No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

KAUFMAN COUNTY; MATTHEW HINDS, PETITIONERS

v.

EUNICE J. WINZER, Individually and on Behalf of the Statutory Beneficiaries of Gabriel A. Winzer; SOHELIA WINZER; HENRY WINZER, RESPONDENTS

_____

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

On the morning of April 27, 2013, Deputy Sheriff Matthew Hinds and fellow officers were dispatched to a rural neighborhood in Kaufman County, Texas, after 911 dispatchers received panicked phone calls from neighbors reporting that a suspect was terrorizing the neighborhood, threatening them, and brandishing and/or shooting a handgun. Shortly after Hinds' arrival at the scene, the suspect, whom Hinds spotted in the middle of the roadway, fired a gun in his direction. After losing sight of the suspect among houses and trees, Hinds and other arriving officers slowly approached his last known location. Gabriel Winzer suddenly emerged into the roadway riding toward the officers on a bicycle. After seeing that Winzer appeared to be carrying a weapon, one of the officers stated he had "that gun" and another officer yelled for Winzer to "put the gun down." Shortly thereafter, Hinds and the officers opened fire; Winzer was shot, fell off his bicycle but arose and disappeared again. The officers located Winzer nearby in the backyard of a residence where he later passed away.

1. Did the Fifth Circuit panel majority err in reversing Kaufman County's summary judgment after concluding Officer Hinds did not violate clearly established law?

2. Did the Fifth Circuit panel majority improperly retain Kaufman County as a defendant by concluding that Officer Hinds may have violated a constitutional right by evaluating his use of

force from the perspective of the Respondents?

3. Did the Fifth Circuit panel majority improperly second-guess the reasonableness of Officer Hinds' use of force without due regard to the circumstances he encountered?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in this Court are listed in the caption of the case on the title page. No corporations are involved in this proceeding.

Other proceedings in other courts that are directly related to this proceeding include:

- *Winzer, et al. v. Kaufman County, et al.*, No. 15-cv-1284, U.S. District Court for the Northern District of Texas. Judgment entered October 4, 2016

- *Winzer v. Hinds, et al.*, No. 15-cv-1295, U.S. District Court for the Northern District of Texas. Judgment entered October 4, 2016.

- *Winzer, et al. v. Kaufman County, et al.*, 916 F.3d 464 (5th Cir. 2019), U.S. Court of Appeals for the Fifth Circuit. Judgment entered October 29, 2019.

Bill Cuellar and Garry Huddleston were defendants – appellees in these underlying proceedings but were dismissed by the district court, which was affirmed by the Fifth Circuit. Consequently, they are not parties to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Matthew Hinds and Kaufman County respectfully petition this Court for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit. *See Winzer v. Kaufman County, et al.*, 916 F.3d 464 (5th Cir. 2019), attached in the Appendix ("App.") hereto at 1a—2a, 11a—47a.

OPINIONS AND ORDERS BELOW

The Fifth Circuit's order and dissenting opinions denying rehearing and rehearing *en banc* is reported at 940 F.3d 900 (5th Cir. 2019) and is reprinted in the Appendix hereto at 3a—10a.

The Fifth Circuit's opinion and dissenting opinion affirming in part and reversing in part the district court's judgment is reported at 916 F.3d 464 (5th Cir. 2019) and is reprinted in the Appendix hereto at 11a—47a.

The district court's order granting Kaufman County's motion for summary judgment has not been reported. It is reprinted in the Appendix hereto at 48a—54a.

The district court's order granting the individual defendants' motion to dismiss and for summary judgment has not been reported. It is reprinted in the Appendix hereto at 55a—74a.

JURISDICTION

The Fifth Circuit had appellate jurisdiction because the district court's orders granting the motions for summary judgment were "final decisions" within the meaning of 28 U.S.C. § 1291.

A divided Fifth Circuit denied *en banc* review on October 21, 2019, by a vote of 10 – 6. Petitioners timely filed this petition for writ of certiorari on ___ _____. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents brought the underlying actions under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a

> judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondents allege that Petitioners violated their rights under the Fourth Amendment to the United States Constitution, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On the morning of April 27, 2013, several terrified Kaufman County residents in a quiet, rural neighborhood called 911 to report that a black man was walking up and down their neighborhood, brandishing a handgun, shooting at mailboxes, and threatening neighbors. (ROA.16-11482.311-320). The suspect was quoted as yelling "everyone's going to get theirs" and he wanted to "get back what's mine." (ROA.316-17). Callers also reported the suspect was

bald and was wearing a brown shirt with jeans or blue sweatpants. (ROA.311, 316).

Upon receiving these calls, dispatchers radioed local law enforcement officers in the area, including Kaufman County Sheriff's deputies and Texas State troopers. (ROA.279-80, 285-86, 290-91, 296-97, 302-03, 321-22). Dash-cam videos from the squad cars captured the arrival of the first two officers – Deputy Matthew Hinds and DPS Trooper Gerardo Hinojosa. (ROA.279-80, 285-86, 323). As they arrived, Hinds and Hinojosa spotted the suspect standing in the middle of the road down from their location, approximately 150 yards away. (*Id.*). After they stopped and exited their vehicles, the suspect turned toward the officers and fired a gun at them. (*Id.*). Hinojosa heard the "whizzing sound" of a bullet go by. (ROA.286). Hinds quickly reported "shots fired" over his police radio to dispatchers and others. (ROA.280, 286, 324). The suspect then ducked from Hinds' view. (ROA.280, 286).

Deputies Gary Huddleston, Bill Cuellar, and Keith Wheeler soon arrived at the scene. (ROA.279-80, 286, 291, 297, 303). Pursuant to their training, the officers set up to approach the location where the suspect was last seen. (*Id.*). Dispatch was continuing to receive all calls and updated Officer Hinds that the suspect was in front of a neighbor's house. (ROA. 281). Hinds spotted the suspect about 100-120 yards away. (*Id.*). Another officer used the vehicle's PA system to call out for the suspect to drop his gun and come toward the officers. (*Id.*). The suspect refused to comply and, instead, disappeared from view again. (*Id.*).

The officers slowly proceeded down the road toward the suspect's location, again giving multiple warnings for him to come out and drop his gun. (ROA.281, 286, 291, 297-98, 303, 323). Dispatchers reported to Hinds that the suspect had gone into his house. (ROA.281).[1] With other neighbors in the area, the officers were concerned for everyone's safety, including their own. (*Id.*). As they were deciding how to engage the suspect, 25-year old Gabriel Winzer ("Gabriel") suddenly appeared, from where the suspect was last seen, riding a bicycle down the road toward the officers. (ROA.281, 286, 291-92, 298, 304, 323). At that moment, he was approximately 90-100 yards away. (*Id.*).

While coming toward the officers, Gabriel appeared to have a gun in his hand. (ROA.281, 286, 292, 298, 304). One of the officers stated that Gabriel had "that gun," clearly referring to the suspect who had earlier fired at Hinds and Hinojosa. (ROA.298). After yelling for him to "put the gun down," which Gabriel ignored, the officers fired multiple shots at him. (ROA.281, 286, 292, 298, 304, 323). Gabriel fell off the bicycle and disappeared again into an unknown location. (*Id.*).

After several minutes, the officers moved into the area where Gabriel left the road, and they found him and his father, Henry Winzer, in the back yard of their residence. (ROA.282, 286-87, 292, 298, 304, 323). Gabriel was on the ground. The officers repeatedly

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[1] Operable firearms were later discovered in the house. (ROA.331; Appellees' Br. at ROA.268).

ordered Henry to move away from his son and to come towards them with his hands up. But he refused. (ROA.282, 286, 298-99, 304). When the officers asked about the gun that Gabriel had, Henry claimed it was only a toy gun and tossed a dark-colored plastic gun in their direction.[2] (ROA.282, 287, 299). Instead of complying with commands and receiving medical help, Garbriel resisted. Once Gabriel was finally handcuffed, EMS personnel entered the back yard of the residence, but he was deceased. (ROA.287, 293, 299, 305). Gabriel's autopsy showed that, at the time of his death, he was wearing a brown T-shirt and blue knit exercise pants, matching the description of the suspect reported by 911 callers. (ROA.335).[3]

Defendants Hinds, Cuellar and Huddleston moved the district court to dismiss the Respondents' claims against them because (1) the claims against Cuellar and Huddleston were barred by the two-year statute of limitations; and (2) Hinds was entitled to qualified immunity in that his use of deadly force was not excessive nor objectively unreasonable in violation of clearly established law. (ROA.244-273). The district court agreed, dismissing Respondents' claims against Cuellar and Huddleston and concluding that Hinds' use of force was objectively reasonable because he "had probable cause to believe that G. Winzer posed a threat of serious physical harm to himself, his fellow officers, and other individuals in the neighborhood."

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[2] A gunshot residue analysis later confirmed the presence of gunshot residue on Gabriel. (ROA.328).

[3] The majority opinion omits this fact and suggests Gabriel Winzer was not the original shooter. (App. 15a, 29a)

(App. 73a—74a). Respondents filed a motion for reconsideration, which the district court denied. (ROA.742-748).

Subsequently, Petitioner Kaufman County filed a motion for summary judgment on the grounds that, absent a Constitutional violation committed by Hinds, the County had no Section 1983 liability to Respondents. (ROA.648-655). The district court agreed, granted the County's motion, and entered a Final Judgment. (ROA.761-768).

Respondents timely appealed, and a divided panel of the Fifth Circuit affirmed the district court's judgment in part and reversed in part. (App. 11a—47a). The panel consisted of Judges James L. Dennis, James Graves, Jr. and Edith Brown Clement. The majority (Judges Dennis and Graves) concluded that "the errors in the district court's analysis were myriad" (App. 28a) and adopted a distilled set of facts in determining whether an objectively reasonable officer would have believed that Gabriel Winzer posed an imminent threat of harm. (App. 31a—32a). Denying that it was second-guessing Hinds' decisions or imposing a "20/20 hindsight analysis," the majority held that a jury must decide whether Hinds' use of force was unreasonable; therefore, he was not entitled to qualified immunity under the first prong of the analysis. (App. 32a). Nevertheless, the majority found that Winzer's right to be free from excessive force in this situation was not clearly established and affirmed his dismissal from the suit. (App. 33a). The majority, however, reversed and remanded the district court's summary judgment for Kaufman County. (App. 33a—34a).

Judge Clement concurred in the panel majority's conclusion that the law was not clearly established but authored a compelling dissent to the rest of the majority opinion. (App. 35a—47a). She wrote, "the majority misapprehends qualified immunity—both its first principles and specific legal standards—and has endangered Officer Hinds's (and future law enforcement officers') rightful claim to it." (App. 39a) Faulting the majority for discounting the tense circumstances encountered by Hinds, Judge Clement observed that the majority, in fact, imposed the sort of 20/20 hindsight analysis and the second-guessing of decisions by officers in field, which the Fifth Circuit (and this Court) have forbidden. (App. 42a). Judge Clement concluded that, based on all of the knowable and uncontroverted facts available to Hinds, and "after using the appropriate sensitivity required to analyze [his] decisions…the plaintiffs failed to meet their burden to show his actions were objectively unreasonable." (App. 45a).

Petitioners then sought rehearing *en banc* in the Fifth Circuit which was denied by a 10 – 6 vote. (App. 3a-4a). Judge Jerry E. Smith dissented from the denial of rehearing and also joined in a separate dissenting opinion authored by Judge James C. Ho and joined by Judges Clement and Kurt D. Engelhardt. (App. 5a—10a). Judge Smith pointedly quoted:

> Abandon hope, all ye who enter Texas, Louisiana, or Mississippi as peace officers with only a few seconds to react to dangerous confrontations with threatening and well-armed potential killers.…[T]here is little

> chance that, any time soon, the Fifth Circuit will confer the qualified-immunity protection that heretofore-settled Supreme Court and Fifth Circuit caselaw requires. (App. 5a).

Judge Ho opened his dissent from rehearing *en banc* with the observation that, "If we want to stop mass shootings, we should stop punishing police officers who put their lives on the line to prevent them." (App. 5a). He later remarked about the dangerous and ill-advised message the majority's opinion sends to law enforcement officers: "See something, do nothing." (App. 10a).

REASONS FOR GRANTING THE PETITION

This appeal involves multiple questions of exceptional importance because the Fifth Circuit's decision conflicts with decisions of this Court and other appellate courts across the country.

First, the majority opinion potentially subjects Kaufman County to Section 1983 liability under *Monell v. New York City Dept. of Social Services* despite no officer being liable for violating clearly established law.

Second, the majority opinion conflicts with Supreme Court decisions requiring that the reasonableness of an officer's use of force to be judged from the perspective of an objective officer on the scene, taking into account the facts and information "knowable" to the officer at the time. *See White v. Pauly*, 580 U.S. ___, 137 S. Ct. 548, 550 (2017).

The opinion also conflicts with decisions of this Court prohibiting the assessment of an officer's use of force with the benefit of 20/20 hindsight from the "peace of a judge's chambers," and without due regard for the fact that officers are often forced to make split-second judgments about the amount of force to use in circumstances that are tense, chaotic, and rapidly evolving. *See Graham v. Conner*, 490 U.S. 386 (1989); *Ryburn v. Huff*, 565 U.S. 469 (2012).

The opinion also conflicts with Fifth Circuit decisions holding that the use of deadly force is presumptively reasonable and officers may take action to defend themselves or others when an objective officer has reason to believe that a suspect poses a threat of serious harm. *See e.g, Ontiveros v. City of Rosenberg*, 564 F.3d 379 (5th Cir. 2009); *Ramirez v. Knoulton*, 542 F.3d 124 (5th Cir. 2008).

Third, the majority implies that an officer must wait until the moment a suspect uses a deadly weapon to act to stop the suspect. This conflicts with *Mullenix v. Luna*, 136 S. Ct. 305, 311 (2015).

I. THE PANEL MAJORITY IMPROPERLY REVERSED KAUFMAN COUNTY'S SUMMARY JUDGMENT IN THE ABSENCE OF A VIOLATION OF CLEARLY ESTABLISHED LAW.

The panel majority erred in reversing the district court's summary judgment for Kaufman County as premature. (*See* App. 33a—34a). Here, the panel

majority effectively concluded there may have been a Constitutional violation but then conceded it was not a clearly established Constitutional right.

The majority's reversal of the County's summary judgment violated the law in the Fifth Circuit and other Circuits: If the law was not clearly established, how could a county deliberately violate the law? *See Bustillos v. El Paso Co. Hosp. Dist., et al.*, 891 F.3d 214, 223 (5th Cir. 2018); *Hagans v. Franklin Cty. Sheriff's Ofc.*, 695 F.3d, 505, 511 (6th Cir. 2012); *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 393 (8th Cir. 2007) (*en banc*); *see also Gonzalez v. Ysleta Indep. Sch., Dist.*, 996 F.2d 745, 759 (5th Cir. 1993) (dicta).

The majority reasoned that, because there were genuine fact issues about whether Hinds committed a constitutional violation, the County was not yet entitled to summary judgment. *Id.* This conclusion conflicts with this Court's decision in *City of Los Angeles v. Heller*, 106 S. Ct. 1571 (1986), the Fifth Circuit's own decision in *Bustillos v. El Paso Cty. Hosp. Dist.*, 891 F.3d 214 (5th Cir. 2018), and the decisions of other Circuits.

In *Heller*, this Court plainly held:

> [N]either *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has

> concluded that the officer inflicted no constitutional harm.

Heller, 106 S. Ct. at 1573 (emphasis in original).

