No. 17-1476

In the Supreme Court of the United States

CITY OF FORT WORTH, TEXAS
W.F. SNOW
J. ROMERO
Petitioners

v.

ERIC C. DARDEN
Respondent

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Every federal circuit has held that police officers are not entitled to summary judgment on the qualified-immunity defense if there are genuine issues of material fact in dispute as to "what actually happened" in the moments leading up to the conduct in question. The Fifth Circuit faithfully applied this precedent. In the absence of any conflict, should this Court re-write the summary-judgment standard of review for qualified-immunity cases?

2. Every federal circuit has held that police officers violate "clearly established" law if they use force on suspects who are not resisting arrest. The majority of federal circuits have applied this principle to the use of a taser on an unarmed, compliant suspect. Is this rule "too generalized" for a reasonable officer to understand? And if it is, what effect would such a holding on the further development of civil-rights jurisprudence?

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INTRODUCTION

Contrary to the representations in the Petition, nothing in the Fifth Circuit's opinion disturbs this Court's precedent, creates new law, or presents a public-policy issue that merits certiorari. The court of appeals correctly recognized an obvious factual dispute on an essential element of Petitioners' qualified-immunity defense and, after applying the well-established standard of review for summary-judgment motions, arrived at the unremarkable conclusion that Petitioners had not established that they are entitled to judgment as a matter of law.

Petitioners' arguments to this Court, therefore, are nothing more than a routine request for (alleged) error correction which, as this Court's Rule 12 provides, is not a compelling basis for granting certiorari. To conceal this fact, Petitioners flagrantly misrepresent both the record and the Fifth Circuit's opinion to further their ruse that the court below created a conflict in the law that will somehow work to the detriment of law-enforcement personnel throughout the country. It did nothing of the sort. Instead, it provided a detailed discussion of *all* the evidence in the record, faithfully applied clearly established law, and reached a result that is consistent with the opinions of both this Court and every other federal circuit that has addressed the issues presented. Accordingly, even if this Court were inclined to grant certiorari for error-correction purposes, a cursory review of both the facts and the applicable law will reveal that there is no error to be found. This Court, therefore, should deny the petition.

COUNTER-STATEMENT OF THE CASE

A. Background Facts

Petitioners William F. Snow and Javier Romero are employed as police officers by Petitioner City of Fort Worth. On May 16, 2013, Snow and Romero were part of the City's "Zero Tolerance Unit," which was ordered to execute a "no-knock" search warrant on a private residence. ROA.678, 957. Although the City was supposed to provide the members of this unit with a "briefing sheet" in order to "make sure that all of the pertinent information is communicated to everybody that's involved," it is undisputed that no such information was provided. ROA.1527. Accordingly, the officers had no knowledge of the physical descriptions of *any* of the expected occupants of the house (which included children) or whether weapons could be expected to be inside (there were none). ROA.1527; 1580.

When the "Zero Tolerance Unit" broke down the front door and stormed into the residence, they immediately encountered Jermaine Darden on the couch in the front room. ROA.1594. Clearly surprised by the officers' surprise entrance, Jermaine put both of his hands in the air, made no efforts to resist their orders, was clearly unarmed, and did not make any threatening gestures towards the officers. ROA.1510. Notwithstanding Jermaine's efforts to comply, however, Snow grabbed Jermaine and threw him to the ground, tearing his shirt in the process. ROA.1503. Despite the fact that Jermaine weighed approximately 350 pounds but was only 5' 8" tall, and was obviously

morbidly obese, Snow was able to throw him to the ground in an instant. ROA.705, 1503, 1528.

Once on the ground, Snow placed his body on Jermaine, choked him and held him down, face first. ROA.1510. Romero choked Jermaine, punched him, and kicked him in the head. ROA.1510. Moreover, Jermaine and several of his family members repeatedly told the officers that he had asthma and could not breathe. ROA.1511. Despite these warnings and Jermaine's obvious physical condition, Snow also shot Jermaine with his taser two times in sixteen seconds. ROA.1496–97. After Jermaine went motionless, none of the officers checked his pulse to confirm if he was breathing, nor did any of the officers attempt to administer CPR. ROA.1537. Jermaine died at the scene before the ambulance arrived to take him to the hospital. ROA.1510.

B. Proceedings in the District Court

Jermaine's brother, Respondent Eric C. Darden, filed the underlying lawsuit under the Civil Rights Act of 1871, 42 U.S.C. § 1983, alleging (among other things) that Snow and Romero violated Jermaine's civil rights by using excessive force. ROA.592–94. He further alleged that the City was liable for failing to train Snow and Romero on the appropriate use of force under these circumstances. ROA.594–97. Following discovery, all three Petitioners filed motions for summary judgment. ROA.647–49 (Romero); ROA.756–59 (City); ROA.785–87 (Snow).

