No. _____

In the
Supreme Court of the United States

PAUL ANTHONY VALDERAS,
Petitioner,
v.

CITY OF LUBBOCK, ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

DANIEL A. DAILEY
Counsel of Record
Chief Litigation Counsel
KINGDOM LITIGATORS, INC.
A PUBLIC INTEREST LAW FIRM
3131 McKinney Avenue, Suite 600
Dallas, Texas 75204
Tel: 214-422-9350
E-Mail: ddailey@kingdomlitigators.com

Attorney for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether an officer on the scene constrained by what he observes to use *any* force creates a reasonable inference that deadly force is excessive?

LIST OF PARTIES

In accordance with Supreme Court Rule 14.1(b), the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made so that the Justices of this Court may evaluate possible disqualification or recusal.

1) Paul Anthony Valderas, Petitioner, Plaintiff-Appellant below

2) Daniel A. Dailey, KINGDOM LITIGATORS, INC. A PUBLIC INTEREST LAW FIRM

3) Billy Mitchell, Respondent, Defendant-Appellee below

4) City of Lubbock, Respondent, Defendant-Appellee below

5) David Kerby, Kerby & Wade

6) Camie Wade, Kerby & Wade

7) Jeff Hartsell, City of Lubbock Attorney's Office

STATEMENT OF RELATED PROCEEDINGS

- *Valderas v. City of Lubbock, et al.,* No. 18-11023 (5th Cir.) (Opinion of the Fifth Circuit Court of Appeals affirming the Northern District of Texas.) (May 21, 2019)
- *Valderas v. City of Lubbock, et al.,* No. 5:17-CV-245 (N.D. Texas) (Order from the Northern District of Texas granting Respondent's motion for summary judgment.) (July 2, 2018)

There are no additional proceedings in any court that are directly related to this case.

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Petitioner Paul Valderas ("Mr. Valderas") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's panel opinion is not reported but is available at 2019 WL 2207293. Pet.App.1-15. The district court's order is not reported but is available at 2019 WL 2207293 under Docket Sheet filing 18-11023. Pet.App.16-36.

JURISDICTION

The panel court of appeals entered judgment on May 21, 2019. Mr. Valderas, invoking this Court's jurisdiction under 28 U.S.C. § 1254(1), has timely filed this petition for a writ of certiorari within ninety days of the United States Court of Appeals for the Fifth Circuit's judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

INTRODUCTION

On January 26, 2017, two identically trained officers, Sergeant Billingsley ("Sgt. Billingsley") and Officer Mitchell ("Respondent"), observed Mr. Valderas discard a gun given to him by the LPD.[1] Sgt. Billingsley declined to respond with lethal force, but Respondent fired five times. Three of these shots struck Mr. Valderas in the back rendering him a paraplegic. If both identically trained officers observed the same "display," but had two separate responses, and both are objectively reasonable, then *Graham* is a fallacy. Mr. Valderas had no chance of surviving that night. The question presented has split lower courts across the country and claimed hundreds of lives. Can both officers' use-of-force responses be reasonable?

This Court has never addressed this factual scenario. As dissenting Justices Sotomayor and Ginsburg noted, "[t]hat two officers on the scene, presented with the same circumstances as Kisela, did not use deadly force reveals just how unnecessary and unreasonable it was for Kisela to fire four shots at Hughes." *Kisela v. Hughes*, 138 S. Ct. 1148, 1157, 200 L. Ed. 2d 449 (2018) (SOTOMAYOR, J. and GINSBURG, J. dissenting) (internal citation omitted). ("We analyze [the objective reasonableness] question from the perspective of a reasonable officer on the scene" (internal quotation marks omitted).) *Id.* "Rather

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[1] The Lubbock Police Department directed a confidential informant to provide Mr. Valderas with a stolen gun in order to charge him with possession of a firearm by a felon. ("Anderson called me to set the whole Paul situation up." ROA. 835-37, 1341).

than defend the reasonableness of Kisela's conduct, the majority sidestep[ped] the inquiry altogether…" *Id.*

As a result, lower courts across the country are split. Indeed, some courts analyze the other officers' conduct on the scene for reasonableness, while other courts do not. Here, the Fifth Circuit made clear that it is unpersuaded by Mr. Valderas's plea under *Graham* to analyze the reactions of both officers and to allow a jury to decide which was reasonable. Pet.App.12. This Court has never addressed the exact scenario Graham envisioned when it established the objective reasonableness test in 1989.

Why are courts split on applying Graham's objective standard? It is because if courts apply a reasonable inference from an officer on the scene it could make reasonable conduct unreasonable, or unreasonable conduct reasonable. For example, Rodney King was beaten by four cops with at least fourteen officers present. Applying a reasonable inference from the officers on the scene infers that Rodney King's beating was reasonable. The inverse is also true. For example, in Fairfax, Virginia an officer stood trial who genuinely believed that a mentally ill man was armed. The court analyzed his partner's reaction to use pepper spray and denied summary judgment; however, a jury found for the officer at trial. *Clem v. County of Fairfax, VA*, 150 F. Supp. 2d 888 (E.D. Va. 2001). Courts are not choosing to defy *Graham*, however reasonableness varies depending on the culture of the police department.