One corollary to this Court's holding in *Heller*, which the Fifth Circuit and other Circuits have recognized, is that governmental liability cannot attach under Section 1983 for claims premised on *deliberate indifference* to a constitutional right when that right has not yet been clearly established. *See Bustillos*, 891 F.3d at 222. This is the case even when a constitutional violation might be proven. Indeed, in *Bustillos*, the Fifth Circuit affirmed the dismissal of the plaintiffs' deliberate indifference (i.e. failure to train) claim against El Paso County, regardless of whether the complaint sufficiently alleged a constitutional violation, because a "policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established." *Id.* (quoting *Hagans v. Franklin County Sheriff's Office*, 695 F.3d 505, 511 (6th Cir. 2012)) (quoting *Szabala v. City of Brooklyn Park*, 486 F.3d 385, 393 (8th Cir. 2007) (*en banc*)).

Respondents' Section 1983 claim against Kaufman County stems from its alleged failure to train its officers on the use of deadly force (*see* ROA.140-141), which this Court has held requires a showing of deliberate indifference by the government entity. *See City of Canton v. Harris*, 489 U.S. 378, 389, 109 S. Ct. 1197, 1205 (1989).

Furthermore, this Court's decision in *Owen v. City of Independence*, 445 U.S. 622 (1980) does not bar a judgment in favor of the County. There, the Court held that the good-faith immunity enjoyed by public officials does not extend to municipalities when the municipality itself commits a constitutional violation through its policies. *Id.* at 657. Unlike *Owen*, this case, along with *Bustillos*, *Szabala* and others, involves an explicit claim for failing to adequately train public officials, which courts have recognized requires a more rigorous analysis of culpability and causation – i.e., deliberate indifference – to avoid imposing *respondeat superior* liability. *See e.g., Szabala*, 486 F.3d at 394. In fact, the Fifth Circuit has previously observed that the deliberate indifference requirement mandated by *City of Canton* can be applied consistently with the Court's holding in *Owen*. *Gonzalez*, 996 F.2d at 759-760. It follows from these cases that Kaufman County cannot be deliberately indifferent to a Constitutional right that was not clearly established at the time of the official's conduct. Hence, the panel majority wrongfully reversed the County's summary judgment.

II. THE MAJORITY OPINION MISAPPLIES THE STANDARDS GOVERNING QUALIFIED IMMUNITY ARTICULATED BY THIS COURT IN DETERMINING WHETHER OFFICER HINDS REASONABLY PERCEIVED A THREAT OF IMMINENT HARM.

Police officers who routinely confront dangerous suspects and tense encounters in the field must decide

whether and how to protect themselves and the general public within the confines of the Fourth Amendment. *See Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (an officer's use of deadly force is a seizure under the Fourth Amendment and therefore must be reasonable). When deciding whether an officer's use of force is unreasonable and violates the Fourth Amendment, this Court has long required courts to apply an objective test in carefully balancing the "nature and quality of the intrusion on the individual's Fourth Amendment interest against the countervailing governmental interests at stake." *See Graham v. Connor*, 490 U.S. 386, 395-96 (1989) (internal quotation marks omitted). This is not a rigid or mechanical test; rather, whether an officer's use of deadly force is reasonable is informed by a number of non-exclusive factors including (1) the severity of the suspected crime; (2) whether the suspect imposes an immediate threat to the safety of the officer or others; (3) the suspect's level of resistance; (4) the relationship between the need for force and the amount of force used; and (5) the officer's effort to temper or limit the amount of force used. *See id.* at 396; *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473.

This Court and the Fifth Circuit have repeatedly emphasized that determining the reasonableness of an officer's decision to use deadly force must be viewed from the circumstances he or she confronted, without the benefit of 20/20 hindsight from the peace and comfort of courthouse chambers. *See Graham*, 490 U.S. at 396; *Ryburn*, 565 U.S. at 476-77 (2012); *Saucier v. Katz*, 533 U.S. 194, 209 (2001); *Ramirez*, 542 F.3d at 129; *Ontiveros*, 564 F.3d at 382. Indeed, this

Court has warned judges against "second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn*, 565 U.S. at 477. On occasion, the Fifth Circuit has ignored this Court's teaching. *See e.g., Mullenix v. Luna*, 136 S. Ct. 305 (2015) (summarily reversing denial of qualified immunity).

Thus, a court's evaluation of an officer's use of force is limited to facts and information "knowable" to the officer at the time. *White*, 137 S. Ct at 550. This framework permits courts to use "reasonable inferences which [the officer] is entitled to draw from the facts" when assessing whether he reasonably perceives a threat of harm. *See Terry v. Ohio*, 88 S. Ct. 1868, 1883 (1968).

Contrary to this well-established precedent and guidance, the panel majority took the opposite approach in assessing Officer Hinds' use of force and thereby committed reversible error. Not only did the majority ignore what was indisputably a chaotic and "especially tense situation" (*see* ROA.641), it actually adopted the Respondents' characterization of the events, including Gabriel Winzer's alleged innocent intent, and failed to consider critical facts and reasonable inferences that an objective officer in Hinds' position could have drawn based on the totality of the circumstances.

First, the majority's decision is based on the flawed conclusion that Gabriel Winzer was at home when the officers first arrived and was "not the suspect who had fired at Hinds and Hinojosa." (App. 15a). As Judge

Clement notes in her dissent, the sole source for this "highly disputed" fact is Henry Winzer's contested affidavit. (App. 35a—36a, n.1). Indeed, Henry's affidavit admits that *he* was at home, and not with Gabriel, when Gabriel was "walking around the neighborhood, [supposedly] playing with a bright orange toy gun" before the officers arrived. (ROA.497). Henry claims he instructed Gabriel to come home only after Henry noticed law enforcement officers following him (*See* ROA.498).[4]

Second, and equally important, the pivotal question is whether Hinds could have *reasonably* believed that Gabriel was the same person who took a shot at him just minutes earlier. The majority appears to say no, based solely on the fact that Gabriel was on a bicycle and wearing a blue jacket, rather than a brown shirt. (App. 29a, 32a). The record, however, confirms that Gabriel was wearing a brown T-shirt while riding his bicycle. (ROA.335) ("When first viewed, the body is clad in a…cut away bloodstained *brown T-shirt*...") (emphasis added). Neighbors calling 911 also reported the suspect as a bald man wearing blue sweatpants or jeans. (ROA.311, 316). This description matched Gabriel as well. (ROA.335)("When first viewed, the body is clad in…bloodstained *blue knit exercise pants*…The scalp hair is black and

[4] The panel majority found that the district court erred in disregarding certain parts of Henry Winzer's affidavit under the "sham affidavit" doctrine. (App. 22a—26a). Petitioners contend the majority is incorrect; however, as Judge Clement observed in her dissent, Officer Hinds's behavior was reasonable in any event, even taking the affidavit into consideration. (App. 38a—39a).

measures *less than 1/8 inch*.") (emphasis added). Hence, the majority's opinion resting on the notion that Gabriel Winzer was not the suspect who initially shot at Hinds ignores this Court's mandate to view the facts and circumstances from Hinds' perspective, including reasonable inferences he could have drawn, to determine whether his behavior was reasonable.

Similarly, when Gabriel appeared on his bicycle, he emerged from the "last known location of the suspect." (App. 32a). Yet, the majority erroneously credits Respondents' assertion that Gabriel was simply riding his bike toward the officers on an "innocent mission to show the officers his toy pistol."[5] (App. 15a). The majority even subjectively describes Gabriel's approaching on the bicycle as "dawd[ling]" and taking a "child-like 'figure 3'" (App. 30a—31a & n.10), which Judge Clement aptly noted were not obvious and could only be discerned from a repeated, nuanced review of the video evidence "in the quiet of an office." (App. 45a). "Such fine distinctions into [the majority's] analysis of what a reasonable officer should do when faced with a split-second, life-or-death decision in real time is particularly misguided." (*Id.*) (citing *Graham*, 490 U.S. at 396-97). In fact, it contravenes this Court's instructions about focusing only on what was "knowable" to Hinds. Whether Winzer's intent was truly "innocent" is something Hinds could not have known. Likewise, right before Gabriel emerged on his bicycle from the suspect's last known location, Hinds was advised that the suspect had gone into his house. (ROA.281). But, for what reason? To change clothes?

[5] Winzer was 25 at the time (ROA 335).

To dispose of his gun? To get another one? To re-load and fire again? Instead of following this Court's precedent and respecting the real-time decision-making of these officers in the field, the majority imposes additional burdens never before placed on officers. Before resorting to deadly force, officers must question or confirm the identity of suspects they encounter, determine their true intentions and whether or not they are armed. This Court's decisions do not impose such requirements on police officers.

When the facts and evidence are viewed consistently with this Court's jurisprudence, Officer Hinds' decision to use deadly force was eminently reasonable. Disregarding this Court's guidance, the majority goes to great lengths to downplay the threat of harm confronted by Hinds and the other officers in the chaos that was rapidly unfolding that day. From the "peace of a judge's chambers," the majority improperly second guesses Hinds' decision on the appropriate level of force he should use, contrary to a long line of precedent from this Court and the Fifth Circuit. By engaging in this forbidden second-guessing, as Judge Clement correctly observed, the majority has undermined the qualified immunity framework established by this Court and the Fifth Circuit by forcing officers to disregard their own instincts and the observations of their fellow officers in determining the nature of the risk posed by suspects and the appropriate level of force to use. In real-time, life-threatening scenarios that law enforcement officers frequently confront, the majority now requires them to unnecessarily question whether and how they can protect themselves and others. This is not the first time the Court has been called upon to correct the

mistaken analysis of a Fifth Circuit panel. *See e.g., Mullenix v. Luna*, 136 S. Ct. 305 (2015).

The majority also faults Hinds and the other officers for the quickness of their reaction in deciding to use deadly force. (App. 30a). Citing *Trammel v. Fruge*, a case that does not even involve deadly force, the majority suggests officers must assess whether a suspect is aware of their commands to drop his weapon and why he is disobeying. Despite clear, indisputable video evidence that (1) at least once the officers yelled for the suspect to drop his weapon and surrender, (2) when Gabriel emerged on his bicycle, one officer referred to him having "that gun," and (3) another officer yelled for him to "put that down," the majority implies that Hinds should have waited and given Gabriel more time to comply with their commands. This Court has never required an officer to unreasonably risk his own life by waiting to see whether a suspect will follow through on a reasonably perceived threat. Such hindsight and speculation exposes officers to potentially deadly consequences. *See Ontiveros*, 564 F.3d at 384 n.2 (referring to the exigencies that officers face and how requiring them to delay reacting results in "a tie, you die" scenario).

III. THE PANEL MAJORITY'S ANALYSIS OF HINDS' USE OF FORCE CONTRAVENES THE FIFTH CIRCUIT'S AND OTHER CIRCUITS' DECISIONS HOLDING THAT A POLICE OFFICER'S USE OF DEADLY FORCE IS NOT UNCONSTITUTIONAL WHEN HE REASONABLY FEARS FOR HIS SAFETY IN RESPONSE TO A PERCEIVED THREAT OF HARM.

This Court should also review this case because, under controlling Fifth Circuit law and the law of other Circuits, Officer Hinds' use of deadly force was reasonable under the circumstances.[6] Indeed, the

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[6] *See e.g., Reese v. Anderson,* 926 F.2d 494, 500-01 (5th Cir. 1991) (holding that *Garner* did not prohibit conduct where facts indicated that an officer reasonably perceived a threat from a non-compliant suspect after a car chase); *Young v. City of Killeen*, 775 F.2d 1349, 1352-53 (5th Cir. 1985) (holding that there was no constitutional deprivation here "all witnesses agreed" that the officer had reasonably perceived a threat at the time of the shooting); *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 385 (5th Cir. 2009) (affirming summary judgment on the basis of qualified immunity where facts indicated that a SWAT team officer reasonably perceived a threat from a non-compliant suspect barricaded behind a door); *Manis v. Lawson*, 585 F.3d 839, 845-46 (5th Cir. 2009) (holding that an officer was entitled to qualified immunity where facts established that he reasonably perceived a threat from a non-compliant suspect refusing to show his hands and appearing to retrieve a gun); *Ballard v. Burton*, 444 F.3d 391, 402-03 (5th Cir. 2006) (holding that an officer was entitled to summary judgment on an excessive force claim where facts indicated the officer reasonably perceived a threat from a non-compliant suspect); *Ramirez v. Knoulton*, 542 F.3d 124, 129-31 (5th Cir. 2008) (holding that an officer was entitled to qualified

panel decision mistakenly failed to recognize the importance of cases clearly requiring burden shifting to summary judgment non-movants when qualified immunity is alleged, a burden which "is a heavy [one]." *See Mendez v. Poitevent*, 823 F.3d 326, 331 (5th Cir. 2016) (quoting *Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015); *Harris v. Serpas*, 745 F.3d 767.771 (5th Cir. 2014) ("Once the defendant raises the qualified immunity defense, the burden shifts to the plaintiff to rebut this defense by establishing that the official's allegedly wrongful conduct violated clearly established law.") (internal quotations and citation omitted).

In *Ramirez v. Knoulton*, 542 F.3d 124 (5th Cir. 2008), the Fifth Circuit reversed the district court's denial of qualified immunity for a police officer who used deadly force when he encountered a suspect whose conduct was deemed "defiant and threatening." *Id.* at 129-30. After being stopped on a roadside by the officers, the suspect exited his car holding a handgun at his side. *Id.* at 127. The suspect never discharged his gun, pointed it at the officers, or even raised it. *Id.* at 129. In addition, there were no vulnerable bystanders nearby, and the officers had summoned a crisis negotiator to the scene. *Id.* Nevertheless, when the suspect brought his hands together at this waist,

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immunity where facts indicated that a suspect was "defiant and threatening"). *See also Salazar-Limon v. City of Houston*, 826 F.3d 272, 279 (5th Cir. 2016) (holding that an officer was entitled to qualified immunity where the officer reasonably perceived a threat from a non-compliant suspect who physically struggled with the officer before suddenly reaching towards his waistband); *see also Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

one officer fired a shot hitting the suspect. *Id.* at 127. The district court found there was at least a fact issue of whether the officer's actions were excessive. The Fifth Circuit, however, disagreed noting that the district court "largely employed 20/20 hindsight in reaching this conclusion." *Id.* at 129. The Court faulted the district court for failing to consider the totality of the circumstances, including situations that are "tense, uncertain, and rapidly evolving," in deciding whether the suspect posed a threat of serious physical harm. *Id.* at 129-30. Critically, the Fifth Circuit quoted this Court's admonition in *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985):

> A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.

Id. (quoting *Sharpe*, 470 U.S. at 686-87). Here, the panel majority's decision utilizes this same sort of 20/20 hindsight, which this Court and the Fifth Circuit prohibit.

In *Manis v. Lawson*, 585 F.3d 839 (5th Cir. 2009), the Fifth Circuit again reversed the district court's denial of qualified immunity for an officer who used deadly force against an unarmed suspect who was non-compliant and appeared to be reaching for something under his seat at the time the officer shot him. *Id.* at 845. The Fifth Circuit observed that the suspect's actual intent – if that could even be discerned – was not the test; the question was whether the officer was

objectively reasonable in believing he posed a threat of serious harm. *Id.*

Similarly, in *Salazar-Limon v. City of Houston*, 826 F.3d 272 (5th Cir. 2016), the Fifth Circuit concluded there was no Constitutional violation by an officer who reasonably perceived a threat from a non-compliant suspect who briefly struggled with the officer, walked away from him, and reached towards his waistband at the time the officer shot him. *Id.* at 275, 279. The Court noted that the suspect's positioning toward the officer was immaterial, stating "we have never required officers to wait until a defendant turns toward them, with weapon in hand, before applying deadly force to ensure their safety." *Id.* at 279 n.7 (citing cases).