Snow and Romero's motion argued that they were entitled to qualified immunity as a matter of law. In

support of this defense, Snow and Romero argued that the evidence conclusively established that their actions were "measured, minimal, and imminently reasonable." ROA.818. And although it was undisputed that the members of the "Zero Tolerance Team" were not provided with briefing sheets, ROA.1520–23; 1559–61; 1580, and that both Snow and Romero admitted in their deposition testimony that the City provided training that taught them that it was acceptable to punch suspects in the face, ROA.1684–87, and to kick them in the mouth, ROA.1516–17, but failed to train them how to handle obese suspects (notwithstanding regulations requiring same), the City argued that it was entitled to summary judgment because its training is "adequate." ROA.775.

Respondent filed a combined response to all three motions, along with a joint appendix containing 187 pages of evidence, which—in addition to Snow and Romero's admissions discussed above—also included:

— Sworn testimony from multiple eyewitnesses who confirmed that Jermaine *was not* resisting arrest, never made any threatening gestures, and never attempted to push an officer off of him; ROA.1598–1600; 1611; 1618; 1637–43; 1666; 1673; 1677.

— Sworn testimony from several officers in the "Zero Tolerance Unit" who admitted that they were not trained on what amount of force is appropriate, were not properly advised about what to expect when they entered Jermaine's house, and were not trained about how to

properly care for suspects who complain that they cannot breathe; ROA.1517; 1520–23; 1559–61; 1576

— Expert testimony from the current Chief of Police for the Dallas Independent School District, who opined that *no* reasonable police officer would act as Snow and Romero did; ROA.1549–50; and

— Expert testimony from a forensic pathologist, who concluded that the officers' actions triggered a cardiac arrhythmia that sent Jermaine into sudden cardiac arrest, and that he could have been resuscitated had one of them properly performed CPR. ROA.1536.

This evidence, however, did not persuade the district court, which concluded that the video "clearly" showed that Jermaine did not comply with the officers' commands. App. 54. The district court further concluded that Darden could not establish an excessive force claim because there was evidence in the record that Jermaine was obese and therefore—as a matter of law—he could not prove that his death was caused "directly and only" from Snow and Romero's use of force. App. 53–54. For both of these reasons, the district court granted Snow and Romero a summary judgment and dismissed Darden's claims against the City without addressing the merits of its arguments. App. 54–55.

C. Proceedings in the Court of Appeals

The Fifth Circuit categorically rejected the district court's analysis. In its discussion of the underlying facts, the court of appeals stated at the outset that "the videos do not show what happened during the twenty-five seconds that followed [Snow's initial takedown of Jermaine] and there is conflicting testimony about what transpired." App. 3. It further noted that the video actually reflected Jermaine *complying* with the officers' demands before they tased him—a fact that the district court did not acknowledge in its opinion. App. 4. The court of appeals also identified evidence in the summary-judgment record that Romero "repeatedly punched and kicked [Jermaine] in the face, another fact that the district court did not recite in its opinion. App. 4.

The court of appeals began its opinion by addressing the district court's conclusion that Darden could not recover because Jermaine had preexisting medical conditions that may have also contributed to his death. App. 8–9. Relying on the well-established rule that "a tortfeasor takes his victim as he finds him," the panel correctly concluded that "the evidence suggests that [Jermaine] would not have suffered a heart attack and died if officers had not tased him, forced him onto his stomach, and applied pressure to his back. App. 9. Accordingly, the appellate court concluded that the district court erred when concluding otherwise.

The court then addressed the merits of Darden's excessive-force claim. Unlike the district court's opinion, which simply presumed the officers' conduct

was not excessive without any analysis or discussion of the controlling case law, the Fifth Circuit's opinion engaged in a lengthy discussion of the "totality-of-the-circumstances" test mandated by this Court in *Graham v. Connor*, 490 U.S. 386, 396 (1989). App. 9–14. With regard to the first prong of the test—the severity of the crime—the court of appeals acknowledged that Jermaine was accused of dealing drugs, and that this factor weighed in favor of the officers. App. 10. But with regard to the other factors—whether Jermaine posed a legitimate safety threat or was resisting arrest—the panel identified the following evidence in the record that weighed in Darden's favor:

— Jermaine was not suspected of committing a *violent* offense;

— Jermaine did not threaten the officers in any way when they entered the residence;

— Jermaine put his hands in the air as soon as the officers entered the residence; and

— Darden made no threatening gestures and did not resist arrest.