The Fifth Circuit's best attempt to explain the question presented was the pure *non sequitur* reasoning. The Fifth Circuit concluded that Respondent's reaction with lethal force was not unreasonable simply because Respondent and Sgt. Billingsley had "differing positions." Pet.App.12. The Fifth Circuit's analysis is incorrect for two reasons.

First, the statement assumes that the differing positions of the officers prevented a line-of-sight to Mr. Valderas when there are no facts to support this assumption. In fact, Sgt. Billingsley testified he had his gun drawn, expected a gunfight, and moved to a position to see Mr. Valderas with the gun, but he did not fire. ROA. 1037. When asked why he did not fire, Sgt. Billingsley claimed he could not remember what he saw. ROA. 1044. However, Investigator Daniel Merritt ("Officer Merritt") came forward and confirmed Mr. Valderas was discarding the gun. ROA. 1488. Based on Sgt. Billingsley's reactive training, he knew lethal force was no longer authorized. Mr. Valderas assures this Court it will not find a single fact in the record to support the Fifth Circuit's erroneous conclusion.

Next, using *ignoratio elenchi* the Fifth Circuit stated that Respondent's use of deadly force does not become unreasonable simply because Sgt. Billingsley did not also use deadly force. Pet.App.12. To the contrary, Respondent's lethal force reaction was unreasonable because he admitted he saw Mr. Valderas discard the gun and witnessed the termination of the threat. ROA. 1037. Respondent knew his reaction was unreasonable because he

subsequently removed that testimony to obtain summary judgment based on qualified immunity. ROA. 1037. A reasonable officer on the scene with SWAT training observing the same display would not—and did not—react by using lethal force.

If the Fifth Circuit's holding stands, it will set an extremely dangerous precedent because it proves that it is legally and factually impossible to overcome qualified immunity. Legally, *Graham* envisioned this exact scenario. Courts must determine the reasonableness of force from the perspective of an officer on the scene. Both officers had identical reactionary time, knowledge, training, and experience. Legally, a jury must decide which officer's conduct was reasonable.

Factually, if an officer can manipulate material facts to conform to cases wherein the lower courts granted qualified immunity, then officers are entitled to absolute immunity. Before Officer Merritt confirmed that Mr. Valderas discarded the gun, Respondent claimed he saw Mr. Valderas continuing to display the weapon. ROA. 1488. After Officer Merritt came forward with the truth, Respondent manipulated that portion of his statement to obtain qualified immunity under *Salazar-Limon*, 826 F.3d at 279, and he was successful. Pet.App.10. The Fifth Circuit's holding sets precedent that allows officers to manipulate critical facts to obtain qualified immunity, effectively rendering their actions absolutely immune from a jury.

Against this backdrop, a jury must answer two specific questions. First, whether Respondent saw Mr. Valderas discard the gun. Next, whether a reasonable

police officer in the same situation would know that Mr. Valderas discarded the gun. Both answers are disputed because Respondent initially claimed he witnessed the "display" but now claims he did not. Second, the only logical inference is that Sgt. Billingsley—a trained sniper, in fear for his life, expecting a gunfight, with a line-of-sight—did not fire his weapon was because he knew the threat was terminated and that it was not reasonable to shoot.

Accordingly, Mr. Valderas urges this Court to grant certiorari and resolve the split in the lower courts by holding that courts must draw reasonable inferences from similarly situated officers on the scene who are constrained to use lethal force.

STATEMENT OF THE CASE

1. ***Factual Background.*** Mr. Valderas alleges that Respondent, an officer with the Lubbock Police Department ("LPD"), violated his Fourth Amendment rights when Respondent used excessive force during his arrest. ROA.7. Mr. Valderas failed to report to his parole officer after he suffered a three-month drug relapse, and an arrest warrant was issued. ROA. 1362-63.

A. The Shooting

On January 23, 2017, the LPD directed a confidential informant ("CI") to convince Mr. Valderas he would be robbed and to equip him with a stolen gun. ROA. 835-837, 1341. Later in the day, the CI went to Mr. Valderas's motel, waited until he was intoxicated, and convinced him to take the stolen gun. ROA. 679-80. Three days later, Respondent executed the plan to

apprehend Mr. Valderas and shot him three times in the back. Pet.App.38.

The shooting occurred on January 26, 2017, after the CI notified the LPD that Mr. Valderas was now "armed." Pet.App.3. Three officers for the LPD, Sgt. Billingsley, Officer Merritt, and Respondent were on the arrest team. Pet.App.3. While talking to the CI through the passenger side window of a parked vehicle, Mr. Valderas saw a brown Chevrolet Tahoe speeding toward him head-on. Pet.App.3. Sgt. Billingsley was in the driver's seat. ROA. 98, 1016. Respondent was in the passenger seat with Officer Merritt sitting directly behind him. ROA. 98, 1016. Remembering the CI's prior warning, Mr. Valderas removed the gun from his waistband, expecting to be robbed. Pet.App.3, 4.