The above precedent from the Fifth Circuit is consistent with the clearly established law in other Circuits as well. For example, in the Tenth Circuit, an officer's use of deadly force is "justified under the Fourth Amendment if a reasonable officer….would have probable cause to believe that there was a threat of serious physical harm to themselves or to others," even before a suspect fires a weapon or attempts to use a weapon. *Estate of Larsen v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) (emphasis omitted) (officer's shooting of a man with a raised knife was reasonable even when suspect made no threatening movements toward officer because a "reasonable officer need not await the 'glint of steel' before taking self-protective action; by then, it is 'often too late to take safety precautions'") (quoting *People v. Morales*, 198 A.D.2d 129, 130 (N.Y. App. Div. 1993)).

In *Mullins v. Cyranek*, 805 F.3d 760 (6th Cir. 2015), the Sixth Circuit affirmed qualified immunity for an officer who encountered a suspect with a gun and shot and killed the suspect, even though at the time, the suspect had tossed the gun over the officer's shoulder in response to the officer's command to drop the weapon. *Id.* at 767. The Sixth Circuit held that the officer's actions were not unreasonable, noting that the suspect initially had his finger on the trigger of the gun: "While [the officer]'s decision to shoot [the suspect] after he threw his weapon away may appear unreasonable in the 'sanitized world of our imagination,' [the officer] was faced with a rapidly escalating situation, and his decision to use deadly force in the face of a severe threat to himself and the public was reasonable." *Id.* The Court went on to say, "[w]hile hindsight reveals that [the suspect] was no longer a threat when he was shot," officers should not be denied qualified immunity "in situations where they are faced with a threat of severe injury or death and must make split-second decisions, albeit ultimately mistaken decisions, about the amount of force necessary to subdue such a threat." *Id.* at 768 (citing *Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991) ("Also irrelevant is the fact that [the decedent] was actually unarmed…The sad truth is that [the decedent's] actions alone could cause a reasonable officer to fear imminent and serious physical harm.") (other citation omitted).

The error in the panel majority's decision is highlighted by all of these cases; the opinion requires police officers to wait before using deadly force to

confirm a suspect's identity, confirm whether or not he is carrying a weapon, and/or discern what his or her true intentions might be. With the benefit of 20/20 hindsight and a nuanced review of the dash-cam video from the peace of courthouse chambers, the panel majority has imposed requirements on police officers that heretofore have not been imposed by this Court, the Fifth Circuit, or other Circuits. *See e.g., Wilson v. Meeks*, 52 F.3d 1547, 1553-54 (10th Cir. 1995) ("Qualified immunity does not require that the police officer know what is in the heart or mind or his assailant. It requires that he react reasonably to a threat" and "the inquiry here is not into [decedent's] state of mind or intentions, but whether, from an objective viewpoint and taking all factors into consideration, [the officer] reasonably feared for his life."); *Untalan v. City of Lorain*, 430 F.3d 312, 315 (6th Cir. 2005) ("Within a few seconds of reasonably perceiving a sufficient danger, officers may use deadly force even if in hindsight the facts show that the persons threatened could have escaped unharmed."). The majority's conclusion that Officer Hinds could not have reasonably relied on his own instincts and his fellow officers' observations violates these precedents. In the words of Judge Clement:

> [The panel majority] undermines officers' ability to trust their judgment during those split seconds when they must decide whether to use lethal force. Qualified immunity is designed to respect that judgment, requiring us to second-guess only when it clearly violates the law. The standard acknowledges that we judges—mercifully—never face that split

> second. Indeed, we never have to decide anything without deliberation—let alone whether we must end one person's live to preserve our own or the lives of those around us.
>
> The qualified immunity standard stops this privilege from blinding our judgment, preventing us from pretending we can place ourselves in the officers' position based on a cold appellate record. It prevents us from hubristically declaring what an officer should have done—as if we can expect calm calculation in the midst of chaos.
>
> The majority opinion, written from the comfort of courthouse chambers, ignores that deference. Instead, it warns officers that they cannot trust what they see; they cannot trust what their fellow officers observe; they cannot trust themselves when posed with a credible threat. It instructs them, in that pivotal split second, to wait. But when a split second is all you have, waiting itself is a decision—one that may bring disastrous consequences. (App. 46a—47a).

In summary, the majority's conclusion that Hinds may have violated the Constitution by unreasonably resorting to deadly force is contrary to controlling authority from the Supreme Court, the Fifth Circuit, and other Circuit Courts thus warranting review by this Court.

CONCLUSION

For the reasons explained above, Petitioners respectfully submit that this Court should grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-11482

[Filed October 29, 2019]
[Filed February 18, 2019]

D.C. Docket No. 3:15-CV-1284
D.C. Docket No. 3:15-CV-1295

EUNICE J. WINZER, Individually and on behalf of the statutory beneficiaries of Gabriel A. Winzer; SOHELIA WINZER; HENRY WINZER,
Plaintiffs – Appellants
v.

KAUFMAN COUNTY; BILL CUELLAR; GARRY HUDDLESTON;
MATTHEW HINDS,Defendants - Appellees
HENRY ANDREE WIZNER, also known as Henry A. Wizner,
Plaintiff – Appellant

v.

MATTHEW HINDS, Individually and in his capacity as member of Kaufman County Sheriff Department; UNKNOWN STATE TROOPERS, Individually and in their capacity as member of Texas Department of Public Safety; UNKNOWN PARAMEDICS,

Individually and in their capacity as emergency responders of the East Texas EMS; SERGEANT FORREST FRIESEN,
Defendants – Appellees

Appeals from the United States District Court for the Northern District of Texas

Before DENNIS, CLEMENT, and GRAVES, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

EDITH BROWN CLEMENT, Circuit Judge, dissenting in part.

Certified as a true copy and issued
As the mandate on October 29,
2019

Attest: /s/ Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth
Circuit

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 16-11482

[Filed October 21, 2019]

EUNICE J. WINZER, Individually and on behalf of the statutory beneficiaries of Gabriel A. Winzer; SOHELIA WINZER; HENRY WINZER,
Plaintiffs – Appellants

v.

KAUFMAN COUNTY; BILL CUELLAR; GARRY HUDDLESTON;
MATTHEW HINDS, Defendants - Appellees

HENRY ANDREE WINZER, also known as Henry A. Winzer,
Plaintiff - Appellant

v.

MATTHEW HINDS, Individually and in his capacity as member of Kaufman County Sheriff Department; UNKNOWN STATE TROOPERS, Individually and in their capacity as member of Texas Department of Public Safety; UNKNOWN PARAMEDICS, Individually and in their capacity as emergency responders of the East Texas EMS; SERGEANT FORREST FRIESEN,
Defendants – Appellees

Appeals from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

Before DENNIS, CLEMENT, and GRAVES, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

In the poll, 6 judges vote in favor of rehearing en banc, and 10 vote against. Voting in favor are Judges Smith, Elrod, Southwick, Ho, Engelhardt, and Oldham. Voting against are Chief Judge Owen, Jones, Stewart, Dennis, Haynes, Graves, Higginson, Costa, Willett, and Duncan.

ENTERED FOR THE COURT:

/s/ James E. Graves, Jr.
James E. Graves, Jr.
United States Circuit Judge

JERRY E. SMITH, Circuit Judge, dissenting from the denial of rehearing
en banc:

"E pur si muove." Galileo, 1633.

"Abandon hope, all ye who enter Texas, Louisiana, or Mississippi as peace officers with only a few seconds to react to dangerous confrontations with threatening and well-armed potential killers . . . . [T]here is little chance that, any time soon, the Fifth Circuit will confer the qualified-immunity protection that heretofore-settled Supreme Court and Fifth Circuit caselaw requires." *Cole v. Carson,* 935 F.3d 444, 469 (5th Cir. 2019) (en banc) (Smith, J., dissenting).

I respectfully dissent (again).

JAMES C. HO, Circuit Judge, joined by JERRY E. SMITH, EDITH BROWN
CLEMENT, and KURT D. ENGELHARDT, Circuit Judges, dissenting from denial of rehearing en banc:

If we want to stop mass shootings, we should stop punishing police officers who put their lives on the line to prevent them.

The Fourth Amendment prohibits "unreasonable searches and seizures"—not reasonable efforts to protect citizens from active shooters. The panel opinion turns this principle on its head. As Judge Clement explained in her eloquent dissent, the majority opinion 'undermines officers' ability to trust their judgment during those split seconds when they

must decide whether to use lethal force." *Winzer v. Kaufman County,* 916 F.3d 464, 482 (5th Cir. 2019) (Clement, J., dissenting in part). "It instructs them, in that pivotal split second, to wait. But when a split second is all you have, waiting itself is a decision—one that may bring disastrous consequences." *Id. See also Cole v. Carson,* 935 F.3d 444, 470 n.3 (5th Cir. 2019) (en banc) (Smith, J., dissenting) (same).

Acknowledging that a vote against rehearing en banc need not signal agreement with the panel majority, I respectfully dissent from the denial of rehearing en banc.

The district court set forth the disturbing events presented in this case. "The undisputed facts show that, on April 27, 2013, two Kaufman County Sheriff's Office deputies, Gerardo Hinojosa and Defendant Matthew Hinds, responded to several 9-1-1 reports of an armed man who was firing a gun and destroying mailboxes in the vicinity of County Road 316 in Terrell, Texas. One caller reported that the suspect had yelled, 'Everyone's going to get theirs," and he wanted to 'get back what's mine.' The police dispatcher relayed these reports to responding officers." *Winzer v. Kaufman County,* 2016 WL11472367, at *1 (N.D. Tex. Aug. 10, 2016), *rev'd in part,* 916 F.3d 464 (5th Cir. 2019).

The record contains transcripts from several understandably panicked 9-1-1 callers.

According to one 9-1-1 caller: "He's over there kicking people's mailboxes, he has a gun. It's me and my mom and my baby. I don't know who he is, please

hurry. . . . He's out in the street. He's kicking the next door neighbor's uh, mailbox but he was pointing the gun to our house. I don't know who he is . . . Please hurry. . . . Oh he's outside shooting, oh my God."

Another 9-1-1 caller stated: "Please get the cops here. Oh my God. Oh my God. . . . [W]e see him kicking the mailbox and we open the door and he pointed the gun toward our house. . . . I don't know if he's out there, I have no idea, I'm not getting up." Later in that same call, a background voice can be heard, warning that "he's coming back down the street." The caller responds: "Don't open that door, Robin. He's coming back down the street."

Yet another 9-1-1 caller reported: "I had my kids outside earlier just a little bit ago and he pointed that pistol in the yard and he said "I'm just trying to get back what's mine."" The 9-1-1 operator confirmed that the shooter was in fact pointing at the caller's house. The caller further stated: "And he was just out there hollering at my husband, he was standing on the front porch and he saying he's going to take back what's his."

Another 9-1-1 caller stated: "I'm calling to report some gunshots. There's a man walking up and down the street screaming and firing a gun."

The district court explained what the officers found when they arrived at the scene. "Hinojosa and Hinds arrived in marked patrol vehicles and located a suspect near the intersection of County Road 316 and County Road 316A. The suspect was a black male wearing a brown shirt. The deputies positioned their

vehicles approximately 100 to 150 yards away. In their voluntary statements, the deputies wrote that the man fired one round in their direction. Hinojosa and Hinds saw white smoke rise from the gun, and Hinojosa heard a whizz go by. Hinds reported over the radio, "shots fired." The deputies did not return fire. The suspect then walked toward County Road 316A, out of the officers' view." *Id.* The panel opinion acknowledged that neither officer returned fire at this time, for fear of hurting nearby civilians. 916 F.3d at 468.

The officers continued down County Road 316A and instructed people to clear the area and return to their homes. 2016 WL 11472367, at *1. When they found the armed gunman again, they identified themselves using their car's PA system and ordered him to drop his weapon. Instead, he "ducked into the tree line and out of sight." *Id.* The officers established a "defensive position," guns drawn and using police vehicles for cover. 916 F.3d at 468.

A few minutes later, Gabriel Winzer suddenly emerged from behind a house and biked towards the officers from approximately 100 yards away. One officer yelled out that Winzer had a gun. Another ordered Winzer to put the gun down. Six seconds later, one of the officers fired at Winzer. Shortly after, the other officers also fired. Winzer turned his bicycle away from the officers and disappeared from view.

Minutes later, the officers located Winzer in the backyard of a house (later determined to be the home of Winzer's father, Henry). The officers discovered that Winzer had suffered four gunshot

wounds to his chest, shoulder, and upper back, and his father was nearby trying to comfort and revive him. The officers attempted to place handcuffs on Winzer's wrists, but he resisted. So the officers tased him. Once they succeeded in handcuffing him, the officers permitted the paramedics to enter the backyard. The paramedics pronounced Winzer dead at the scene. *Id.* at 468-69; 2016 WL 11472367, at *1-2.

The panel majority suggests that Winzer might not have been the suspect. 916 F.3d at 468 & n.1. But as the district court noted, a forensic report later detected the presence of gunshot residue on Winzer's body. 2016 WL 11472367, at *2. And the officers found multiple weapons in the home—four lightly modified Bushmaster rifles, a Ruger Super Blackhawk revolver, a Taurus Model 669 revolver, a Remington Model 870 Magnum shotgun, and a Bryco Model 38 pistol—as well as multiple boxes of ammunition and several expended cartridges.[1]

* * *

It is unknown how many lives were saved by these deputies on April 27, 2013. What is known, however, is that Kaufman County will now stand trial for their

[1] Courts analyze the actions of law enforcement officers for qualified immunity purposes based on the facts and reasonable beliefs they possess at the time they act. Other factors not known to them at that moment—whether facts existing at the time of their action or subsequently discovered, for better or worse—cannot later justify their actions, nor strip them of qualified immunity they otherwise enjoy. *See, e.g., Cole,* 935 F.3d at 456 ("we consider only what the officers knew at the time of their challenged conduct") (collecting cases). Here, nothing in the record suggests who else (if not Winzer) might have been the shooter who terrorized the innocent citizens of Kaufman County that day.

potentially life-saving actions—and that its taxpayers, including those who will forever be traumatized by Winzer's acts of terror, will pick up the tab for any judgment.

I have deep concerns about the message this decision, and others like it, sends to the men and women who swear an oath to protect our lives and communities. For make no mistake, that message is this: See something, do nothing.

What's more, we have no business—no factual basis in the record, and no legal basis under the Fourth Amendment—second-guessing split-second decisions by police officers from the safety of our chambers. To quote Judge Clement again, "we judges—mercifully—never face that split second. Indeed, we never have to decide anything without deliberation—let alone whether we must end one person's life to preserve our own or the lives of those around us." Winzer, 916 F.3d at 482 (5th Cir. 2019) (Clement, J., dissenting in part). "The majority opinion, written from the comfort of courthouse chambers, ignores" this reality. *Id. See also Cole*, 935 F.3d at 476 (Ho & Oldham, JJ., dissenting) ("No member of this court has stared down a fleeing felon on the interstate or confronted a mentally disturbed teenager who is brandishing a loaded gun near his school . . . . [We have] no basis for sneering at cops on the beat from the safety of our chambers.")

I respectfully dissent from the denial of rehearing en banc.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-11482
[Filed February 18, 2019]

EUNICE J. WINZER, Individually and on behalf of the statutory beneficiaries of Gabriel A. Winzer; SOHELIA WINZER; HENRY WINZER,
Plaintiffs – Appellants

v.

KAUFMAN COUNTY; BILL CUELLAR; GARRY HUDDLESTON;
MATTHEW HINDS,Defendants - Appellees

HENRY ANDREE WINZER, also known as Henry A. Winzer,
Plaintiff - Appellant

v.