App. 10–11.

The court of appeals then addressed the district court's conclusion that video evidence in the record "clearly" refuted the evidence listed above. Relying on this Court's 2007 decision in *Scott v. Harris*, in which it held that a court should not believe the movant's evidence over the non-movant's "unless video evidence provides so much clarity that a reasonable jury could

not believe [the non-movant's] account," the panel concluded that the video offers no evidence of the principal factual dispute in the case, namely, how Jermaine transitioned from kneeling on the couch to lying on the floor, and whether he resisted arrest in the process. App. 12–13 (citing 550 U.S. 372, 380 (2007). The court therefore concluded that the videos "do not present the clarity necessary to resolve the factual dispute presented by the parties' conflicting accounts," leaving a factual issue in dispute that precludes the grant of a summary judgment. App. 12–14.

The court of appeals then cited a decade of its own precedent to demonstrate that it is "clearly established" that "a constitutional violation occurs when an officer tases, strikes, or violently slams an arrestee who is not resisting arrest." App. 15. And because the court had concluded that there was a factual dispute as to whether Jermaine was resisting arrest in the first place, the Fifth Circuit reversed the district court's summary judgment, because such a dispute necessarily means that Snow and Romero did not establish that they were entitled to judgment as a matter of law. App. 14–19.

Finally, because the district court did not address the merits of the City's summary-judgment arguments, it vacated the order dismissing Darden's claims against it and remanded the issues for consideration in the first instance. App. 19–20.

D. Misstatements in the Petition

Both of Petitioners' issues presented, and all of the arguments raised in support of them, are premised on erroneous representations—both in the "statement of the case" and elsewhere throughout the petition—that the record contains "clear" and "undisputed" video evidence of acts or omissions by Jermaine that justified Snow and Romero's use of deadly force. Petitioners further misrepresent the record when they repeatedly suggest that all of the other eyewitnesses to the incident admitted or affirmed that Jermaine was struggling with officers *before* he was tased. In accordance with this Court's Rule 15(2), therefore, Respondent points out each of these misstatements.

The opening paragraphs of Section C of Petitioners' statement of the case (misleadingly titled, "[Jermaine] refuses commands and resists") give the impression that when the officers first entered the residence, they ordered Jermaine to get on the ground, and that he disobeyed them by refusing to do so and by repeatedly reaching behind the couch in a furtive manner. Pet. at 4–5, 23. Petitioners then suggest that Jermaine's disobedience gave Snow "reason to fear" that Jermaine was reaching for a weapon, leaving him no choice but to grab Jermaine's shirt in a futile attempt to subdue him. Pet. at 5–6. Petitioners later assert that there is only a "small gap" of time where Jermaine's interactions with the officers is not plainly visible to the viewer, and repeatedly claim throughout the petition that evidence of Jermaine's "resisting" or "struggling" with the officers on the scene is captured by "undisputed" and "clear" video evidence in the record. Pet. at 18, 19, 24, 25, 32.

A cursory review of the only two videos in the record reveals that all of these assertions are demonstrably false. In reality, Snow made contact with Jermaine and ripped off his shirt within two seconds of entering the residence *while* the officers were yelling commands. GOPRO0007 Video at 2:13–15; GOPRO0018 Video at 1:02–04. Both of Jermaine's hands are visible, and he never reaches behind the couch. *Id.* Because the officers wearing the helmet cameras immediately moved into other rooms, there is *no* video evidence of *any* interaction between the officers and Jermaine for the next 25 seconds. The next time Jermaine can be partially seen on video, he appears to already be on the ground and is being rolled onto his stomach by several officers. GOPRO0018 Video at 1:31. There is not a clear shot of Jermaine until *after* Snow shot him with a taser. GOPRO0007 Video at 2:59; GOPRO0018 Video at 2:09.

Petitioners' reliance on the deposition testimony of the other occupants of the house is similarly misleading. Pet. at 6–7. Although Petitioners claim that that these witnesses "admit" that Jermaine was resisting or refusing to obey the officers, all of the record citations in the petition direct the Court to testimony about Jermaine's behavior when the officers *first* arrived on the scene (before he had an opportunity to comply with their orders) and *after* he was tased.