However, after the CI noticed Mr. Valderas pull the gun, she alerted him that the approaching vehicle was actually undercover police officers. Pet.App.4. As the officers exited their vehicle, Mr. Valderas discarded the gun through the window to the CI and turned to run. Pet.App.4.

Meanwhile, Sgt. Billingsley exited the driver's side of the vehicle and observed Mr. Valderas discard the gun. ROA. 1037-38, 1043-44, 1063. Sgt. Billingsley did not shoot. ROA. 1016-17. Officer Merritt exited the vehicle but did not have a line-of-sight to fire, so he did not shoot. ROA. 951-55, 958; Pet.App.6. Officer Merritt confirmed that Mr. Valderas threw the gun in the car, and there was no gun near Mr. Valderas after he was shot. ROA. 951-55, 968.

In Respondent's first sworn statement, he claimed he exited the vehicle, stepped to the right, and yelled "police," but that Mr. Valderas continued displaying the pistol. Pet.App.4. Respondent claimed he was afraid for his life, so he shot Mr. Valderas three times in the back. Pet.App.26. In Respondent's affidavit in support of his motion for summary judgment, he removed the statement "Mr. Valderas continued displaying the pistol" and instead claimed he could not see Mr. Valderas discard the gun, so he shot in fear for his life. Pet.App.26.

The surveillance video at 0.09 seconds depicts Mr. Valderas discarding the weapon. ROA. 274. At 0.09 seconds, Respondent steps to the right and yells police. ROA. 274. The video then shows Mr. Valderas turn to run at the same moment Respondent fired five rounds at the back of Mr. Valderas. Pet.App.2. Three of these shots struck Mr. Valderas, permanently paralyzing him. Pet.App.39.

B. The Training

a. Respondent

Respondent began his employment with the LPD in 2010 and was employed by the Houston Police Department prior to moving to Lubbock. ROA. 868. Since 2017, Respondent was assigned to the Lubbock Police Special Operations Gang Unit where his duties included tactical operations and gang member apprehension. *Id.* Respondent went to basic SWAT school with Sgt. Billingsley, but he did not make SWAT. ROA. 868, 1109.

b. Sgt. Billingsley

Sgt. Billingsley is a certified police officer and experienced SWAT team member. ROA. 1049. He also has basic and advanced sniper training, as well as various certifications in firearm training, including as an advanced firearm instructor. ROA. 1049. Sgt. Billingsley was an active duty marine for four years and inactive reserves for a year prior to becoming an officer with the LPD. ROA. 1023. To date, he has served a little over 15 years with the LPD. ROA. 1023-24. Both Respondent and Sgt. Billingsley are equally trained officers.

2. *District Court.* District Court. Mr. Valderas filed a complaint against the City of Lubbock and Respondent of the LPD in both his individual and official capacity pursuant to 42 U.S.C. § 1983. Pet.App.4. In his complaint, Mr. Valderas pleaded violations of his Fourth Amendment rights against Respondent for his use of excessive and lethal force. Pet.App.4. Mr. Valderas pleaded that Respondent's use-of-force was objectively unreasonable because Mr. Valderas did not pose an imminent threat of death or serious bodily injury to Respondent, and neither of the other two officers present with Respondent fired their weapons. Pet.App.6.

The district court granted Respondent's Motion for Summary Judgment based on the affirmative defense of qualified immunity. Pet.App.36. In its opinion, the district court did not analyze Sgt. Billingsley's reaction to the same situation. Pet.App.1-15. Furthermore, the district court found that Respondent had a "good-faith belief that [Mr. Valderas] was still armed." Pet.App.28.

Mr. Valderas timely filed a notice of an interlocutory appeal to the Fifth Circuit. Pet.App.5.

3. ***Court of Appeals.*** On appeal, a panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court. Pet.App.2, 14-15. In its opinion, the Fifth Circuit stated, "…to the extent that there is any inconsistency in [Respondent's] testimony, it has no bearing on the question of whether [Respondent] saw or should have seen [Mr.] Valderas discard the gun." Pet.App.10 The Fifth Circuit was unpersuaded. It stated, "[Respondent's] decision to use deadly force does not become unreasonable simply because Sgt. Billingsley did not also use deadly force, especially given the differing positions of the two officers." Pet.App.12. It is unclear from where in the record the Fifth Circuit drew this conclusion. Sgt. Billingsley and Respondent both testified to having a line-of-sight on Mr. Valderas during the entire encounter. ROA. 1037, 1487-88.

4. ***This petition followed.***

REASONS FOR GRANTING THE PETITION

First, *Graham* envisioned this exemplar case. Two experienced officers with identical training made different use-of-force decisions when faced with an identical circumstances. The only difference between the two officers is that one officer fired five times, and the other did not fire at all. If both reactions are reasonable—as the Fifth Circuit contends—then *Graham* is an impossible standard, and officers are entitled to *de facto* absolute immunity masquerading as qualified immunity. Fair notice mandates that this

Court declare that officers are entitled to absolute immunity to properly caution citizens who encounter the police and decrease oppressive litigation against police officers.