MATTHEW HINDS, Individually and in his capacity as member of Kaufman County Sheriff Department; UNKNOWN STATE TROOPERS, Individually and in their capacity as member of Texas Department of Public Safety; UNKNOWN PARAMEDICS, Individually and in their capacity as emergency responders of the East Texas EMS; SERGEANT FORREST FRIESEN,
Defendants – Appellees.

Appeals from the United States District Court for the Northern District of Texas

Before DENNIS, CLEMENT, and GRAVES, Circuit Judges.
PER CURIAM:

This case is a § 1983 action arising from the deadly shooting of a young man by Kaufman County law enforcement officers responding to a 911 call.

The district court dismissed all claims against the individual officers and the county. We now AFFIRM in part and REVERSE in part.

BACKGROUND

I. The use of force.

On April 27, 2013, 911 dispatchers received multiple calls of a man standing in a rural street shooting a pistol. The man reportedly was kicking at mailboxes and pointed a gun at a house. The man further appeared agitated, speaking to himself and yelling "everyone's going to get theirs" and "I'm just trying to get back what's mine." Callers described the suspect as a black male wearing a brown shirt and jeans.

At approximately 10:30 am, dispatch relayed these details to law enforcement units in the area. Pertinent here, dispatch specifically informed the officers that the suspect was a "black male wearing blue jeans and a brown shirt." Officers Matthew Hinds, Gerardo Hinojosa, Gary Huddleston, William Cuellar, Brad

Brewer, and Keith Wheeler responded immediately to the area.

Hinds and Hinojosa arrived at the scene first and observed a suspect matching dispatch's description in the road 150 yards away. Both officers angled their vehicles to provide cover and took up defensive positions. The suspect then raised his hand and fired directly at Hinds and Hinojosa.[1]

Neither officer returned fire because there were multiple civilians in the area. Hinds "relayed to dispatch that shots had been fired by the suspect." The officers did not report that the suspect was in possession of a bicycle. The suspect then disappeared into the trees and the officers lost visual contact. Appellants' summary judgment evidence indicates that at the time of this shooting, Gabriel Winzer, the decedent, was inside his father's house and did not fire this shot at the officers.

Shortly thereafter, Huddleston, Cuellar, and Wheeler arrived. Hinds informed Cuellar and Wheeler that a suspect had fired shots at him and Hinojosa. Hinds told at least Cuellar that the suspect was "wearing a brown shirt."

The suspect then re-appeared at a distance between 100 to 500 yards from the officers. Because

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[1] It is not clear if Appellants dispute whether this shot was in fact fired. For purposes of this appeal, we assume that a suspect did fire a shot at Hinds and Hinojosa. Appellees have presented contemporaneous video and radio records from police dashboard cameras indicating "shots fired." We cannot and do not assume, however, that Gabriel Winzer was the suspect who fired the shot.

there were civilians in the area between the officers and the suspect, the officers decided to "move down [the road] to keep the public safe and attempt to move them inside their homes." At this point, the officers again confirmed several times that the suspect was wearing a brown shirt. The officers advanced down the road in a defensive position secured by three vehicles. As they advanced, the officers directed civilians into their homes. During the approach, the officers lost sight of the suspect. Accordingly, upon reaching the suspect's last known location, the officers set up a defensive position "for better cover." Hinds "angled [his] vehicle near the southwest corner [of the street], Trooper Hinojosa angled his vehicle near the northwest corner, and Deputy Wheeler positioned his marked Chevy Tahoe behind and centered between those vehicles."

Huddleston was on the Tahoe's driver's side. Cuellar was kneeling down on the driver's side by the front tire. Wheeler was away from the Tahoe in a ditch. Hinds and Hinojosa were near the passenger rear of the Tahoe. Four of the law enforcement officers had semi-automatic rifles and one had a shotgun.

The officers began giving verbal commands for the suspect to drop his weapon and "come out."

"After a few minutes," the officers spotted a figure on a bicycle enter the road. The rider was wearing a blue jacket instead of the brown shirt the suspect had been wearing, and was over 100 yards away. What happened next is highly disputed[2] and central to the resolution of this appeal. All of the officers claim the

rider was armed, raised a pistol to a firing position, and they feared for their lives.

As it turned out, the person on the bicycle was Gabriel Winzer, and not the suspect who had fired at Hinds and Hinojosa. According to Appellants, Gabriel was on an innocent mission to show the officers his toy pistol. Gabriel's father claims that when Gabriel rode off toward the officers "[he] did not have anything in his hands," "had both hands on the handle bar of his bike," and "did not reach for anything nor did he have anything in his hands when he was shot." Moreover, Mr. Winzer claims that Gabriel was "unarmed," "did not fire any shots," and "did not point anything towards the deputies." Indeed, Mr. Winzer states that "Gabriel did not move his hands in any way that might have suggested that he was reaching for something."

While Gabriel's actions on the bike are disputed,[2] it is beyond dispute that an officer yelled "put that down!" The officers then fired within six seconds of spotting Gabriel on his bike. Three officers fired Bushmaster AR-15s, one officer fired an M4 patrol rifle, and the fifth fired a Remington 870 shotgun. In total, seventeen shots were fired. Four bullets struck Gabriel, who was still over 100 yards from the officers. Upon being hit, Gabriel fell off his bike and fled out of view. The officers remained in their positions before

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[2] "Because this case comes to us on appeal from a summary judgment, we are obliged to review the record and construe the facts in the light most favorable to [Appellants], the nonmoving part[ies] in the court below." *See Sanders v. English,* 950 F.2d 1152, 1154 (5th Cir. 1992); *see also Tolan v. Cotton,* 134 S. Ct. 1861, 1866 (2014).

fanning out to set up a perimeter around Gabriel's house.

Meanwhile, Henry Winzer, Gabriel's father, was attempting to provide assistance to Gabriel in their back yard. After some time, the officers surrounded the yard and advanced on Gabriel and Henry. Henry told Hinojosa that Gabriel had been shot. As they approached, the officers asked Henry where the gun was. Henry informed the officers that the only gun they had was a toy cap gun. Henry then tossed a toy gun towards the officers and said "there is your gun." Nonetheless, the officers approached with caution because the "suspect had his arms underneath his body and no one knew whether he still had a weapon."

When the officers attempted to cuff Henry and Gabriel, both resisted. Huddleston and Brewer both tased Gabriel during this encounter. About 10 seconds after the last Taser deployment, [Gabriel] went limp and [the officers] were able to handcuff him. EMS later pronounced Gabriel dead at the scene.

II. The Procedural History

On April 22, 2015, Henry filed cause number 15-cv-01295, in the Northern District of Texas. In a *pro se* complaint, Henry asserted claims against Hinds, "unknown state troopers," and "unknown paramedics." Compl. at 1, *Winzer v. Hinds et al.,* No. 15-cv-01295 (N.D. Tex. 2015), ECF No. 1 ("Henry Complaint").

Separately, on April 27, 2015, Eunice Winzer, Gabriel's mother, filed cause number 15-cv-01284, in

the Northern District of Texas against "Kaufman County," "City of Kaufman," and "City of Terrell."[3] None of the officers involved in the incident were named defendants. *See* Eunice subsequently filed an amended complaint and a second amended complaint, again failing to list any of the officers as named defendants.

On September 18, 2015, Eunice filed a third amended complaint in 15-cv-01284 individually and on behalf of Henry.[4] The Third Amended Complaint alleged violations of Gabriel's Fourth Amendment right against excessive force and failure to train against several defendants. Relevant here, Appellants listed Cuellar and Huddleston as named defendants for the first time. Appellants additionally formally added Hinds as a named defendant in cause number 15-cv-01284. This essentially consolidated the parties from the two pending lawsuits and, on September 21, 2015, the Court formally consolidated the cases.

On January 15, 2016, Hinds, Cuellar, and Huddleston filed a motion for summary judgment. Cuellar and Huddleston argued that the claims against them were time-barred. All three of these officers also asserted that they were entitled to qualified immunity.

While the motion for summary judgment was pending, Appellants sought leave to file a fourth

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[3] Appellants later voluntarily dismissed the City of Terrell and the City of Kaufman.

[4] Appellants had retained counsel and were no longer *pro se* as of May 12, 2015.

amended complaint to add Hinojosa and Wheeler as defendants. The district court denied the motion for leave to amend. The court ultimately granted summary judgment on both the limitations and qualified immunity defenses. Kaufman County then promptly sought summary judgment, arguing that there could be no county liability if there was no constitutional violation by its officers. The court granted Kaufman County summary judgment. The district court denied a motion for reconsideration, and this appeal followed.

DISCUSSION

Appellants argue that the district court erred in four ways. First, that the district court erred in granting summary judgment to Cuellar and Huddleston based on limitations. Second, that the district court erred in denying leave to add Hinojosa and Wheeler as defendants. Third, that the court erred in granting summary judgment to Hinds based on qualified immunity. Fourth, that the court erred in granting summary judgment to Kaufman County. We address each in turn.

I. Claims Against Cuellar and Huddleston Are Time-Barred

The district court ruled that Appellants' claims against Cuellar and Huddleston were barred by a two-year statute of limitations. Appellants argue that the court should have related the claims back to the date of the original complaints. The district court did not err.

The limitations period for a § 1983 action is determined by the state's personal injury limitations period. *Whitt v. Stephens Cnty.,* 529 F.3d 278, 282 (5th Cir. 2008). In Texas, that period is two years. *Id.* When a plaintiff adds a defendant after the limitations period has run, Rule 15(c) allows the plaintiff to relate the claims filed against the new defendant back to the date of the original filing. *See* Fed. R. Civ. P. 15(c). To do so, the plaintiff must show both that the added defendant received adequate notice of the original lawsuit and that the defendant knew that, but for a mistake concerning the identity of the defendant, the action would have originally been brought against the defendant. *Jacobsen v. Osborne,* 133 F.3d 315, 319-22 (5th Cir. 1998). Rule 15(c) is meant to "correct a *mistake* concerning the identity of the party." *Id.* at 321. "Rule 15(c) does not allow an amended complaint adding new defendants to relate back if the newly-added defendants were not named originally because the plaintiff did not know their identities.'" *Id.* (quoting *Barrow v.Wethersfield Police Dep't,* 66 F.3d 466, 470 (2d Cir. 1995)). We review a grant of summary judgment *de novo. Whitt,* 529 F.3d at 282.

The incident at issue occurred on April 27, 2013. Accordingly, Appellants had to file suit by April 27, 2015. *See Whitt,* 529 F.3d at 282. Appellants did not add Cuellar or Huddleston as named defendants until their Third Amended Complaint on September 21, 2015. Appellants added Cuellar and Huddleston, therefore, after the two-year limitations period had expired.

Nonetheless, Appellants argue that their claims against Cuellar and Huddleston should "relate back"

to the filing of the original complaint under Rule 15(c). Appellants assert two primary grounds for that argument: (1) the original complaint listed "unknown officers" that clearly gave the defendants notice; and (2) Appellants diligently tried to identify the officers and added them as soon as they did. Neither argument has merit.

First, this court has clearly held that "an amendment to substitute a named party for a John Doe does not relate back under Rule 15(c)." *Whitt,* 529 F.3d at 282-83. Thus, to the extent Appellants sued "unknown officers," they cannot use these "John Doe" claims to now substitute in Cuellar and Huddleston after the limitations period. *Id.*

Second, even if Appellants were diligent in trying to identify Cuellar and Huddleston, such failures to identify do not relate back. Rule 15(c) requires a *"mistake* concerning the identity of a party." *See Jacobsen,* 133 F.3d at 321.[5]

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[5] Appellants further cite to *Jacobsen v. Osborne,* 133 F.3d 315 (5th Cir. 1998), for the proposition that an "identity of interest" "exception" to Rule 15(c) saves their claims. However, this doctrine only applies to Rule 15(c)'s requirement that the substituted party must have received notice of the suit. *Jacobsen,* 133 F.3d at 320. It does not relate to 15(c)'s second requirement that there also be a mistake of identity. *See id.* at 319. It is on the second requirement that Appellants' argument fails and the "identity of interest" exception does not cure that fault. *See id.* at 320-21 (applying "identity of interest" exception to imply notice where plaintiff mistakenly named individual officer, but not applying "identify of interest" exception to claims against unnamed John Doe deputies).

"[Flailing to identify individual defendants cannot be characterized as a mistake." *Id.*

The district court did not err in granting summary judgment to Cuellar and Huddleston based on the statute of limitations.

II. Claims Against Hinojosa and Wheeler Were Futile

The district court denied leave to amend to add Hinojosa and Wheeler on the grounds that the claims would be futile as barred by the statute of limitations. Appellants again assert that the claims against Wheeler and Huddleston should relate back under Rule 15(c). Appellants' argument lacks merit.

"A district court's denial of leave to amend is reviewed for an abuse of discretion." *Simmons v. Sabine River Auth. La.,* 732 F.3d 469, 478 (5th Cir. 2013). "Although leave to amend under Rule 15(a) is to be freely given, that generous standard is tempered by the necessary power of a district court to manage a case." *Schiller v. Physicians Res. Grp., Inc.,* 342 F.3d 563, 566 (5th Cir. 2003). A district court does not abuse its discretion in denying leave where claims against new defendants are barred by the statute of limitations. *See Whitt,* 529 F.3d at 282-83.

Appellants' argument lacks merit for the same reason their claims against Cuellar and Huddleston are untimely. Appellants had to add Hinojosa and Wheeler by April 27, 2015. *See id.* Appellants did not seek leave to add Hinojosa and Wheeler until February 18, 2016. The only grounds Appellants gave for their failure to do so is that Appellants "did not

know the identities" of Wheeler or Hinojosa until conducting discovery. Again, Rule 15(c) requires a *"mistake* concerning the identity of a party." *See Jacobsen,* 133 F.3d at 321. "[Flailing to identify individual defendants cannot be characterized as a mistake." *Id.*

The district court did not abuse its discretion in denying leave to amend because those claims were futile as barred by the statute of limitations.

III. A Material Fact Issue Exists as to Hinds's Qualified Immunity

The district court determined that Hinds was entitled to qualified immunity because he had "probable cause" to believe that Gabriel "posed a threat of serious bodily harm." Appellants argue that in reaching that conclusion, the district court "improperly gave greater credence to Hinds's evidence regarding the reasonableness of the force that he used." We agree. Before addressing the merits of Hinds's qualified immunity claim, we first address the district court's refusal to consider Henry's affidavit testimony.

A. Henry Winzer's Affidavit

The district court disregarded Henry's affidavit under the "sham affidavit" doctrine, concluding it contradicted statements in Henry's original complaint. This was an abuse of discretion. *See Williams v. Manitowoc Cranes, L.L.C.,* 898 F.3d 607, 615 (5th Cir. 2018) ("A district court abuses its discretion when its [evidentiary] ruling is based on

an erroneous view of the law or a clearly erroneous assessment of the evidence.").