For example, Petitioners cite the testimony of Clifton Crippen to support their allegation that "[Jermaine] stood up (despite many forceful commands by officers for him to get on the ground)." Pet. at 6 (citing ROA.1596). But a review of the

testimony at this location in the record reflects the misleading nature of Petitioners' assertion:

> Q: So based on your memory today, you think Jermaine stood up?
>
> A. Uh-huh.
>
> Q. And that would have been after officers had entered saying get down?
>
> A. No. It was the initial—that boom, and he was startled and—
>
> Q. So he rose up on his knees on the couch or he stood up on his feet?
>
> A. No, he stood up because he didn't know what was going on. He stood up with his hands up. He didn't know what was going on.

ROA.1596. In other words, Crippen's testimony offers no evidence to support Petitioners' assertion that Jermaine was resisting arrest during the 25-second gap in the video; if anything, it provides additional support for Jermaine's argument that he was indicating a willingness to submit to the officers when they first entered the residence.

Petitioners also attempt to paint the testimony of Jermaine's mother, Donna Randle, in a false light. Although Randle affirmed that Jermaine attempted "to get into a better position so that he could breathe easier," Pet. at 7, 14, 26 (citing ROA.1053, 1057), she never stated that he was resisting arrest before he was tased. A close examination of this testimony reflects that she made this assessment after being shown the

video of officers telling him to "stop [moving]." ROA.1057. The only time officers can be heard telling Jermaine to "stop moving" was while he was writing in agony on the floor with four taser darts in his back. GOPRO0007 Video at 3:22–3:30; GOPRO0018 Video at 2:10–18.

The same is true with regard to Petitioners' reliance on the testimony of Donald Virden and Orlando Cook. Pet. at 7, 16 (citing ROA.1078–79, 1091–92). According to Petitioners, "Virden testified [Jermaine] was repeatedly raising up as officers were trying to control him." Pet. at 16 (citing ROA.1078–79). But once again, the record reflects that Virden made this statement about Jermaine's conduct *after* he was tased. ROA.1079. And as Petitioners acknowledge, Cook's only statements concerned Jermaine's actions while the officers were trying to handcuff him, which did not occur until after he had been subdued by the taser. Pet. at 16 (citing ROA.1091–92); GOPRO0007 Video at 3:22–3:30; GOPRO0018 Video at 2:10–18.

Petitioners' description of Romero's involvement in the altercation is particularly understated. The petition claims that Romero's role was limited to taking "reasonable steps to help bring it to an end, including trying to hold down [Jermaine]." Pet. at 7. Donald Virden, however, testified that Romero kicked Jermaine in the head while he was already on the ground, and this fact is also confirmed on the video, and in Jermaine's medical records. ROA.1496, 1643, 1695–1700.

Finally, with regard to the second prong of the qualified-immunity analysis, Petitioners allege that Respondent failed to inform the lower courts "as to what clearly established law the court should consider." Pet. at 34. This is also false. The record plainly reflects that Respondent's brief in support of his response to Petitioners' motion for summary judgment included the following argument:

> Having demonstrated that genuine issues of material fact exist with regard to whether Jermaine was resisting arrest when Snow tased him and when Romero kicked him in the face, this Court should conclude that Snow and Romero are not entitled to summary judgment on their qualified-immunity defense it is clearly established that such acts constitute excessive force. In each of the cases cited in footnotes 34 and 35 above, the courts denied the officers' motions for summary judgment on qualified immunity because "once a suspect has been handcuffed and subdued, and is no longer resisting, an officer's subsequent use of force is excessive." The Fifth Circuit has also held that it is clearly established that the amount of force that an officer can use "depends on the severity of the crime at issue, whether the suspect posed a threat to the officer's safety, and whether the suspect was resisting arrest or attempting to flee."

ROA.1455–56 (internal citations omitted). These authorities were also cited in Petitioner's briefs to the Fifth Circuit. Petitioners' suggestion that this is an appropriate basis for granting certiorari is meritless.

REASONS FOR DENYING THE WRIT

Having demonstrated that there is no undisputed or incontrovertible video evidence of the interactions between Jermaine and the officers in the 25 seconds before they tased him, this case required nothing more than the application of the well-established standard of review for summary judgment of the qualified-immunity defense, which the Fifth Circuit faithfully applied. And because its opinion does not conflict with the holdings of this Court or any other circuit court of appeals, this Court should deny certiorari.

I. The Fifth Circuit correctly applied the well-established standard for summary-judgment review of the qualified-immunity defense.