To be clear, the instant case is not meant to contemplate Respondent's intentions, whether pure or evil. Rather, this case turns on whether a reasonable officer would know that the threat had been terminated and that lethal force was not authorized (an officer's good intentions do not make objectively unreasonable uses of force constitutional. *Graham*, 490 U.S. at 397). Sgt. Billingsley knew the threat was terminated and that lethal force was not authorized, so he was constrained to shoot. This case is the quintessential case for objectivity under *Graham*, but the Fifth Circuit remains unpersuaded. Lower courts across the country, including the Fifth Circuit, instead rely on the officer's "good faith belief." ("Nothing in either statement differs on [Respondent's] 'good faith' belief that [Mr. Valderas] was still armed…")[2] Pet.App.28. (emphasis added). As a result, people are dying, and the tension between citizens and police has intensified.

Mr. Valderas urges this Court to grant certiorari because *Graham* envisioned *Paul Valderas v. City of Lubbock* to determine objective reasonableness without regard to intent. Yet, the outcome in this case is

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[2] The Fifth Circuit improperly applied a "good-faith" standard to an assertion of qualified immunity and cited several of its own Fifth Circuit cases in support. Pet.App.28. *e.g.* "*Trent v. Wade,* 776 F.3d 368, 376 (5th Cir. 2015) (*citing Kovacic v. Villarreal*, 628 F.3d 209, 211 (5th Cir. 2010).)" This explains why the district court applied a ***good-faith*** standard. Pet.App.7.

inconsistent with the outcome that *Graham* envisioned. This means that either *Graham* is impracticable, or the Fifth Circuit egregiously misapplied the law.

Next, the Fifth Circuit and district court opinions set a deadly precedent. Allowing police officers to manipulate material facts to obtain qualified immunity runs afoul of the purpose of qualified immunity, *e.g.*, officers who make honest mistakes and need breathing room. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743, 131 S. Ct. 2074, 2085, 179 L. Ed. 2d 1149 (2011).

There is no dispute that Respondent deliberately removed the testimony that established that he observed Mr. Valderas discard the gun before opening fire. Without explanation, the Fifth Circuit concluded, "to the extent that there is any inconsistency in [Respondent's] testimony it has no bearing on the question of whether [he] saw or should have seen [Mr.] Valderas discard the gun." Pet.App.10. If Respondent is permitted to manipulate sworn testimony to obtain qualified immunity, then Mr. Valderas's lawsuit is futile because Respondent is entitled to absolute immunity.

Assuming Respondent saw Mr. Valderas discard the gun, the issue goes back to *Graham*. The Fifth Circuit granted Respondent qualified immunity because "the events transpired in a matter of seconds, leaving [Respondent] with little time to 'realize' that Mr. Valderas no longer possessed a gun..." Pet.App.6, 11, 34. Under *Graham*, the question is whether a ***reasonable*** officer on the scene—here, Sgt. Billingsley—would have sufficient time to realize Mr. Valderas no longer possessed the gun. The Fifth

Circuit, like many courts across the country, is unpersuaded by *Graham*. Pet.App.12.

Lower court decisions have adversely impacted both police officers and plaintiffs across the country because some courts analyze the reactions of every officer on the scene, while others remain unpersuaded. Mr. Valderas urges this Court to review the instant case because if the Fifth Circuit's decision stands, *Graham* is impracticable. ("Rather than defend the reasonableness of Kisela's conduct, the majority sidesteps the inquiry altogether." *Kisela,* 138 S. Ct. at 1157 (SOTOMAYOR, J. and GINSBURG, J. *dissenting*).)

I. Under *Graham*, An Officer Constrained to Use Any Force Necessarily Creates A Reasonable Inference That Deadly Force Is Excessive—Otherwise, *Graham* is Obsolete.

Some courts are persuaded that *Graham* requires an analysis of all similarly situated officers on the scene; while other courts, such as the Fifth Circuit, are not persuaded. ("We are unpersuaded…[Respondent's] decision to use deadly force does not become unreasonable simply because Sgt. Billingsley did not also use deadly force, especially given the differing positions of the two officers.") Pet.App.12. Mr. Valderas contends that the constrain to use lethal force is an inference that should be drawn in favor of the non-movant, especially when there was a specific action that terminated the threat. ("That two officers on the scene, presented with the same circumstances as Kisela, did not use deadly force reveals just how unnecessary and unreasonable it was for Kisela to fire

four shots at Hughes." *Kisela*, 138 S. Ct. at 1157. (SOTOMAYOR, J. and GINSBURG, J. *dissenting*).)

This is the precise objective standard that *Graham* intended when it overturned *Glick*'s subjective test. *Johnson v. Glick*, 481 F.2d 1028 (2d. Cir. 1973). Accordingly, Sgt. Billingsley's inaction alone establishes a genuine question of reasonableness that can only be resolved by a jury.

A. Lower Courts Struggle With The Evolution From A Subjective Good Faith Standard To An Objective Reasonableness Standard.