Under the sham affidavit doctrine, a district court may refuse to consider statements made in an affidavit that are "so markedly inconsistent" with a prior statement as to "constitute an obvious sham." *Clark v. Resistoflex Co., A Div. of Unidynamics Corp.,* 854 F.2d 762, 766 (5th Cir. 1988); *see also Aerel, S.R.L. v. PCC Airfolis, L.L.C.,* 448 F.3d 899, 907 (6th Cir. 2006) (stating that the sham affidavit rule is only appropriate where an affidavit "directly contradicts" prior testimony); *Kennett-Murray Corp. v. Bone,* 622 F.2d 887, 894 (5th Cir. 1980) (finding that the sham affidavit rule was inappropriate because the affidavit was not "inherently inconsistent" with prior testimony). However, not "every discrepancy" in an affidavit justifies a district court's refusal to give credence to competent summary judgment evidence. *Kennett-Murray,* 622 F.2d at 893. Generally, "[i]n considering a motion for summary judgment, a district court must consider all the evidence before it and cannot disregard a party's affidavit merely because it conflicts to some degree with an earlier" statement. *Id.* "In light of the jury's role in resolving questions of credibility, a district court should not reject the content of an affidavit even if it is at odds with statements made" earlier. *Id.*

There is nothing inherently inconsistent between Henry's original complaint and the summary judgment affidavit.[6] The complaint stated that Gabriel "had" a

[6] We cannot join with the dissent's accusation that Henry "[c]onveniently" altered details to "create the key factual dispute." Henry's original "complaint" was a five sentence, hand-written

plastic toy gun and that he "rode out on a 10 speed bicycle to show [the officers] the toy gun," but contained no factual allegation regarding where Gabriel "had" the gun as he rode the bike. Henry Compl. 4. Meanwhile, the affidavit says that Gabriel was "playing with a bright orange toy gun," but further explains that "Gabriel did not have anything in his hands, including the toy gun, while he was on the bike." Instead, Gabriel "had both hands on the handlebars of his bike" and "did not move his hands in any way that might have suggested he was reaching for something." It is entirely possible that Gabriel rode out on his bicycle with the toy gun in his waistband (or elsewhere on his person) and had his hands on the handlebars of his bicycle at all relevant times.? [7] Because these statements can be "reconciled," there is no sham. *See Robinson v. Nexion Health at Terrell, Inc.,* 671 F. App'x 344, 344 (5th Cir. 2016) (reconcilable affidavits cannot be sham).

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statement placed into the limited space of a form-petition for *pro se* litigants. *See* Henry Compl. 4. Thus, it is no surprise that Henry failed to include every pertinent factual detail to his claims. We will not punish Henry for the clear, non-conflicting benefit he received by attaining competent counsel. Indeed, the affidavit is entirely consistent with the third amended complaint, which was drafted with the assistance of counsel and was the live pleading at the time of Hinds's motion.

[7] It is not a "clear implication" from the complaint, as the dissent asserts, that Gabriel "was holding [the gun] out" as he rode his bike to show the toy gun to the officers. One does not necessarily, nor even normally, "hold out" an object in front of them as they traverse over 100 yards, on a bicycle, to show an object to another. Especially when that object is a toy gun and the individual is approaching a group of armed police officers. Perhaps more significantly, that "clear implication" is directly contrary to the complaint's allegation that Gabriel was "an unarmed man." Henry Compl. 3.

Moreover, while the affidavit significantly supplements the complaint factually, it contradicts nothing. We have held that the sham affidavit doctrine is inappropriate where an "affidavit supplements, rather than contradicts" an earlier statement. *Clark,* 854 F.2d at 766. At most, the affidavit creates a credibility issue for Henry's version of the facts. Such credibility determinations, however, are for the trier of fact, not the district court. *See Kennett-Murray,* 622 F.2d at 894; *Tarver v. City of Edna,* 410 F.3d 745, 753 (5th Cir. 2005) ("Any credibility determination made between the officers' and [Henry's] version of events is inappropriate for summary judgment.").

Thus, the district court abused its discretion in applying the sham affidavit doctrine to exclude Henry's competent summary judgment evidence. *See Williams,* 898 F.3d at 615; *Clark,* 854 F.2d at 766; *Kennett-Murray,* 622 F.2d at 894. "The harmless error doctrine applies to the review of evidentiary rulings, so even if a district court has abused its discretion, [this court] will not reverse unless the error affected 'the substantial rights of the parties.'" *See Williams,* 898 F.3d at 615 (internal citations and quotation marks omitted). However, an error is not harmless where, as here, it affected Appellants' substantial rights by "tipp[ing] the balance" of the outcome at summary judgment and thereby severely inhibiting their ability to assert their claim. *See Dartez v. Fibreboard Corp.,* 765 F.2d 456, 469 (5th Cir. 1985) (finding an evidentiary ruling affected substantial rights where it "tipped the balance in favor of finding liability"); *see also E.E.O.C. v. Manville Sales Corp.,* 27 F.3d 1089, 1094-95 (5th Cir.

1994) (finding an evidentiary ruling affected substantial rights where it "directly impact [ed] the ability of [the plaintiff] to enforce his rights"). We conclude that the district court's exclusion of Henry's affidavit was an abuse of discretion that affected the Winzers' substantial rights. Accordingly, in analyzing the qualified immunity issue below, we consider the facts as stated in Henry's affidavit.

B. Qualified Immunity

"To determine whether qualified immunity applies, [we] engage 1] in a two-part inquiry asking: first, whether '[t] aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right;' and second, 'whether the right was clearly established.'" *Trammell v. Fruge,* 868 F.3d 332, 339 (5th Cir. 2017) (quoting *Saucier v. Katz,* 533 U.S. 194, 201 (2001)). We have discretion to address either prong of the qualified-immunity inquiry first. *See Pearson v. Callahan,* 555 U.S. 223, 236 (2009) (noting that "the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable"). "[U]nder either prong, [we] may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan v. Cotton,* 134 S. Ct. 1861, 1866 (2014). "[We] must view the evidence 'in the light most favorable to the opposing party.'" *Id.* (quoting *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970)).

1. Violation of a Constitutional Right

In the first prong of a qualified immunity analysis, we must "answer the constitutional violation question by determining whether the officer's conduct met the Fourth Amendment's reasonableness requirement." *Lytle v. Bexar Cnty., Tex.,* 560 F.3d 404, 410 (5th Cir. 2009).

Under the Fourth Amendment, "it is unreasonable for an officer to 'seize an unarmed, nondangerous suspect by shooting him dead.'" *Brosseau v. Haugen,* 543 U.S. 194, 197 (2004) (quoting *Tennessee v. Garner,* 471 U.S. 1, 11 (1985)). "It is not, however, unconstitutional on its face." *Garner,* 471 U.S. at 11. "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.*

"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 v. Connor,* 490 U.S. 386, 396 (1989). "[I]ts proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* This reasonableness inquiry is an objective one. *Id.* at 397. "[T]he question is whether the

officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* We only consider facts that were "knowable" to Hinds. *See White v. Pauly,* 137 S. Ct. 548, 550 (2017).

The district court concluded that "a reasonable officer on the scene . . . could have easily drawn the inference that the black man cycling towards five armed police officers, disregarding their orders to drop his weapon, and raising his arm in their direction was the same black man who had so brazenly fired upon them just around the corner." The errors in the district court's analysis are myriad.

First, as discussed above, the central error is the district court's failure to credit Henry's testimony, instead adopting the officers' characterization of the events preceding the shooting. This alone is reversible error. *See Tolan,* 134 S. Ct. at 1866 (reversing qualified immunity analysis at summary judgment stage where this court failed to view the evidence in the light most favorable to the non-moving party).

Second, the district court improperly concluded that Gabriel was "raising his arm" towards the police. This is directly contrary to Appellants' summary judgment affidavit, which claims that "Gabriel had both hands on the handle bar of his bike." Further, Henry claims that "Gabriel did not point anything towards the deputies" and "did not move his hands in any way that might have suggested that he was reaching for something." The district court should have viewed these statements "in the light most favorable"

to Appellants in determining whether an objectively reasonable officer would have concluded that Gabriel posed an "immediate threat" to the safety of the officers or others. *See Tolan,* 134 S. Ct. at 1866; *Graham,* 490 U.S. at 396; *Bazan v. Hidalgo Cty.,* 246 F.3d 481, 493 (5th Cir. 2001) (stating that the excessive force inquiry is confined to whether the officer "was in danger *at the moment of the threat* that resulted in the [officer's] shooting [the victim]").

Third, the district court ignored facts in the record casting doubt on whether a reasonable officer would have concluded that the "black man cycling towards [the officers] . . . was the same black man who had so brazenly fired upon them" earlier. For instance, Hinds had informed Cuellar that the suspect who fired the shots was "wearing a brown shirt." In fact, the officers repeatedly informed each other that the suspect was in a "brown shirt." The man on the bike, however, was wearing a blue jacket.[8] Further, the officers had no indication at all that the dangerous suspect, who had fired a shot at Hinds and Hinojosa earlier, had a bicycle. Moreover, the man on the bike was over 100 yards away and there had been numerous civilians in the area throughout the encounter. A jury could conclude that a reasonable officer would not have determined that Gabriel was the dangerous suspect. *See Lytle,* 560 F.3d at 41213 (finding genuine fact issues as to whether an officer's firing at approaching vehicle was unreasonable, even if vehicle posed a threat to officer, where shots fired in residential area could pose risk to civilians).

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[8] After the shooting, one of the officers stated that "he was in blue, that's what threw me off."

Fourth, the district court's conclusion that Gabriel "disregard[ed] their orders to drop his weapon," aside from improperly concluding on summary judgment that Gabriel had a weapon, is contradicted by the video evidence, which shows the officers fired on Gabriel within a second of shouting to "put that down!" The video further shows that Gabriel turned a tree-lined corner on his bicycle (that could possibly have obstructed his view of the officers), made a child-like "figure 3," and then only momentarily headed towards the officers before being shot. It is far from clear that Gabriel had the opportunity to be deterred by the officers' warnings or to even register their commands. *See Trammell,* 868 F.3d at 342 ("[T]he quickness with which the officers resorted to" deadly force "militates against a finding of reasonableness.").

Statements audible in the video further demonstrate Hinds's lack of reasonableness. Seconds prior to the shooting, an officer appears to state that Gabriel "had that gun,"[9] while another shouts to "put that down!" Though these statements weigh in Hinds's favor, they must be balanced against competing evidence that Gabriel did not match the suspect's description, did not have anything in his hands, had both hands on the handlebar of his bike, and did not reach for anything. They must further be balanced

[9] We note that there are conflicting facts regarding the gun Gabriel "had" at the time of the shooting. Henry claims that Gabriel had a "bright orange toy gun." The officers, however, claim the gun was "dull colored," "dark colored," or "silver," depending on whose affidavit you consult. Henry later tossed a toy gun towards the officers when the officers entered the Winzers' backyard to secure Gabriel. There is no evidence that any real firearm was ever found in Gabriel's possession or anywhere in his path.

with the undisputed facts that Gabriel was over 100 yards away, on a bicycle, and slowly approaching five officers barricaded behind three vehicles and with high powered rifles drawn and ready.[10] It is for a jury to determine whether a reasonable officer on the scene, when confronted with these facts, would have determined that Gabriel posed such an imminent risk to the officers that use of deadly force was justified within seconds of his appearance.

Given the district court's multifarious errors, and that we must consider the facts in the light most favorable to Appellants, we conclude that it is proper to consider only the following facts in determining whether an objectively reasonable officer would have believed that Gabriel posed an imminent threat and whether Hinds's use of force was constitutional. Hinds responded to a 911 call of a man with a gun. The suspect was a black male, afoot and wearing a brown shirt. Upon Hinds's arrival, the suspect fired a shot at Hinds and Hinojosa. Hinds then lost sight of the suspect. The officers encountered numerous civilians along the road as they searched for the suspect. The officers eventually set up a defensive barrier complete with three vehicles, five officers, four semiautomatic

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[10] The dissent would likewise violate *Tolan,* stating that Hinds acted reasonably because Gabriel was "riding headlong" at the officers. Yet, there is no evidence that Gabriel was "riding headlong" at the officers. Henry claims that Gabriel was "on his bike." The officers, for their part, state only that Gabriel was "coming" towards them while "riding" a bicycle. The video likewise shows that Gabriel dawdled slightly before turning toward the officers. In fact, accepting Henry's claim that Gabriel did not raise his arm towards the officers, as we must, there is no evidence indicating that the officers reasonably believed that Gabriel made any aggressive movements whatsoever prior to the shooting.

rifles, and a shotgun on a road in the vicinity of the suspect's last known location. Minutes later, Gabriel, on his bike and dressed in blue, not brown, appeared on the same street as the last known location of the suspect. Gabriel was riding his bicycle more than 100 yards away. Further, Gabriel did not have anything in his hands, had both hands on the handlebar of his bike, did not reach for anything, did not point anything towards the deputies, and was unarmed. Nonetheless, an officer stated that Gabriel "had that gun," while another screamed "put that down!" Hinds opened fire on Gabriel within seconds of spotting him.[11]

While "[w]e are loath to second-guess the decisions made by police officers in the field," *see Vaughan v. Cox,* 343 F.3d 1323, 1331 (11th Cir. 2003) (citing *Graham,* 490 U.S. at 396-97), we conclude that a jury could find that the use of deadly force was unreasonable if it credited and drew reasonable inferences from the Winzers' account. Accordingly, Hinds was not entitled to qualified immunity under the first prong.

2. Clearly-Established Law

Having determined that there are genuine issues of material fact with respect to whether Hinds's use of deadly force was objectively reasonable, the question remains "whether the right was clearly established at the time of the conduct." *Lytle,* 560 F.3d at 410. The

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[11] Contrary to the dissent's claim that we impose a 20/20 hindsight analysis, these facts are construed from Hinds's perspective at the time of the shooting, while also taking into account our duty to construe the evidence in the light most favorable to the non-moving party.

Supreme Court has held that we cannot "define clearly established law at a high level of generality." *Ashcroft v. al-Kidd,* 563 U.S. 732, 742 (2011). This inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'"*Mullenix v. Luna,* 136 S. Ct. 305, 308 (2015) (quoting *Brosseau,* 543 U.S. at 198-99). The Supreme Court does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft,* 563 U.S. at 741. Under this exacting standard, we cannot conclude that Gabriel's right to be free from excessive force was clearly established here.

IV. Summary Judgment Premature for Kaufman County

The district court granted summary judgment in favor of Kaufman County based on its ruling that there was no constitutional violation and the officers were entitled to qualified immunity. *See Hicks-Fields v. Harris Cty., Texas,* 860 F.3d 803, 808 (5th Cir. 2017) ("[T]o establish municipal liability under § 1983, a plaintiff must show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right."). Because we determine that there are genuine issues of fact as to whether there was a constitutional violation, we reverse the district court's grant of summary judgment to the county as premature and remand to the district court for reconsideration.

CONCLUSION

For these reasons, we REVERSE the district court's grant of summary judgment to the county and REMAND for consideration in light of this opinion. We otherwise AFFIRM.

EDITH BROWN CLEMENT, Circuit Judge, dissenting in part.

The majority has correctly concluded that Officer Hinds is entitled to qualified immunity due to the lack of clearly established law. But en route to this decision, it has taken an unnecessarily difficult path, disregarding the deference long afforded to district courts' evidentiary rulings and misapplying well-worn qualified immunity standards. In light of these significant errors, I dissent from sections III(A), III(B)(1), and IV of the opinion.

I.

As to the evidentiary error, the majority seems to concede that if Gabriel was pointing the gun (or toy gun) at the officers, Officer Hinds's decision to shoot should be protected. But it concludes that the district court erred when it rejected an affidavit from Gabriel's father, Henry, which stated that no gun was in view. This failure to admit the affidavit and credit its version of the incident was apparently the "central error" of the court's analysis. The majority thus bases its conclusion that a constitutional violation may have occurred on a five-page document—submitted one month after Officer Hinds's motion for summary judgment—that contravenes the unanimous observation of the witnessing officers recorded in their sworn statements and in video-recorded utterances prior to the shooting, and, as addressed more thoroughly below, Henry's own initial complaint.[1]

[1] Note that in framing the dispute over the affidavit, the majority opinion errs by presenting certain facts from the affidavit as if they

The problems with the majority's analysis stem from an unfaithful application of the standard of review. We are told that the applicable standard—review for abuse of discretion—requires the court to find a "clearly erroneous assessment of the evidence" that affected substantial rights. Accordingly, as the majority concedes, the key question here is not whether the district court merely erred when it concluded Henry Winzer's affidavit was a sham; rather, it is whether the district court abused its discretion in doing so. The answer: No, it obviously did not.