A. Federal appellate courts unanimously hold that summary judgment on qualified immunity is not appropriate when there is a factual dispute over *what actually happened.*

The Fifth Circuit correctly held that the district court erred when concluding that Petitioners were not entitled to qualified immunity as a matter of law because a genuine issue of material fact remains in dispute with regard to *what actually happened* on the day of the incident in question. Contrary to the assertions in the petition, nothing in recent—or any—opinions from this Court or any circuit court suggest that summary judgment is appropriate under such circumstances. Although Petitioners couch their arguments under the ruse that the Fifth Circuit "improperly shift[ed] the focus from what [Jermaine] was actually doing to what he may have been

thinking," Pet. at 25, nothing could be further from the truth.

Instead, the Fifth Circuit's opinion correctly recognized that the record reflects a factual dispute as to how the events immediately preceding Jermaine's death unfolded, and that such a dispute necessarily precludes a summary judgment. Such a holding is consistent with the Fifth Circuit's own precedent, specifically, its 1994 opinion in *Mangieri v. Clifton*, in which it held that a district court simply cannot make a determination of the reasonableness of an officer's activities "without settling on a coherent view of what happened in the first place." 29 F.3d 1012, 1016 & n.6 (5th Cir. 1994). Every other circuit court applies a similar version of this rule. *See Estate of Lopez v. Gelhaus*, 871 F.3d 998, 1021 (9th Cir. 2017); *Curley v. Klem*, 499 F.3d 199, 208 (3d Cir. 2007); *Arrington v. United States*, 473 F.3d 329, 339 (D.C. Cir. 2006); *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1312 (10th Cir. 2002); *Mitchell v. Randolph*, 215 F.3d 753, 755 (7th Cir. 2000); *Vathekan v. Prince George's County*, 154 F.3d 173, 179 (4th Cir. 1998); *Thomas v. Roach*, 165 F.3d 137, 143 (2d Cir. 1999); *Crumpton v. Morris*, 112 F.3d 513 (8th Cir. 1997); *McKinney v. DeKalb County, Ga.*, 997 F.2d 1440, 1443 (11th Cir. 1993); *Apostol v. Landau*, 957 F.2d 339, 342 (7th Cir. 1992); *Prokey v. Watkins*, 942 F.2d 67, 73 (1st Cir. 1991); *Jackson v. Hoylman*, 933 F.2d 401, 403 (6th Cir. 1991).

Here, the Fifth Circuit's opinion explained how the evidence in this case does not provide such coherence:

> [T]he videos…do not show whether [Jermaine] got onto the ground when he was commanded to

> do so. After the officers entered the house and ripped off [Jermaine's] shirt, the next shot of [Jermaine] shows him lying on the ground approximately twenty-five seconds later. Neither video shows what transpired between those two events. Nor do the videos make clear how [Jermaine] transitioned from kneeling on the couch to lying on the floor. The parties offer conflicting accounts of [Jermaine's] actions during those twenty-five seconds: witnesses for the plaintiff claim that [Jermaine] was compliant with the officers' commands and was thrown to the ground by police, whereas Officer Snow claims that [Jermaine] was attempting to stand up and was resisting the officers' attempts to get him on the ground.

App. at 3. Accordingly, the Fifth Circuit correctly recognized that if a factual dispute exists about what actually occurred, there is necessarily a factual dispute about how a reasonable officer would have responded to the occurrence. Such a holding is consistent with this Court's 2014 decision in *Tolan v. Cotton*, in which this Court reversed a summary judgment and remanded an excessive-force case to the Fifth Circuit when it failed to acknowledge a clear factual dispute in the record and credited the movant's evidence over the non-movant's. 134 S. Ct. 1861, 1868 (2014).

There is no plausible interpretation of the Fifth Circuit's opinion that would allow a reasonable reader to conclude that it "bas[ed] its analysis solely on [Jermaine's] subjective reasons for resisting" or that it "used 20/20 hindsight to view facts only from the

suspect's subjective point of view." Pet. at i, 21. Petitioners' sole support for this argument is a single sentence in the Fifth Circuit's opinion:

> A jury could conclude that all reasonable officers on the scene would have believed that [Jermaine] was merely trying to get into a position where he could breathe and was not resisting arrest.

Pet. at 25 (citing App. 13). But nothing in this sentence suggests that the Fifth Circuit focused its analysis on what *Jermaine* believed; there is obviously no evidence of this because Jermaine died at the scene. The focus of this sentence is on what "*all reasonable officers* would have believed," which—as Petitioners acknowledge—is undisputedly the standard of review. Pet. at 27 (citing *D.C. v. Wesby*, 138 S. Ct. 577, 586 (2018)).