Historically, this Court has replaced the subjective good faith standards for objective reasonableness standards. The reason this Court overturned subjective tests was to require a neutral analysis of an officer's use-of-force without regard to his specific motivations—whether pure or evil. Understanding the evolution of qualified immunity and excessive force is critical to understanding the split of authority over the last thirty years. Some courts still apply the subjective good-faith standard to qualified immunity and often intertwine that analysis with the excessive force analysis.

i. Qualified Immunity

1) Wood v. Strickland

In 1975, this Court held that a government official attempting to assert qualified immunity must "be acting sincerely and with a belief that he is doing right." *Wood v. Strickland*, 420 U.S. 308, 321, 95 S. Ct. 992, 1000, 43 L. E. 2d 214 (1975). In *Wood*, this Court

noted that officials must be held accountable for all "permissible intentions" and "knowledge of the basic, unquestioned constitutional rights" on which the official allegedly infringed. *Id.*

2) Harlow v. Fitzgerald

In 1982, *Harlow* overturned the previously established good-faith immunity defense, which was essentially absolute immunity for all government officials. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). This Court held that "governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known." *Id.* at 801.

ii. Excessive Force

1) Johnson v. Glick

In 1973, the Second Circuit held that the following factors apply to the use-of-force analysis: 1) the need for the application of force; 2) the relationship between the need and the amount of force used; 3) the extent of the injury inflicted; and 4) whether the force was applied in ***good faith***. *Glick*, 481 F.2d at 1033 (emphasis added). This remained the standard for over a decade.

2) Graham v. Connor

In 1989, *Graham* overturned the longstanding *Glick* test by requiring an objective inquiry into an officer's

use-of-force, abrogating the subjective inquiry under *Glick*. *Graham*, 490 U.S. at 387. Rather than rely on the officer's underlying intent or motivation, *Graham* requires that an officer's use-of-force be "objectively reasonable." *Id.* The court makes this judgment solely from the perspective of "a reasonable officer on the scene." *Id*.

Under *Graham*, this Court provided broad discretion for lower courts to determine the objective reasonableness of force on a case-by-case basis for the purpose of determining what a reasonable officer would do. *Graham*, 490 U.S. at 396. The proper application of *Graham* necessarily requires "careful attention to the facts and circumstances of each particular case." *Id*. at 396. Whether an officer's use-of-force was objectively unreasonable relies upon an objective analysis of "the totality of the circumstances." *Tennessee*, 471 U.S. at 9. The purpose of assessing the totality of the circumstances is to determine how a reasonable officer on the scene would react with force—in identical circumstances and with identical training, including response time.

1. There Is A Split Of Authority.

Courts are split on whether the force reaction of another officer on the scene is a reasonable inference to be drawn in favor of either party. Failure to resolve this issue exposed police officers to harassing lawsuits and caused the deaths of hundreds of United States citizens. Under the theoretical pretext of *Graham*, lower courts still apply *Glick*. This issue is widespread throughout the lower courts. Therefore, review on certiorari is critical.

In the D.C. Circuit, there were multiple officers on the scene, but only one officer fired. *Young v. D.C.*, 322 F. Supp. 3d 26 (D.D.C. 2018). To determine the reasonableness of the shooting officer's reaction, the court did not analyze the reactions of the other officers on the scene. *Id.* The court found that the shooting officer's reaction was not reasonable. *Id.* (*citing Johnson v. D.C.*, 528 F.3d 969 (D.C. Cir. 2008)).

In the Second Circuit, there were two officers on the scene, but only one officer fired. *Santana v. City of Hartford*, 283 F. Supp. 2d 720 (D. Conn. 2003). To determine the reasonableness of the shooting officer's reaction, the court did not analyze the reaction of the other officer on the scene. *Id.* The court found that the shooting officer's reaction was reasonable. *Id.* (*citing*, *Salim v. Proulx*, 93 F.3d 86, 90 (2d Cir. 1996).)

In the Third Circuit, there were two officers on the scene, and both officers fired. *Kelley v. O'Malley*, 328 F. Supp. 3d 447 (W.D. Pa. 2018). To determine the reasonableness of the shooting officer's reaction, the court analyzed both officers' reactions. *Id.* The court found that the officers' reactions were reasonable. *Id.* (*citing Estate of Smith v. Marasco*, 430 F.3d 140, 148 (3d Cir. 2005).)

In the Third Circuit, there were two officers on the scene, but only one officer fired. *Remillard v. City of Egg Harbor City*, 424 F. Supp. 2d 766 (D.N.J. 2006). To determine the reasonableness of the shooting officer's reaction, the court did not analyze the reaction of the other officer on the scene. *Id.* The court found that the shooting officer's reaction was not reasonable. *Id.*

(*citing Bennett v. Murphy*, 274 F.3d 133, 137 (3d Cir. 2002).)

In the Fourth Circuit, there were two officers on the scene, but only one officer fired. *Clem v. Cty. of Fairfax, VA*, 150 F. Supp. 2d 888 (E.D. Va. 2001). To determine the reasonableness of the shooting officer's reaction, the court analyzed the reaction of the other officer on the scene. *Id.* The court found that the shooting officer's reaction was not reasonable. *Id.* (*citing McLenagan v. Karnes*, 27 F.3d 1002, 1006 (4th Cir. 1994); *Compare*, *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991).)