"It is well settled that this court does not allow a party to defeat a motion for summary judgment using an affidavit that impeaches, without explanation, sworn testimony." *S. W.S. Erectors, Inc. v. Infax, Inc.,* 72 F.3d 489, 495 (5th Cir. 1996); *see also Vincent v. Coll. of Mainland,* 703 F. App'x 233, 238 (5th Cir. 2017) ("Conclusory, self-serving affidavits are insufficient to create a fact issue when they contradict prior testimony."). Accordingly, the district court may appropriately reject such statements that create a clear discrepancy with prior accounts—especially when no explanation for the conflict is offered. *See Albertson v. T.J. Stevenson & Co.,* 749 F.2d 223, 228 (5th Cir. 1984).

Henry Winzer's initial, pro se complaint—challenging the officers' use of force—stated that Gabriel "had a plastic toy cap gun" and "rode out on a

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are beyond dispute. For example, the majority baldly asserts that Gabriel "was inside his father's house and did not fire" at the police officers during their initial encounter with the suspect. But the sole source for this fact is the contested affidavit. It therefore belongs among the "highly disputed" facts which come later in the opinion.

10 speed bicycle to show [the officers] the toy gun." A clear implication of this observation is that Gabriel was holding out the object "to show them" the toy, or at a minimum that the toy would have been visible to the officers. The majority's suggested interpretation to the contrary (leaving open the possibility that the gun was concealed) may be an acceptable one, but it does not follow that the district court's similarly reasonable interpretation of the complaint was wrong. At the very least, it was not an abuse of discretion for the district court to interpret the statement as it did.[2]

Henry Winzer's first account was compatible with the unanimous testimony of the police officers on the scene. Then, one month after defendants' summary judgment motion and after Henry Winzer obtained counsel, the court received a new affidavit that told a different story. As it turns out, Henry Winzer's initial account was mistaken: Gabriel's hands were on the bike's handlebars at the time of the shooting, and the

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[2] The majority suggests that it would be abnormal for someone to hold out an object in front of them as they ride a bicycle towards a group of individuals to show them the object. They say that is especially true "when that object is a toy gun" and the group being approached is formed of armed police officers. But riding a bicycle toward a group of police officers with any type of gun is abnormal when gunshots had just been fired, the officers were obviously in a defensive posture, and the officers had just told all civilians to return to their homes. Yet that is indisputably what occurred. The majority does not seem to appreciate the tragic reality that Gabriel's actions—even accepting Henry's version as true—were strange and dangerous. Officer Hinds's reaction to Gabriel's unusual behavior, on the other hand, was reasonable.

gun was not otherwise visible.[3] No explanation for this new version of the story was offered.

This case presents the appropriate circumstances for an application of the sham affidavit doctrine. In response to a summary judgment motion and with the aid of counsel, Henry added material details in an affidavit that significantly changed the story he described in his original complaint. Conveniently, every altered detail served to create the key factual dispute that, according to the majority, could result in a finding of a constitutional violation. The district court correctly disregarded the affidavit as a sham. The majority's conclusion—after a lengthy discussion relying on a strained reading of the complaint—that it was an *abuse of discretion* for the district court to so conclude is puzzling. After all, even if the district court's assessment of the inconsistency between the complaint and the affidavit was wrong, we cannot say that its assessment was "clearly erroneous."

II.

If the district court is correct about the affidavit, then the record evidence suggests Gabriel had a gun (or toy gun) in his hand as he rode towards the officers. In that case, it should be beyond dispute that Officer Hinds rightfully received immunity for his decision to shoot. But suppose this is wrong. Suppose instead that the court was required to accept Henry's affidavit and

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[3] Notably, the affidavit also includes facts that would have no significance unless it were possible for the police officers to see the gun. For example, it notes that "[i]t was clearly apparent that the gun Gabriel had *in his hand* was not real, based on the color and make of it." (Emphasis added.)

to credit his observation that Gabriel rode out to the police officers with both hands on his bike. What then?

The result should be the same: Officer Hinds was still entitled to this court's recognition that his behavior was reasonable. In concluding otherwise, the majority misapprehends qualified immunity—both its first principles and specific legal standards—and has endangered Officer Hinds's (and future law enforcement officers') rightful claim to it. *See White v. Pauly,* 137 S. Ct. 548, 551-52 (2017) (explaining that, because qualified immunity is "an immunity from suit," the protection "is effectively lost if a case is erroneously permitted to go to trial" (internal quotation marks omitted)).

A. *Reviewing the Qualified Immunity Standard*

Before turning to a specific critique of the majority's conclusions, it is worth highlighting the fundamental tenets of qualified immunity, since those tenets recede to the background of the opinion. Qualified immunity is grounded in the acknowledgment that officers must make split-second judgments about the appropriate use of force in chaotic, highly dangerous situations. *Graham v. Connor,* 490 U.S. 386, 397 (1989). It is designed to protect "officials from harassment, distraction, and liability when they perform their duties reasonably," *Pearson v. Callahan,* 555 U.S. 223, 231 (2009) (noting that this protection was "the driving force" behind the doctrine's creation), and to allow them "breathing room to make reasonable but mistaken judgments about open legal questions," *Ashcroft v. al-Kidd,* 563 U.S. 731, 743 (2011). Accordingly, "once properly raised by the

[officer], the 'plaintiff has the burden to negate the assertion of qualified immunity.'" *King v. Handorf,* 821 F.3d 650, 653 (5th Cir. 2016) (quoting *Collier v. Montgomery,* 569 F.3d 214, 217 (5th Cir. 2009)).[4]

Both prongs of the qualified immunity standard are imbued with this deference and respect. First, "[a]n officer's use of deadly force is presumptively reasonable when the officer has reason to believe that the suspect poses a threat of serious harm to the officer or to others." *Ontiveros v. City of Rosenberg,* 564 F.3d 379, 382 (5th Cir. 2009). Notably, "[t]he reasonableness of the use of deadly force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (internal quotation omitted). The focus is only on what was "knowable" to the individual officer at the time. *White,* 137 S. Ct. at 550. And, most importantly, our definition of "reasonableness" cannot be grounded on what, upon reflection "in the peace of a judge's chambers," seems necessary; rather, it is defined by the chaotic circumstances into which officers are thrust. *Graham,* 490 U.S. at 396-97 (internal quotation omitted). As the Supreme Court has long emphasized, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.*

Similarly, the "clearly established" prong protects officers from having to parse nuances in case law from

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[4] Notably, the majority opinion fails to even acknowledge this burden.

various courts and jurisdictions to discover the bounds of their conduct. Accordingly, our "inquiry . . . is whether, under the law in effect at the time [of the shooting], no reasonable officer could have believed deadly force was lawful." *Manis v. Lawson,* 585 F.3d 839, 846 (5th Cir. 2009). The officer loses protection only if his conduct violates "controlling authority" or "a robust consensus of cases of persuasive authority." *al-Kidd,* 563 U.S. at 741-42 (internal quotation marks omitted). Notably, that guidance must be finely tuned to the specific "circumstances with which [the officer] was confronted." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). An unreasonable mistake of law regarding the excessive use of force requires "existing precedent [that] squarely governs *the specific facts at issue." Kisela v. Hughes,* 138 S. Ct. 1148, 1153 (2018) (emphasis added) (internal quotation marks omitted). We have "repeatedly" been told we are not permitted "to define clearly established law at a high level of generality." *City & County of San Francisco v. Sheehan,* 135 S. Ct. 1765, 1775-76 (2015) (quoting *al-Kidd,* 563 U.S. at 742).

Having set forth these principles, the specific problems in the majority's conclusions become obvious. The majority fundamentally misapprehends this guidance and has reached a result on the reasonableness prong that is, simply put, wrong.

B. *Officer Hinds committed no constitutional violation*

The majority failed to give due weight to the tense circumstances surrounding Officer Hinds at the time of his decision to shoot. Instead, the majority

argues that Officer Hinds unreasonably misdiagnosed the danger he faced by highlighting certain "competing evidence" to show that the officer could have—should have—known that Gabriel was not a threat. Notably, the majority uses the accelerated timeline of events against Officer Hinds when discussing evidence that suggests he behaved reasonably, but then repeatedly faults Officer Hinds for insufficiently considering other factors that existed only fleetingly before the shooting began. The majority's implicit suggestion that Officer Hinds could not reasonably have relied on video-recorded utterances immediately prior to the shooting in making his decision is just one example. In other words, the majority imposes the sort of 20/20 hindsight analysis that we have forbidden. *Cf. Ontiveros,* 564 F.3d at 384-85 (circumstantial evidence that provided an innocuous explanation for a suspect's actions did not override a reasonable interpretation to the contrary by an officer).

Here is Officer Hinds's position based on the uncontroverted facts: He was responding to a dispatch that a man was recklessly shooting his firearm in a residential area, threatening the lives of innocent civilians in their homes. Upon Officer Hinds's arrival, the individual shot his gun at him without provocation from a distance of 100-150 yards. The suspect then ran from Officer Hinds, darting into private property for cover. In other words, an extremely dangerous individual with a gun was at large in a residential neighborhood, posing an immediate and serious threat to the lives of civilians and police officers.

Officer Hinds and his fellow officers rightfully proceeded with caution. They slowly moved up the road with guns drawn, using their vehicles for protection. They directed the innocent civilians they passed to remain in their homes while they pursued the suspect. Using their PA system, the officers also commanded the suspect to come out of hiding and surrender. No response.

Suddenly, an individual appeared on a bike close to where the suspect had last been seen, riding headlong at the police officers. [5] The individual continued towards the officers, undeterred both by their prior warnings to innocent civilians to stay in their homes and by their commands to the suspect to come out and surrender. He was also undeterred by the fact that Officer Hinds and his fellow officers were in a defensive position with their guns drawn. Gabriel was approximately 100 yards from Officer Hinds at the time—a similar distance from which the suspect had just shot at him. As Gabriel got closer, one of the officers warned his colleagues that Gabriel had a gun. Another screamed, "Put that down!" Then shots were fired.

Words are imperfect vessels for capturing the chaos of such moments (the video recording does a

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[5] The majority takes issue with this account of the facts, claiming it unfairly favors Officer Hinds. But its arguments in support are unpersuasive. The majority claims that the dissent mischaracterizes Gabriel's actions to say he rode headlong at the officers. According to my colleagues, the record supports only the inference that Gabriel was "coming" towards the officers "while 'riding' a bicycle." There is no meaningful distinction between these accounts, let alone one that unfairly favors Officer Hinds.

better job of conveying the tension). But all of this happened. The events are undisputed.

It should come as no surprise that all of the officers on the scene, including Officer Hinds, stated that they feared for their safety and the safety of others at that critical moment. And there was nothing unreasonable about Officer Hinds's decision to shoot. In that split second, Officer Hinds was justified in concluding that the individual riding at them while their guns were drawn was the armed suspect. He had just heard that Gabriel was holding a gun. And his own experience with the suspect, as well as his knowledge that the suspect had been shooting at his neighbors' mailboxes, justified his thought that Gabriel posed a serious threat to his own, his fellow officers', and other civilians' safety.[6] Regardless of any factual dispute regarding the visibility of the gun Gabriel possessed or the color of his shirt, Officer Hinds cannot be faulted for acting out of a reasonable desire to protect himself and the neighborhood by pulling the trigger. None of the countervailing concerns noted by the majority undercuts this conclusion. Officer Hinds clearly "ha[d] reason to believe that the suspect pose[d] a threat of serious harm to [him] or to others." *Ontiveros,* 564 F.3d at 382. He acted on that

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[6] The majority seems to think that innocent civilians were at risk by the officers' actions, relying on *Lytle v. Bexar County,* 560 F.3d 404 (5th Cir. 2009) for support. Its analogy to this case is forced. The court in *Lytle* found that it would be unreasonable for an officer to fire at the back of a car four houses down a residential block that was travelling away from him in part due to the risk "that the shots might strike an unintended target." *Id.* at 412-13. The circumstances here are very different: the officers took extensive precautions to ensure all innocent civilians were out of harm's way.

reasonable belief. There was no constitutional violation.

Critically, the majority's counternarrative of the pivotal moment includes subjective evaluations that could only be discerned after a nuanced, repeated review of the video evidence. For example, we are told that Gabriel "made a child-like 'figure 3'"—instead of a more mature straight line, apparently—and "dawdled slightly" before turning toward the officers. These details regarding direction, posture, and speed are not obvious from a review of the footage in the quiet of an office. But the majority's imputation of such fine distinctions into its analysis of what a reasonable officer should do when faced with a split-second, life-or-death decision in real time is particularly misguided. *See Graham,* 490 U.S. at 396-97.

In short, this dissent has simply looked at all of the knowable—and uncontroverted—facts available to Officer Hinds. And, after using the appropriate sensitivity required to analyze such decisions, it has concluded that the plaintiffs failed to meet their burden to show his actions were objectively unreasonable. By contrast, despite the majority's assurance that it is "loath to second-guess the decisions made by police officers in the field" from a privileged position of comfort, *see Graham,* 490 U.S. at 396-97, this is precisely what it has done.

The majority's analysis flouts well-established legal guideposts and omits applicable burdens. Its conclusion that Officer Hinds may have behaved unreasonably is not persuasive. Fortunately, the

majority at least gets the second prong of the qualified immunity analysis right. But its failure to accord appropriate deference to Officer Hinds on the first prong is not only misguided—it invites future error. And because the majority errs on the reasonableness prong, Kaufman County is also denied the summary judgment which is clearly appropriate.

* * *

The implications of the majority's mistakes cannot be minimized. The majority decides that qualified immunity can be endangered by an affidavit filed at summary judgment that creates a fact issue nowhere else supported by record evidence.

Worse still, it seriously undermines officers' ability to trust their judgment during those split seconds when they must decide whether to use lethal force. Qualified immunity is designed to respect that judgment, requiring us to second-guess only when it clearly violates the law. The standard acknowledges that we judges—mercifully—never face that split second. Indeed, we never have to decide anything without deliberation—let alone whether we must end one person's life to preserve our own or the lives of those around us.

The qualified immunity standard stops this privilege from blinding our judgment, preventing us from pretending we can place ourselves in the officers' position based on a cold appellate record. It prevents us from hubristically declaring what an

officer should have done—as if we can expect calm calculation in the midst of chaos.

The majority opinion, written from the comfort of courthouse chambers, ignores that deference. Instead, it warns officers that they cannot trust what they see; they cannot trust what their fellow officers observe; they cannot trust themselves when posed with a credible threat. It instructs them, in that pivotal split second, to wait. But when a split second is all you have, waiting itself is a decision—one that may bring disastrous consequences.

Hopefully, these errors will be corrected before we face their effects. In the meantime, I dissent.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:15-CV-01284-N
[Filed October 4, 2016]

EUNICE J. WINZER, *et al.*,	§
	§
Plaintiffs,	§
v.	§
	§
KAUFMAN COUNTY, *et al.*,	§
Defendants.	

ORDER

This Order addresses Defendant Kaufman County's motion for summary judgment [78]. Because the Court previously concluded there was no violation of Gabriel Winzer's constitutional rights, the Court grants Defendant Kaufman County's motion for summary judgment.