Finally, Petitioners' assertion that the Fifth Circuit engaged in an improper subjective analysis is particularly ironic, because that is exactly what they are asking the Court to do: they want the Court to believe their self-interested affidavit testimony as to what *Snow and Romero* believed Jermaine was doing over the testimony of third-party eyewitnesses who offer a contradictory version of events. (This is evident from Petitioners' repeated citations to their own affidavit testimony in their statement of the case when referring to allegedly "undisputed" facts.) Pet. at 4–11. Not only would such a holding turn the summary judgment standard of review on its head, it would effectively result in *total* immunity for *all* individual defendants in *all* excessive-force cases because—for

obvious reasons—everyone accused of using excessive force *always* offers self-serving testimony to explain that he or she acted reasonably.

B. None of the authorities on which Petitioners rely are analogous to the facts of this case.

Contrary to Petitioner's representation, the Fifth Circuit's analysis does not create any conflict with existing precedent from this Court, itself, or any other circuit court of appeals. Indeed, as noted above, *every* federal circuit has held that summary judgment is not appropriate on the qualified-immunity defense when there is factual dispute as to what actually happened. Perhaps not surprisingly, therefore, all of the cases that Petitioners cite where summary judgment was affirmed involve records with undisputed facts. As such, these cases are inapposite and unpersuasive.

For example, Petitioners begin section I-C of their petition with a lengthy discussion of the Ninth Circuit's 2008 opinion in *Gregory v. County of Maui*. Pet. at 27–28 (citing 523 F.3d 1103 (9th Cir. 2008)). Although *Gregory* also involved an attempt by officers to arrest a suspect with an unknown, preexisting heart condition, Petitioners' analysis omits the *undisputed* facts that were ultimately dispositive to the court's analysis, namely:

- The suspect was trespassing and acting aggressively;
- The officers made multiple requests to the suspect before engaging in any physical contact;

— The officers did not strike the suspect, nor did they draw their firearms;

— It was the *suspect* who stated that he could not breathe, not uninterested third parties; and

— There was no evidence that the officers' physical contact contributed to the suspect's death.

Gregory, 523 F.3d at 1107. Here, by contrast, not only is there a fundamental factual dispute as to whether Jermaine was complying with the officers' requests for submission during the 25-second gap on the video, there is also no question that the officers immediately made physical contact with Jermaine, kicked him, tased him, were warned of his physical condition by third parties, and that their actions were deemed as a contributing factor in Jermaine's death. In light of these obvious differences, Petitioners' assertion that "the Ninth Circuit would have affirmed the district court's summary judgment in favor of the petitioners in this case" is overstated, to say the least. Pet. at 29.

Petitioners' reliance on the Seventh Circuit's 1982 opinion in *Silverman v. Ballantine* is similarly misplaced. Pet. at 29 (citing 694 F.2d 1091 (7th Cir. 1982)). Once again, Petitioners correctly identify analogous facts between the two cases—*Silverman* also involved an obese suspect who suffered a heart attack during his arrest—but ignores how those facts were presented to the court. In *Silverman*, the court of appeals specifically noted that "the only direct evidence comes from the defendants themselves" and concluded its analysis by stating that its decision was ultimately based on "the absence of conflicting

evidence." 694 F.2d at 1096–97. That is clearly not the case here.

The other Fifth Circuit cases to which Petitioners direct this court are also legally and factually distinguishable. In *Windham v. Harris County, Texas,* the plaintiff was detained for suspicion of driving while intoxicated, agreed to allow the officers to conduct a gaze-nystagmus test, and then claimed that the test aggravated his pre-existing neck condition. 875 F.3d 229, 242–43 (5th Cir. 2017). The court of appeals concluded that, as a matter of law, administering this test was a reasonable exercise of police authority, and that "no reasonable jury could find that the officers should have been on notice that his neck condition was such that he would suffer injury." *Id.* at 241. Not only did *Windham* arise out of an undisputed record, Respondent respectfully submits that there is an obvious difference between moving a pen in front of a suspect's face and firing multiple darts containing high-voltage electrical current into a suspect's back.

Although Petitioners tacitly suggest that *Williams v. City of Cleveland, Mississippi* gives officers carte blanche to choke and tase any non-compliant suspect, they again miss the point. The holding in *Williams* was not based on a finding that such actions are reasonable *per se*, it was based on a record where it was undisputed that the suspect fled the scene with drugs in hand, was non-compliant to officer commands, received advance warnings about being tased, ignored the warnings, remained unfazed after being tased, and physically struggled with both officers. 736 F.3d 684, 688 (5th Cir. 2013). As in

Gregory, the holding turned on the lack of any factual dispute over what occurred, which allowed the Fifth Circuit to make an objective analysis of reasonableness. In the absence of same, such an analysis must be reserved for the jury.