In the Eighth Circuit, there were fourteen officers on the scene, but only seven officers fired. *Aipperspach v. McInerney*, 963 F. Supp. 2d 901 (W.D. Mo. 2013), *aff'd*, 766 F.3d 803 (8th Cir. 2014). To determine the reasonableness of the shooting officers' reaction, the court did not analyze the reactions of the other officers on the scene. *Id.* The court found that the shooting officers' reactions were reasonable. (*citing Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993).)

In the Ninth Circuit, there were multiple officers on the scene, but only one officer fired. *A.D. v. California Highway Patrol*, No. C 07-5483 SI, 2009 WL 733872 (N.D. Cal. Mar. 17, 2009). To determine the reasonableness of the shooting officer's reaction, the court did not analyze the reactions of the other officers on the scene. *Id.* The court found that the shooting officer's reaction was not reasonable. *Id.* (*citing Bingue v. Prunchak*, 512 F.3d 1169, 1175 (9th Cir. 2008).)

In the Tenth Circuit, there were multiple officers on the scene, but only one officer fired. *Diaz v. Salazar*, 924 F.Supp. 1088 (D.N.M. 1996). To determine the reasonableness of the shooting officer's reaction, the court analyzed the reactions of the other officers on the scene. *Id.* The court found that the shooting officer's reaction was not reasonable. *Id.* (*citing Sevier v. City of Lawrence, Kan.*, 60 F.3d 695, 699 (10th Cir. 1995).)

The cases above are illustrative of the issues facing the entire country. The reasonableness standard is different in every jurisdiction. Police officers cannot know which standard will be applied because the lower courts are widely inconsistent. Meanwhile, people are dying at the hands of police because the standard of reasonableness has become impossible to decipher (as all parties predicted in *Tennessee*). ("Nor do we agree with petitioners and appellant that the rule we have adopted requires the police to make impossible, split-second evaluations of unknowable facts. We do not deny the practical difficulties of attempting to assess the suspect's dangerousness." *Tennessee*, 471 U.S. at 20 (internal quotations omitted).) Only the Supreme Court can bring uniformity to the lower courts.

2. The Fifth Circuit Is Unpersuaded By *Graham*.

The Fifth Circuit's position is clear:

> "We are also unpersuaded by Valderas's argument that the fact that Sgt. Billingsley did not use deadly force establishes that Officer Mitchell's decision to use such force was unreasonable…Officer Mitchell's decision to use

> deadly force does not become unreasonable simply because Sgt. Billingsley did not also use deadly force…"

Pet.App.12.

However, *Graham*'s purpose was to assess the totality of the circumstances to determine what a reasonable officer on the scene would consider a reasonable use-of-force—in identical circumstances and with identical training, including response time. *Graham*, 490 U.S. at 387. The Fifth Circuit's opinion directly conflicts with *Graham*'s intent because the Fifth Circuit is unpersuaded to use Sgt. Billingsley's reaction not to fire as part of the reasonableness analysis. Again, this is a nationwide issue that can only be addressed by the Supreme Court of the United States.

Across the Fifth Circuit, courts essentially apply a good faith subjective test to excessive force claims. For example, in this case, the district court only analyzed Respondent's decision to shoot. Just as in many cases across the country, the district court ignored the reaction of the only other officer on the scene with a line-of-sight. (*See e.g.*, *Santana*, 283 F. Supp. 2d, *Remillard*, 424 F. Supp. 2d 766; *Young*, 322 F. Supp. 3d.) Instead, the district court applied *Glick*'s good-faith standard in holding, "[n]othing in either statement differs on [Respondent's] ***good-faith*** belief that [Mr. Valderas] was still armed, and that [Respondent] had not seen [Mr. Valderas] drop the weapon before he fired." Pet.App.25. (emphasis added).

Mr. Valderas contends that evaluating the totality of the circumstances was created specifically to ascertain the reasonableness of an officer on the scene in an identical circumstance. By ignoring Sgt. Billingsley's reaction in this case, the Fifth Circuit inserted how a reasonable officer would react in similar circumstances. ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.) Again, the Fifth Circuit remains unpersuaded by *Graham*, and only this Court can address this nationwide disagreement.

B. *Graham*'s Objective Standard Envisioned *Paul Valderas v. City Of Lubbock.*

If this Court accepts the lower court's entire proposition[3] as true, the only plausible reason Sgt. Billingsley did not fire was because he saw Mr. Valderas discard the weapon and realized the threat had ended. The premise of *Graham* was to abrogate any subjective intent, whether pure or evil. Instead, courts must determine how a well-trained officer in similar circumstances would—or did—react.

