claims helps to alleviate some of the anxiety these officers face. This case offers the Court the opportunity to once again direct the Ninth Circuit to join the Court and the other circuits by clarifying that not every purported inconsistency is material and that police officers are entitled to the same summary judgment standard in deadly force cases that every other defendant is entitled to in other civil cases.

Respectfully submitted,

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