Curiously, Petitioners also cite to three unpublished cases which, under Fifth Circuit rules, have no precedential value whatsoever. Pet. at 30–31 (citing *Cadena v. Ray*, No. 16-51349, 2018 WL 1566528 (5th Cir. Mar. 29, 2018); *Arshad v. Congemi*, No. 08-30061, 2009 WL 585633 (5th Cir. Mar. 9, 2009); and *Escarcega v. Jordan*, 701 F. App'x 338 (5th Cir. 2007). But even if they did, they are—like all of the other authorities on which Petitioners rely—not on point:

— In *Cadena*, the evidence included a video of officers tasing a suspect, but the video "showed the suspect's resistance to being handcuffed after being taken down, justifying the use of additional force." 2018 WL 1566528, at *3.

— In *Arshad*, the Fifth Circuit's opinion stated, "It is undisputed that Dr. Arshad forcibly resisted Officer Miller after he grabbed her arm." 2009 WL 585633, at *6.

— In *Escarcega*, it was *undisputed* that the suspect's excessive-force claim was based on injuries inflicted upon him by officers after he (a) fled from the officers on foot; (b) repeatedly ignored the officers' commands to stop running, (c) stole the officer's patrol car and drove it with the officer hanging out the passenger-side door; (d) crashed the car into a utility pole; and (e)

> was found on the ground in close proximity to the officer's weapons. 701 F. App'x at 341–42.

Here, by contrast, the video does *not* show Jermaine being "taken down" at all, much less any "forcible resistance" to his arresting officers before they tased him. App. at 3. Nor is there any evidence in the record to suggest that Jermaine had posed "an immediate threat to the safety of officers and the public" at any time during the altercation. *See Escarcega*, 701 F. App'x at 341. Accordingly, even assuming—without conceding—that it would be appropriate for this Court to grant certiorari to resolve an internal circuit split with non-binding authority, Petitioners would still be required to show the existence of a conflict between the holdings of those cases and the Fifth Circuit's opinion below. Because they cannot, this Court should deny the petition.

II. It is clearly established that officers may not tase, choke, punch, or kick suspects who are not resisting arrest.

Petitioners' argument that the applicable law is not "clearly established" ignores the Fifth Circuit's holding, miscites this Court's precedent, and asks this Court to create a new common-law rule that has no conceivable public-policy justification.

First, Petitioner's argument that the Fifth Circuit defined "clearly established law" at too high of a level of generality is meritless. As Petitioners' acknowledge, this Court has held that the test for whether a right is "clearly established" turns on whether it is "sufficiently clear that every reasonable official would

have understood that what he is doing violates that right." Pet. at 33 (citing *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)). Here, the Fifth Circuit cited several of its recent opinions as authority for the proposition that "a constitutional violation occurs when an officer tases, strikes, or violently slams an arrestee who is not actively resisting arrest." App. at 15–17 (citing *Cooper v. Brown*, 844 F.3d 517, 524 (5th Cir. 2016); *Griggs v. Brewer*, 841 F.3d 308, 315 (5th Cir. 2016); *Carroll v. Ellington*, 800 F.3d 154, 174–75 (5th Cir. 2015); *Ramirez v. Martinez*, 716 F.3d 369, 377–78 (5th Cir. 2013); *Newman v. Guedry*, 703 F.3d 757, 762–63 (5th Cir. 2012); *Bush v. Strain*, 513 F.3d 492, 501 (5th Cir. 2008). Petitioners offer no argument or authority to suggest that this rule is too vague for a reasonable officer to comprehend. Instead, they present nothing more than self-serving statements on how the Fifth Circuit *could* have ruled that would have allowed them to escape liability.

Second, the fact that Petitioners' argument is contrary to every other circuit court that has addressed this issue further undermines their argument that this right is not "clearly established." As the Third Circuit held last year in *Anthony v. Seltzer*, "under long-established Fourth Amendment law, 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 was initially non-compliant*." 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)). Importantly, the Third Circuit further identified other opinions from other federal circuits that have extended this "clearly established" right to the use of tasers. *Anthony*, 696 F. App'x at 82 (citing *Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016); *Wate v. Kubler*, 839 F.3d 1012, 1021 (11th Cir. 2016); *Carroll*, 800 F.3d at 177; *Meyers v. Baltimore County*, 713 F.3d 723, 734-35 (4th Cir. 2013); *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009); *Landis v. Baker*, 297 F. App'x 453, 464 (6th Cir. 2008). The fact that the Third Circuit relied on the Fifth Circuit's above-cited holding in *Carroll* is indicative of the correctness of the panel's decision below.