Here, Sgt. Billingsley's background includes certifications as an advanced sniper, firearms instructor, and advanced firearms instructor. He was also an "unofficial" commander on SWAT. ROA. 1114. Sgt. Billingsley made it clear that LPD officers will not shoot a fleeing felon. ROA. 1032. Sgt. Billingsley

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[3] Excluding the Fifth Circuit's two fallacious reasoning discuss *supra* at pg. 2.

testified that lethal force is only authorized if a fleeing felon places an officer in immediate danger of death or serious bodily harm and has a weapon in his hand. ROA. 1032-1033. Sgt. Billingsley testified that he has used lethal force in the past. ROA. 1033-1034. Against this background, the Fifth Circuit strained for any reason that Sgt. Billingsley did not fire. The Fifth Circuit made two critical inferences, which were not supported by the record nor argued by either party.

First, the Fifth Circuit inferred that because Sgt. Billingsley was the driver, he did not have a line-of-sight to fire. Pet.App.12. This inference was conjured by the Fifth Circuit with no reference to a single fact. Indeed, this Court has repeatedly told the Fifth Circuit that all reasonable inferences should be drawn in favor of the non-movant. In *Tolan v. Cotton*, this Court overturned the Fifth Circuit after the Fifth Circuit affirmed the district court's holding that the defendant officer's use-of-force was not unreasonable. *Tolan v. Cotton*, 572 U.S. 650, 654, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014). Rather than view all evidence in the light most favorable to the non-movant, the Fifth Circuit instead determined the "truth of the matter" and resolved all central factual disputes in favor of the movant. *Id.* at 656, *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Although this Court is "not equipped to correct every perceived error coming from the lower federal courts," the Fifth Circuit remains steadfast in "clear misapprehension of summary judgment standards even

after [this Court's] precedent." *Tolan*, 572 U.S. at 659 (internal quotations omitted).

Next, the Fifth Circuit erroneously inferred that Sgt. Billingsley did not fire because when he exited, Mr. Valderas was already collapsing. Pet.App.12. However, Sgt. Billingsley ***never*** provided this testimony. Sgt. Billingsley testified that after he exited the vehicle, he moved to a position to better see Mr. Valderas. ROA. 1074. When asked if he could have fired on Mr. Valderas, Sgt. Billingsley testified, "I don't remember what I saw."[4] ROA. 1043-1044.

Yet, we know what Sgt. Billingsley saw because Officer Merritt's testimony confirmed that Mr. Valderas threw the gun in the car. ROA. 1488. In his testimony, Sgt. Billingsley stated that as he exited the car, he saw Mr. Valderas with the gun. ROA. 1488. Sgt. Billingsley, therefore, admitted to observing the same "physical act." ROA. 1488. A jury could conclude that Sgt. Billingsley did not fire his weapon when he saw Mr. Valderas with the gun because Mr. Valderas was clearly discarding it through the window.

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[4] Later in the deposition, Sgt. Billingsley stated again, "when I'm exiting I see the gun." ROA. 1063. Plaintiff's Counsel asked Sgt. Billingsley again, "and at the moment [you] exited the vehicle and observed [Mr. Valderas] with a gun you could have fired at him [Mr. Valderas]?" ROA. 1065.

C. The Only Logical Inference Is That Sgt. Billingsley Did Not Fire Because It Was Unreasonable.

Courts across the country are clear that justification for lethal force can terminate in seconds. *Lytle v. Bexar County., Tex.*, 560 F.3d 404 (5th Cir. 2009). In *Lytle*, the defendant fired two rounds into plaintiff's vehicle during a police chase and killed the plaintiff. *Id*. The Fifth Circuit upheld the denial of summary judgment because whether the threat had been eliminated was in dispute. *Id*. at 415. The court held that "an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased." *Id*. at 413 (citing *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993).) In *Ellis*, the officer stated he felt threatened because the suspect was holding a mesh bag. *Id.* at 243, 245, 247. The court found that the defendant would have been justified in using lethal force in that moment, but not after the suspect had dropped the bag in question. *Id.* at 247.

If the analysis of the district court is correct, then the only logical reason Sgt. Billingsley did not fire is that Mr. Valderas was fleeing, and the LPD was trained not to shoot a fleeing felon. ROA. 1032. The district court gave the following reasons it was reasonable for Respondent to shoot: 1) Mr. Valderas had previously fled a police pursuit; 2) Mr. Valderas was the member of a gang; 3) Police knew Mr. Valderas was armed; 4) Police had an arrest warrant for Mr. Valderas; 5) Police had a plan to apprehend Mr. Valderas without endangering police or the public; 6) Mr. Valderas pulled a gun out of his waistband;

7) All officers feared for their safety; 8) All three officers began "evasive positioning" to avoid being shot; 9) The CI informed Mr. Valderas that the approaching vehicle was police; 10) The video and testimony confirm the police identified themselves; 11) Respondent did not see Mr. Valderas disarm; 12) All three officers were placed in danger of severe bodily harm or death; 13) Respondent began shooting at almost the same time as Mr. Valderas turned to run. Pet.App.32, 33.

As Sgt. Billingsley made clear, the LPD will not shoot a fleeing felon, and that is why he held his fire. ROA. 1032. Given the district court's extensive list of factors, there is no other legitimate reason why Sgt. Billingsley would not fire his weapon. Accordingly, the only logical inference is that Sgt. Billingsley observed Mr. Valderas disarm and knew the threat was terminated.