I. ORIGINS OF THE MOTION

This case arises from the police-involved shooting death of Gabriel Winzer. In their Third Amended Complaint, the Winzers bring claims against Kaufman County under 18 U.S.C. § 1983 for failure to train its officers, and the Texas survival and wrongful death statute, TEX. CIV. PRAC. & REM. CODE § 71. The Winzers also brought these claims against

Defendants Bill Cuellar, Garry Huddleston, and Matthew Hinds (collectively, "Officer Defendants"). *See* Third Am. Compl. 71131-59 [23]. The Court's August 10, 2016 Order [77] granted the Defendants' motion to dismiss all claims against Officer Cuellar and Huddleston and granted the Defendants' motion for summary judgment in favor of Officer Hinds. Kaufman County is the only remaining defendant.

Kaufman County now moves for summary judgment. The Winzers oppose the motion.

II. THE SUMMARY JUDGMENT STANDARD

Courts "shall grant summary judgment if the movant shows that 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); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986). In making this determination, courts must view all evidence and draw all reasonable inferences in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962). The moving party bears the initial burden of informing the court of the basis for its belief that there is no genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

When a party bears the burden of proof on an issue, "he must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor." *Fontenot v. Upjohn Co.,* 780 F.2d 1190, 1194 (5th Cir. 1986). When the nonmovant bears the burden of proof, the movant may demonstrate entitlement to summary judgment either

by (1) submitting evidence that negates the existence of an essential element of the nonmovant's claim or affirmative defense, or (2) arguing that there is no evidence to support an essential element of the nonmovant's claim or affirmative defense. *Celotex,* 477 U.S. at 322-25. Once the movant has made this showing, the burden shifts to the nonmovant to establish that there is a genuine issue of material fact so that a reasonable jury might return a verdict in its favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986). Moreover, "[c]onclusory allegations, speculation, and unsubstantiated assertions" will not suffice to satisfy the nonmovant's burden. *Douglass v. United Servs. Auto. Ass 'n,* 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc). Indeed, factual controversies are resolved in favor of the nonmoving party 'only when an actual controversy exists, that is, when both parties have submitted evidence of contradictory facts.' *Olabisiomotosho v. City of Hous.,* 185 F.3d 521, 525 (5th Cir. 1999) (quoting *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.,* 66 F.3d 89, 92 (5th Cir. 1995)).

III. THE COURT GRANTS KAUFMAN COUNTY'S MOTION

A. The Court Grants Kaufman County's Motion for Summary Judgment on the Winzers' Section 1983 Claim for Failure to Train

Kaufman County is entitled to summary judgment on the section 1983 claim because there was no underlying constitutional violation. To establish a claim under section 1983, "a plaintiff must (1) allege a

violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *Whitley v. Hanna,* 726 F.3d 631, 638 (5th Cir. 2013) (quotations omitted). A municipality may be held liable under section 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. Dep't of Soc. Servs. of City ofNew York,* 436 U.S. 658, 694 (1978). Thus, to establish a section 1983 claim against a municipality, "a plaintiff must show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right." *Peterson v. City of Fort Worth, Tex.,* 588 F.3d 838, 847 (5th Cir. 2009). Accordingly, to impose *Monell* liability, there must be a constitutional violation. *See,e.g., Pratt v. Harris Cty., Tex.,* 822 F.3d 174, 185 n.7 (5th Cir. 2016) (noting that "[b]ecause, as discussed above, [the plaintiff] cannot show such a violation, we need not address [other claims including a failure to sufficiently train officers]"); *Estate of Pollard v. Hood Cty., Tex.,* 579 F. App'x 260, 267 (5th Cir. 2014) (concluding "that the district court was correct in holding that Hood County cannot be held municipally liable under *Monell* and that Hood County is entitled to judgment as a matter of law on the pleadings").

Kaufman County argues that because the Court previously concluded there was no constitutional violation, they cannot be held liable under *Monell.* The Winzers argue they do not have to show a constitutional violation in order to pursue the section

1983 claim for failure to train. *See* Pls.' Resp. to Mot. for Summ. J. 8-13 [87]. The Winzers contend that a municipality may be liable under section 1983 when individual defendants are not held liable. The Winzers are correct, a municipality may be held liable when individual defendants are not. *See Brown v. Lyford,* 243 F.3d 185, 191 (5th Cir. 2001). For example, when individual officers are protected by qualified immunity, and that immunity does not extend to the municipality, the municipality may be liable for the constitutional violation even though individual defendants are not. *Id.*

While a municipality may be held liable absent individual officers, a municipality cannot be held liable under *Monell* where there is no constitutional violation. *Id.* Where "no claim is stated against officials-if plaintiff does not show any violation of his constitutional rights-then there exists no liability to pass through to the county." *Id.* (citing *City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986)). This is the case here. After reviewing the summary judgment evidence, the Court concluded that the Officer Defendants did not violate G. Winzer's constitutional rights. *See* August 10, 2016 Order n.3, 16 [77]. Accordingly, Kaufman County cannot be liable under section 1983 for a claim stemming from the actions of the Officer Defendants because there was no underlying constitutional violation.

A municipality can also be held liable, when individual defendants are not, where a plaintiff's claim against the municipality does not derive solely from the conduct of the individual defendants. *See Praprotnik v. City of St. Louis,* 798 F.2d 1168, 1173

(8th Cir. 1986). But where a claim stems solely from the Officers' conduct, as it does here, a municipality cannot be held liable under section 1983. *See Bustos v. Martini Club Inc.,* 599 F.3d 458, 467 (5th Cir. 2010) (stating where a Plaintiff's injuries "from his failure-to-train claim stem solely from the Officers' conduct" and "the Officers did not violate Bustos's constitutional rights, neither did the City").

The Court previously concluded the Officer Defendants did not violate G. Winzer's constitutional rights. Because there was no violation of G. Winzer's constitutional rights, the Winzer's *Monell* claims against Kaufman County fail as a matter of law.

B. The Court Grants Kaufman County's Motion for Summary Judgment on the Winzers' State Law Claims

Kaufman County is likewise entitled to summary judgment on the state law claims. Under Texas law, a wrongful death claim "derives wholly from the cause of action that the decedent could have asserted for personal injuries had he lived." *Delesma v. City of Dallas,* 770 F.2d 1334, 1338 (5th Cir. 1985). The Court concluded that G. Winzer would have no viable claim for a violation of his constitutional rights had he lived. Nor have the Plaintiffs demonstrated that G. Winzer would have been entitled to bring an action against Kaufman County on other grounds, had he lived. *See Freeman v. City of Kilgore,* 2014 WL 11498107, at *3 (E.D. Tex. 2014) (granting summary judgment where Plaintiff did not demonstrate "that [the decedent] would have been entitled to bring an action against the City for the injury had he lived").

Because the Winzers' state law claims are entirely derivative of G. Winzer's claims, and the Court has already concluded that G. Winzer's constitutional rights were not violated, the Court grants summary judgment in favor of Kaufman County.

CONCLUSION

For the forgoing reasons, the Court grants Defendant Kaufman County's motion for summary judgment.

Signed October 4, 2016.

/s/ David C. Godbey
United States Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:15-CV-01284-N
[Filed August 10, 2016]

EUNICE J. WINZER, *et al.*,	§
	§
Plaintiffs,	§
v.	§
	§
KAUFMAN COUNTY, *et al.*,	§
Defendants.	

ORDER

This Order addresses Defendants Bill Cuellar, Garry Huddleston, and Matthew Hinds's motion to dismiss and for summary judgment [45], motion for leave to file supplement to appendix [50], and motion to strike [66]. The Court grants the motion to dismiss and for summary judgment, denies the motion for leave, and grants the motion to strike in part.

I. ORIGINS OF THE MOTION

This case arises from the police-involved shooting death of Gabriel Winzer.[1] The undisputed

[1] The following recitation of undisputed facts is drawn from Appendix in Support of Plaintiffs' Response [63] ("Plaintiffs'

facts show that, on April 27, 2013, two Kaufman County Sheriff's Office deputies, Gerardo Hinojosa and Defendant Matthew Hinds, responded to several 9-1-1 reports of an armed man who was firing a gun and destroying mailboxes in the vicinity of County Road 316 in Terrell, Texas. One caller reported that the suspect had yelled, "Everyone's going to get theirs, and he wanted to "get back what's mine." The police dispatcher relayed these reports to responding officers.

Hinojosa and Hinds arrived in marked patrol vehicles and located a suspect near the intersection of County Road 316 and County Road 316A. The suspect was a black male wearing a brown shirt. The deputies positioned their vehicles approximately 100 to 150 yards away. In their voluntary statements, the deputies wrote that the man fired one round in their direction. Hinojosa and Hinds saw white smoke rise from the gun, and Hinojosa heard a whizz go by. Hinds reported over the radio, "Shots fired." The deputies did not return fire. The suspect then walked toward County Road 316A, out of the officers' view.

Shortly thereafter, another Sheriff's deputy and two state troopers from the Texas Department of Public Safety arrived at the scene. A few people had stepped out of their homes to observe the event, and the officers instructed them to go back inside. Using the PA system, the officers identified themselves as Kaufman County Sheriff's Office and ordered the suspect several times to drop his gun and come toward

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Appendix") and from Appendix to Memorandum in Support of Defendants' Motion [47].

them. The suspect ducked into the tree line and out of sight. The officers proceeded down County Road 316A on foot, using Hinojosa's Tahoe for cover. The officers had their weapons drawn.

A black male, later identified as G. Winzer, then entered County Road 316A on a bicycle approximately 100 yards down the road from the officers. G. Winzer was wearing a blue shirt and was riding his bicycle towards the officers. In their voluntary statements, the officers wrote that G. Winzer appeared to be holding a gun and was raising his arm in their direction. One officer commented that G. Winzer had "that gun." Another officer yelled for G. Winzer to put the gun down. About six seconds after G. Winzer's appearance, one of the officers fired a shot in his direction. There was a brief pause, and then the officers fired a volley of shots at G. Winzer. G. Winzer turned his bicycle to the left and then disappeared from view.

Several minutes later, the officers located G. Winzer in the backyard of a home on County Road 316A. The officers later determined that G. Winzer's father, Henry Winzer, lived at the house. G. Winzer had suffered four gunshot wounds to his chest, shoulder, and upper back. H. Winzer was near his son, trying to comfort and revive him. H. Winzer was wearing a brown shirt. The officers ordered H. Winzer to step away from his son and asked where the gun was. H. Winzer tossed a plastic toy gun in the officers' direction. The officers attempted to place handcuffs on G. Winzer's wrists, but he resisted. The officers tased G. Winzer, and once they had succeeded in handcuffing him, permitted the paramedics to enter

the backyard. The paramedics pronounced G. Winzer dead at the scene. A forensic report later detected the presence of gunshot residue on G. Winzer's body.

In their Third Amended Complaint, Plaintiffs Eunice J. Winzer, Soheila Winzer, and H. Winzer bring claims under 42 U.S.C. § 1983 and the Texas survival and wrongful death statute, Texas Civil Practice and Remedies Code § 71, against Defendants Kaufman County, Bill Cuellar, Garry Huddleston, and Matthew Hinds. *See* Third Am. Compl. 8-15 [23]. Cuellar and Huddleston now move to dismiss the claims against them as barred by the statute of limitations. Cuellar, Huddleston, and Hinds also move for summary judgment on the basis of qualified and official immunity.

II. THE RELEVANT LEGAL STANDARDS

A. The Rule 12(b)(6) Standard

When considering a Rule 12(b)(6) motion to dismiss, a court must determine whether the plaintiff has asserted a legally sufficient claim for relief. *Blackburn v. City of Marshall,* 42 F.3d 925, 931 (5th Cir. 1995). A viable complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). To meet this "facial plausibility" standard, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). A court generally accepts well-pleaded facts as true and construes the complaint in the light most favorable to the plaintiff. *Gines v. D.R. Horton, Inc.,* 699 F.3d 812,

816 (5th Cir. 2012). But a court does not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron Corp.,* 484 F.3d 776, 780 (5th Cir. 2007). A plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555. "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (internal citations omitted).

B. The Summary Judgment Standard

Courts "shall grant summary judgment if the movant shows that 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); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986). In making this determination, courts must view all evidence and draw all reasonable inferences in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962). The moving party bears the initial burden of informing the court of the basis for its belief that there is no genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

When a party bears the burden of proof on an issue, "he must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor." *Fontenot v. Upjohn Co.,* 780 F.2d 1190, 1194 (5th Cir. 1986). When the nonmovant bears the burden of proof, the movant may demonstrate entitlement to summary judgment either by (1) submitting evidence that negates the existence

of an essential element of the nonmovant's claim or affirmative defense, or (2) arguing that there is no evidence to support an essential element of the nonmovant's claim or affirmative defense. *Celotex,* 477 U.S. at 322-25. Once the movant has made this showing, the burden shifts to the nonmovant to establish that there is a genuine issue of material fact so that a reasonable jury might return a verdict in its favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986). Moreover, "[c]onclusory allegations, speculation, and unsubstantiated assertions" will not suffice to satisfy the nonmovant's burden. *Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc). Indeed, factual controversies are resolved in favor of the nonmoving party 'only when an actual controversy exists, that is, when both parties have submitted evidence of contradictory facts.' *Olabisiomotosho v. City of Hous.,* 185 F.3d 521, 525 (5th Cir. 1999) (quoting *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.,* 66 F.3d 89, 92 (5th Cir. 1995)).

III. THE STATUTE OF LIMITATIONS BARS THE CLAIMS AGAINST CUELLAR AND HUDDLESTON

The Winzers' claims against Cuellar and Huddleston are barred by the statute of limitations. As explained in the Court's April 25, 2016 Order [69], the applicable statute of limitations required the Winzers to file their claims against Cuellar and Huddleston by April 27, 2015. *See Piotrowski v. City of Houston,* 237 F.3d 567, 576 (5th Cir. 2001); TEX. CIV. PRAC. & REM. CODE § 16.003(a). The Winzers did not name

Cuellar and Huddleston as defendants until they filed the Third Amended Complaint on September 21, 2015. *See* Third Am. Compl. [23]. Clearly, the Winzers failed to bring these claims within the applicable limitations period.

The Winzers nonetheless contend that their claims relate back to the filing of their original complaints. The Court may relate the Third Amended Complaint back to the dates of the Winzers' original complaints if: (1) the basic claim arose out of the conduct set forth in their original complaints; (2) the parties to be brought in received such notice that they will not be prejudiced in maintaining their defense; (3) the parties knew or should have known that, but for a mistake concerning identity, the action would have been brought against them; and (4) the second and third requirements were fulfilled within the prescribed limitations period. *See* FED. R. Civ. P. 15(c); *Jacobsen v. Osborne,* 133 F.3d 315, 319 (5th Cir. 1998) (citing *Schiavone v. Fortune,* 477 U.S. 21, 29 (1986)). Rule 15(c) is "meant to allow an amendment changing the name of a party to relate back to the original complaint only if the change is the result of an error, such as a misnomer or misidentification." *Jacobsen,* 133 F.3d at 320 (internal quotation marks and citation omitted).

The Winzers' failure to name Cuellar and Huddleston as defendants was not due to misnomer or misidentification. Neither Henry Winzer's Complaint, *see* Compl. [1], *in Henry A. Winzer v. Matthew Hinds, et al.,* Civil Action No. 3:15-CV-1295-N-BH (N.D. Tex. filed April 22, 2015), nor the Winzers' Notice of Claim [3] gave any indication that

Cuellar and Huddleston were defendants. [2] The Winzers argue that, at the time they filed their original complaints, they were appearing pro se and were under the mistaken impression that they could not sue the individual officers. But the statute of limitations on section 1983 actions and the strict requirements of Rule 15(c) apply equally to represented and unrepresented plaintiffs. *See, e.g., Singleton v. Stiles,* 992 F.2d 323, 323 (5th Cir. 1993) (holding Rule 15(c) did not permit the addition of a defendant not named in an original pro se pleading because the plaintiff "never intended" to include the defendant in the original pleading). The Winzers' "conscious choice to sue one party and not another does not constitute a mistake and is not a basis for relation back." *Sanders-Burns v. City of Plano,* 594 F.3d 366, 379 (5th Cir. 2010).