Finally, and perhaps most importantly, Petitioner's request for an extraordinarily narrow inquiry into "clearly established law" would undermine the purpose that section 1983 was enacted to serve. Although their conclusion paragraph tacitly references this Court's opinion last year in *White v. Pauly* for the undisputed proposition that a clearly established law must be "particularized to the facts of each case," they conveniently fail to note this Court's reiteration that such an analysis "does not require a case directly on point." 137 S. Ct. 548, 551–52 (2017). This has been a mainstay of the Court's qualified-immunity jurisprudence for over two decades, and the Fifth Circuit's opinion presents no conflict with this rule.

This Court has consistently rejected similar arguments and should do so again here. As this 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 appl[ies] with obvious clarity to the specific conduct in question." 520 U.S. 259, 271 (1997) (emphasis added). 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 that if such a case arose, the officials would be immune from damages liability.

Id. at 271. And again in its 2002 decision in *Hope v. Pelzer*, this Court cautioned against the "danger of a rigid, overreliance on factual similarity." 536 U.S. 730, 742 (2002).

Although this Court has decided several cases in recent years in which it has rejected a plaintiff's arguments that a constitutional rule is "clearly established," it has done so in contexts that are far different from the case at hand. For example:

— In *White v. Pauly*, the plaintiff argued that an officer who arrives late to an ongoing police action should have presumed that his colleagues failed to follow proper identification procedures. 137 S. Ct. at 552.

— In *Reichle v. Howard*, the plaintiff argued that he had a First Amendment right to be free from a politically-retaliatory arrest, even when the arrest is supported by probable cause. 132 S. Ct. 2088, 2093 (2012).

— In *Ashcroft v. al-Kidd*, the plaintiff argued that individualized suspicion was necessary to obtain a warrant under the federal material-witness statute. 563 U.S. 731, 741 (2011).

In each case, this Court concluded that the law was not "clearly established" because there was *no* precedent to support the argument that the plaintiff raised. But here, as discussed above, the Fifth Circuit cited over a decade of its own precedents in support of its holding that a constitutional violation occurs when an officer tases, chokes, punches, or kicks a suspect who is not resisting arrest. App. at 15. In sum, there is no valid comparison between the rule that the Fifth Circuit applied in this case and the proposed rules that this Court rejected in the cases listed above.

Finally, Petitioners' suggestion that the exact circumstances must have been present in order for a right to be "clearly established" presents serious concerns for the vitality of section 1983 as an effective tool to discourage unconstitutional conduct and to provide a remedy to those who are victims of such acts. Although Respondent acknowledges that the purpose of qualified-immunity is "to protect public officials from the broad-ranging discovery that can be peculiarly disruptive of effective government," *Anderson v. Creighton*, 483 U.S. 635, 646 (1987), Petitioners' proposed rule is a bridge too far; an

unworkable standard that will effectively give government actors "one free pass" at an unconstitutional action and, in doing so, will essentially freeze the development of our civil-rights jurisprudence. If this Court adopts Petitioners' argument and concludes that precedent with exact factual similarity is necessary to overcome qualified immunity, litigants whose constitutional rights have been violated in previously unlitigated ways will have no incentive to expend the resources to seek the relief that section 1983 was designed to provide in the first place. And in the absence of such suits, there will be less incentive for government agents to abstain from unconstitutional conduct, which is—of course—the wrong that the section 1983 was enacted to remedy. Because the Fifth Circuit's well-reasoned opinion strikes the proper balance between the public's interest in both effective law enforcement and the existence of a viable remedy for victims of unconstitutional conduct, this Court should reject Petitioners' arguments and deny the petition for writ of certiorari.

CONCLUSION

The Fifth Circuit's proper application of well-established precedent does not "set a dangerous new standard," as Petitioners lament. Nothing in the opinion suggests that "officers must evaluate the resistance they face through the mind of the suspect." Instead, they are simply obligated to comply with the clearly established rule that they may not use deadly force on a suspect who is not actively resisting arrest. Moreover, the Fifth Circuit's opinion is faithful to the summary-judgment standard that applies in *all*

federal cases: judgment as a matter of law is not appropriate when genuine issues of material fact as to *what actually happened* remain in dispute. Because Petitioners have identified no conflict with the opinions of this Court or any federal court of appeals, and cannot articulate any public-policy justification for their narrow and self-serving interpretation of "clearly established law," this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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