II. The Fifth Circuit's Opinion Sets A Dangerous and Deadly Precedent.

Permitting police officers to manipulate their factual accounts to obtain qualified immunity sets a dangerous precedent. It is undisputed that Respondent manipulated his sworn testimony, "Mr. Valderas continued displaying the pistol" after he heard Officer Merritt's testimony, which confirmed Mr. Valderas discarded the gun. ROA. 866. Respondent knew if he did not remove that portion of his testimony, he would be admitting that the "display" he saw was Mr. Valderas discarding the gun. This is dangerous because nothing currently prevents a police officer from using lethal force and subsequently manipulating the facts to obtain qualified immunity.

The instant case sets a deadly precedent for citizen-police encounters because it is unlike many cases in which an officer mistakes a fact and relies on qualified immunity. In *Hudspeth v. City of Shreveport*, an officer mistook a silver object in a suspect's hand for a handgun. *Hudspeth v. City of Shreveport*, 270 F. App'x 332, 333 (5th Cir. 2008). It turned out to be a cell phone. *Id.* In *Salazar-Limon*, an officer mistakenly believed the suspect was reaching for a weapon. *Salazar-Limon*, 137 S. Ct. at 1278. This Court noted that the defendant officer was alone, "this is undeniably a tragic case, but as the dissent notes, post, at 1282 (opinion of SOTOMAYOR, J.), we have no way of determining what actually happened in Houston on the night when Salazar–Limon was shot. All that the lower courts and this Court can do is to apply the governing rules in a neutral fashion." *Id.* at 1282.

Here, Respondent knew that if he observed Mr. Valderas continuing to display the pistol, then he admitted he saw that Mr. Valderas discarded the gun. So, after the deletion, Respondent inserted the statement, "I did not ever see Mr. Valderas drop the weapon" in order to obtain qualified immunity under *Salazar-Limon*. ROA. 870. If this Court declines review in this case, it will set a dangerous and deadly precedent of allowing police officers to manipulate material facts to obtain qualified immunity.

As it stands, the law of the Fifth Circuit provides:

> "…to the extent that there is any inconsistency in Officer Mitchell's testimony, it has no bearing on the question of whether Officer Mitchell

> saw or should have seen Valderas discard the gun."

Pet.App.12.

This statement by the Fifth Circuit establishes that whether Respondent observed Mr. Valderas discard the gun was a material fact. Assuming that Respondent saw Mr. Valderas discard the gun, the next inquiry should have been whether a reasonable officer would have realized that Mr. Valderas discarded the gun. The Fifth Circuit never applied *Graham*'s objective reasonableness test to Sgt. Billingsley's reaction. For example, the Fifth Circuit stated:

> "the events transpired in a matter of seconds, leaving Officer Mitchell with little time to realize that Valderas no longer possessed a gun before making the decision to open fire. Considering the totality of the facts and circumstances, a reasonable officer in Officer Mitchell's position would have reasonably perceived Valderas's actions to pose an imminent threat of serious harm at the time the shots were fired."

Pet.App.11

In this statement, the Fifth Circuit never mentioned Sgt. Billingsley; however, Sgt. Billingsley observed the identical "display" as Respondent. The question of whether he could "realize" or "perceive" that the threat was terminated is an inference drawn from Sgt. Billingsley's decision not to shoot. Pet.App.11. Allowing the Fifth Circuit's precedent to stand is dangerous and deadly.

Fair notice requires this Court to declare police officers have absolute immunity. Indeed, Mr. Valderas would never have ran if he knew that police officers were absolutely immune for their actions. Conversely, Respondent would never have altered his account if he knew he enjoyed absolute immunity. While Mr. Valderas contends that absolute immunity conflicts with the legislative intent of § 1983, he deserved fair notice that if he ran, Respondent could use lethal force with impunity. Pet.App.47. ("Tennessee statute reflects a legislative determination that the use of deadly force in prescribed circumstances will serve generally to protect the public… and provide notice that a lawful police order to stop and submit to arrest may not be ignored with impunity." *Tennessee*, 471 U.S. at 28 (O'CONNER J., REHNQUIST J., BERGER C.J., *dissenting*).) Accordingly, fair notice obligates this Court to review the instant case and inform the public.

CONCLUSION

To decline review of this case would authorize police officers to manipulate their stories to obtain qualified immunity and would invalidate the courageous testimony of Officer Merritt. Qualified immunity was intended to protect honest officers who make reasonable mistakes. *Graham*, 490 U.S. at 396. To decline review of this case sends a clear message to honest officers: stay silent; officers are entitled to absolute immunity.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL A. DAILEY
Counsel of Record
Chief Litigation Counsel
KINGDOM LITIGATORS, INC.
A PUBLIC INTEREST LAW FIRM
3131 McKinney Avenue, Suite 600
Dallas, Texas 75204
Tel: 214-422-9350
E-Mail: ddailey@kingdomlitigators.com

Attorney for Petitioner