Because neither Cuellar nor Huddleston knew or should have known that but for a mistake of identity he would have been named in the Winzers' original pleadings, Rule15(c)'s relation back provision does not apply. Accordingly, the Court dismisses all claims against Cuellar and Huddleston.

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[2] Throughout their original complaints, the Winzers allege that unnamed Kaufman County Sheriff's Office deputies were involved in the alleged constitutional violations. *See* Compl. 4-5 [1], *in Henry A. Winzer v. Matthew Hinds, et al.,* Civil Action No. 3:15-CV-1295-N-BH (N.D. Tex. filed April 22, 2015); Notice of Claim 2-3 [3]. However, even if the Court assumes that these mentions implicate the unknown deputies as defendants, "Rule 15(c) does not apply when John Doe defendants are named after the statute of limitations has run." *Myers v. Nash,* 464 Fed. App'x 348, 349 (5th Cir. 2012).

IV. OBJECTIONS TO SUMMARY JUDGMENT EVIDENCE AND SUPPLEMENTAL FILINGS

The parties filed multiple objections to evidence offered in support of and in opposition to Hinds's[3] motion for summary judgment. Each party also objects to the Court's consideration of supplemental filings submitted in support of and in opposition to the motion. The Court considers each of these objections in turn.

A. Motion to Strike the Winzers' Sur-Reply

The Winzers filed a response to Hinds's objections to their summary judgment evidence (the "Response") [65]. Hinds moves to strike the Response, arguing that it functions as a sur-reply to the motion for summary judgment. The Winzers oppose the motion, and in the alternative, seek leave to file the Response as a sur-reply.

The Response is problematic because it cites new evidence not presented in the Winzers' original response to the motion for summary judgment. The new evidence includes recent news coverage of the shooting and comments from the Kaufman County Sheriff. *See* Resp. 4. The remainder of the Response, however, serves the permissible purpose of responding to Hinds's objections. Hinds made these objections for the first time in his reply, and the

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[3]Cuellar and Huddleston also moved for summary judgment. The analysis of Hinds's motion for summary judgment and the related objections and supplemental filings would have applied equally to these officers, had the statute of limitations not barred the Winzers' claims against them.

Winzers have not had any other opportunity to respond to them.

"[L]eave to file a surreply may be granted . . . to allow the nonmovants a chance to respond to the movant's newly-asserted theories or evidence." *See Lombardi v. Bank ofAm.,* 2014 WL 988541, at *3 (N.D. Tex. 2014) (internal citation and quotation marks omitted). Because the Winzers have not had an opportunity to respond to Hinds's evidentiary objections, the Court grants leave to file the sur-reply. However, the Court strikes the new evidence presented in the Response and will not consider it in the course of deciding Hinds's motion for summary judgment.

B. Objections to Summary Judgment Evidence

The parties objected to several pieces of evidence presented in support of and in opposition to the motion for summary judgment. Under Rule 56, "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." FED. R. CIV. P. 56(c)(2). '[T]he admissibility of summary judgment evidence is subject to the same rules of admissibility applicable at trial.' *Pegram v. Hollowell, Inc.,* 361 F.3d 272, 285 (5th Cir. 2004) (quoting *Resolution Trust Corp. v. Starkey,* 41 F.3d 1018, 1024 (5th Cir. 1995)).

Hinds objects to two expert affidavits that the Winzers submitted in support of their response to the motion. Expert testimony is admissible if: (1) the expert is qualified; (2) the testimony is relevant to the

lawsuit; and (3) the testimony is reliable. FED. R. Evil). 702; *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 147 (1999). Hinds asks the Court to disregard the testimony of forensic enhancement expert James Appleton because several of his statements fall outside his realm of expertise. The Court agrees that Appleton is not qualified to opine on G. Winzer's physical capabilities or the reasonableness of Hinds's actions. *Cf. Smith v. Goodyear Tire & Rubber Co.,* 495 F.3d 224, 226-27 (5th Cir. 2007) (excluding polymer scientist's testimony about tire design). The Court sustains this objection and strikes Appleton's statements regarding these subjects.

Hinds further asks the Court to disregard the testimony of law enforcement expert Jerry Staton. Hinds specifically objects to the following statements: (1) that the gun residue found on G. Winzer "could have been transferred" during his arrest, *see* Pls.' App. 13; (2) that there is "little doubt" the officers could have won a potential gunfight with G. Winzer, *see id.;* (3) that the 9-1-1 callers would have identified the suspect as G. Winzer if it was in fact him, *see id.* at 13-14; and (4) that there is "considerable doubt" as to whether G. Winzer was the person who shot at Hinds when he first arrived on the scene, *see id.* Upon consideration of a motion for summary judgment, the Court disregards "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation." *Brown v. City of Houston, Tex.,* 337 F.3d 539, 541 (5th Cir. 2003). After evaluating Staton's affidavit, the Court agrees that Staton's statements regarding the gun residue and the 9-1-1 callers are speculative and lack

foundation. The Court sustains Hinds's objections and will not consider these statements in deciding the summary judgment motion. The Court overrules Hinds's objections to the other statements.

Hinds also objects to an affidavit from H. Winzer because it conflicts with prior statements he made regarding G. Winzer's possession of a gun. In the affidavit, H. Winzer claims that G. Winzer was unarmed and did not have any object resembling a gun in his hands at the time of the shooting. This statement contradicts H. Winzer's prior allegation that G. Winzer was carrying a toy gun in his hand when he rode out on his bicycle. *See* Compl. 4 [1], *in Henry A. Winzer v. Matthew Hinds, et al.,* Civil Action No. 3:15-CV-1295-N-BH (N.D. Tex. filed April 22, 2015); *see also* Attachments to Notice of Claim 12 [4]. Under the "sham affidavit" doctrine, a "nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony." *Albertson v. T.J. Stevenson & Co., Inc.,* 749 F .2d 223, 228 (5th Cir. 1996). Because G. Winzer has not provided an explanation for his inconsistent statements, the Court sustains Hinds's objection. The Court will disregard H. Winzer's assertion that G. Winzer was not holding any object at the time of the shooting.

Lastly, the Winzers make several broad objections to the admissibility of the officers' affidavits. The Winzers argue that the affidavits contain unsubstantiated assertions and hearsay evidence, but the Winzers do not identify any particular examples. "An affidavit or declaration used to support or oppose

a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." FED. R. Civ. P. 56 (c)(4). However, without further elaboration from the Winzers, the Court is unable to determine which parts of the affidavits are at issue. *See, e.g., Palo v. Dallas Cty.,* 2007 WL 2140590, at *8 (N.D. Tex. 2007) (rejecting overly general objections to summary judgment evidence because they may refer to admissible evidence). The Court overrules these objections.

C. Motion for Leave to Supplement Hinds's Appendix

Hinds moves to supplement his appendix in support of the motion for summary judgment. Hinds's supplemental evidence consists of enhanced video and audio recording of the moment at which the suspect allegedly fired a gun in the direction of first responders Hinds and Hinojosa. The Court denies leave to submit this evidence.

Local Civil Rule 56.7 provides that a party may not file supplemental material without the Court's permission. Hinds represents that he requested the enhanced video and audio recording prior to submitting his motion for summary judgment, but that the forensics laboratory did not return the final work product until a week after the motion deadline. Hinds has not explained why the forensics laboratory was unable to return the report in time for its inclusion in his original appendix. Hinds did not seek an extension of time to file the motion for summary judgment. Moreover, the enhanced video and audio

recording presents only minimally probative evidence. No suspect is visible in the enhanced video. And although the audio recording bolsters Hinds's claim that someone fired a gun at him, Hinds has other evidence to support this claim.

The Court holds that Hinds has not demonstrated good cause to include the late submission with his summary judgment appendix. The Court denies Hinds leave to file the supplemental video and audio evidence.

V. HINDS IS ENTITLED TO QUALIFIED IMMUNITY ON THE SECTION 1983 CLAIM

A. The Qualified Immunity Standard

"Qualified immunity is a defense available to public officials performing discretionary functions '. . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.' *Noyola v. Texas Dep't of Human Resources,* 846 F.2d 1021, 1024 (5th Cir. 1988) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). This doctrine balances two interests: "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan, 555* U.S. 223, 231 (2009). Because "qualified immunity is designed to shield from civil liability 'all but the plainly incompetent or those who knowingly violate the law,' denial of qualified immunity is appropriate only in rare circumstances. *Brady v. Ford Bend Cty.,*

58 F.3d 173, 173-74 (5th Cir. 1995) (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986)).

To resolve a public official's qualified immunity claim, a court must consider two factors. First, has the plaintiff shown a violation of a constitutional right? *Saucier v. Katz,* 533 U.S. 194, 201 (2001). And, second, was the right "clearly established" at the time of the public official's alleged misconduct? *Id.* The second inquiry is critical: unless the official violated a clearly established constitutional right, qualified immunity applies. *Pearson, 555* U.S. at 231. "The judges of the district courts . . . [may] exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 235. "But under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan v. Cotton,* 134 S. Ct. 1861, 1866 (2014).

B. Hinds's Use of Deadly Force Was Objectively Reasonable

The Winzers claim that Hinds used excessive force in violation of G. Winzer's constitutional rights under the Fourth Amendment. An excessive force claim requires proof of "(1) an injury, (2) which resulted from the use of force that was clearly excessive to the need, and (3) the excessiveness of which was objectively unreasonable." *See Mason v.Lafayette City-Parish Consol. Gov't,* 806 F.3d 268, 275 (5th Cir. 2015) (internal quotation marks and citation omitted). An officer's use of deadly force is not excessive when the officer has "probable cause to

believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Id.* (quoting *Tennessee v. Garner,* 471 U.S. 1, 11 (1985)).

When evaluating the objective reasonableness of an officer's conduct, courts must "pay careful attention to the facts and circumstances of each particular case, including (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 276 (internal quotation marks and citation omitted). Courts should "make 'allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.'" *Id.* (quoting *Graham v. Connor,* 490 U.S. 386, 396-97 (1989)). Finally, when evaluating an officer's use of force, courts must view the circumstances "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (quoting *Graham,* 490 U.S. at 396).

Hinds and his fellow officers were in an especially tense situation. An armed and reportedly agitated individual had already shot at them once and disappeared. The officers were uncertain of the suspect's whereabouts. The parties presented conflicting evidence as to whether G. Winzer was the same person who fired upon Hinds, and for purposes of the summary judgment motion, the Court assumes

that G. Winzer never fired upon the officers himself.[4] Nevertheless, a reasonable officer on the scene at the time could have easily drawn the inference that the black man cycling towards five armed police officers, disregarding their orders to drop his weapon, and raising his arm in their direction[5] was the same black man who had so brazenly fired upon them just around the corner.

The Winzers contend that G. Winzer was carrying a bright orange toy gun[6] at the time of the shooting and did not present any threat to the officers. The Winzers also maintain that G. Winzer's appearance did not match the description given by 9-1-1 callers and

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[4] In fact, the 9-1-1 callers and officers' descriptions of the suspect, G. Winzer, and H. Winzer all suggest that the officers initially encountered H. Winzer on County Road 316A. In his affidavit, H. Winzer admits that he was walking along County Road 316A shortly before the shooting and that he went inside his house after noticing a patrol car was following him.

[5] In his opinion Staton claims, "Enhanced video from the event reveals Winzer was not armed and did not reach towards his waist band and then extend his arm like he was about to fire a gun." Pl.'s App. 13. Appleton similarly opines, "Both of [G. Winzer's] hands appear to be on the handle bars . . . . [G. Winzer] makes no hand movements while riding his bicycle." *Id.* at 19. After reviewing the submitted video, the Court finds these claims are unsubstantiated and disregards them for purposes of the summary judgment motion.

[6] The parties presented conflicting evidence as to whether G. Winzer was carrying a real gun, a cap gun, a realistic plastic gun, or a bright orange toy gun when he rode out on his bicycle. For purposes of the summary judgment motion, the Court assumes that G. Winzer was holding a bright orange toy gun at the time of the shooting.

relayed by the police dispatcher. Somewhat contradictorily, the Winzers further assert that the officers were too far away from G. Winzer to positively identify him or to see the bright orange toy gun in his hand. Perhaps most importantly, however, at least one of the officers, upon sighting G. Winzer, yelled at him to drop the gun. Even if the other officers could not see the gun from that distance, they could have reasonably relied on this exclamation in forming the belief that G. Winzer was indeed armed. In light of all the facts, the Court finds that Hinds had probable cause to believe that G. Winzer posed a threat of serious physical harm to himself, his fellow officers, and other individuals in the neighborhood.[7]

The Winzers' law enforcement expert, Staton, opines that "[h]ad Winzer engaged [the officers] at that distance with a handgun there would be little doubt the officers would have easily 'won the gunfight.'" Pl.'s App. 13. The Court sees little relevance in this opinion. Police officers do not need to wait for an assailant to fire the first shot before taking actions to preserve their own lives. Staton's opinion also does not account for the safety of any bystanders in the area. When the armed suspect initially disappeared down County Road 316A, the officers

[7]*See, e.g., Bell v. City of East Cleveland,* 125 F.3d 855, 1997 WL 640116, at *3 (6th Cir. 1997) (holding officer had probable cause to use deadly force where 9-1-1 caller reported young victim had gun, victim disregarded officer's orders, and victim raised arm holding realistic toy gun in the officer's direction); *but see Nance v. Sammis,* 586 F.3d 604, 610 (8th Cir. 2009) (reversing summary judgment where evidence contradicted officers' claim that they identified themselves as police officers, young victim had a real gun and not a toy gun, and victim raised hand with gun before shooting).

proceeded slowly, using the Tahoe for cover, and instructed residents to get back inside their homes. And when G. Winzer suddenly appeared on the road, riding his bicycle towards the officers, they yelled at him to put the gun down. Staton does not offer any alternative protocol that the officers should have followed up to this point.

Hinds had probable cause to believe that G. Winzer posed a threat of serious bodily harm. His use of deadly force was objectively reasonable under the circumstances. Because Hinds did not violate G. Winzer's constitutional rights, the Court grants summary judgment in favor of Hinds on the Winzers' section 1983 claim.

VI. THE COURT GRANTS SUMMARY JUDGMENT ON THE STATE LAW CLAIMS

The Winzers bring claims under Texas state law for wrongful death and survival. "Texas law grants official immunity to an officer who was (1) performing discretionary duties; (2) in good faith; and (3) while acting within the scope of his authority." *Austin v. Johnson,* 328 F.3d 204, 210-11 (5th Cir. 2003) (citing *City of Lancaster v. Chambers,* 883 S.W.2d 650, 653 (Tex. 1994)). The Texas standard for official immunity is "substantially" the same as the federal test for qualified immunity. *Chambers,* 883 S.W.2d at 656. Because Hinds is entitled to qualified immunity on the section 1983 claim, the Court holds that he is entitled to official immunity on the state law claims as well. The Court grants summary judgment on the wrongful death and survival claims in favor of Hinds.

CONCLUSION

The Court denies the motion for leave to supplement appendix. The Court grants in part and denies in part the motion to strike. The Court grants the motion to dismiss and for summary judgment. The Court dismisses all claims against Cuellar and Huddleston. The Court grants summary judgment on all claims against Hinds. The Winzers' claims against Defendant Kaufman County remain pending.

Signed August 10, 2016.

/s/ David C. Godbey
United States District Judge