NO. 20-_____

In the Supreme Court of the United States

SONIA GARCIA AND PHILLIP GARCIA,

Petitioners,

v.

WESLEY BLEVINS,

Respondent.

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

1. The United States Court of Appeals for the Fifth Circuit granted qualified immunity reasoning facts demonstrating that a person shot and killed by police had not threatened anyone, was holding a gun pointed down at his side, was not suspected of any crime, and was not fleeing were irrelevant.

Was it clearly established that a person merely holding a gun has a Fourth Amendment right to be free from deadly force?

2. May courts consider unpublished decisions as persuasive authority in resolving the clearly established prong of qualified immunity cases?

LIST OF PROCEEDINGS

United States Court of Appeals for the Fifth Circuit

No. 19-20494

Sonia Garcia; Phillip Garcia, v. Wesley Blevins; City of Houston

Date of Final Opinion: April 30, 2020

District Court for the Southern District of Texas, Houston Division

Civil Action No. 4:17-cv-00117

Garcia v. Blevins

Date of Final Order: June 13, 2019

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PETITION FOR WRIT OF CERTIORARI

Petitioners Sonia and Phillip Garcia ask this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, *Garcia v. Blevins*, 957 F.3d 596 (5th Cir. 2020), is attached to this petition in the appendix at A-1. Magistrate's memorandum and recommendation order to the United States District Court for the Southern District of Texas, *Garcia v. City of Houston, Texas*, No. 4:17-CV-0117, 2019 WL 2477326, at *5 (S.D. Tex. May 14, 2019) is attached to this petition at A-12. The district judge's memorandum and order adopting *Garcia v. Blevins*, No. 4:17-CV-117, 2019 WL 2474653 (S.D. Tex. June 13, 2019) is attached at A-9.

JURISDICTION

The Court of Appeals entered judgment April 30, 2020. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Petitioner asserted below and is asserting herein the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- **U.S. Const. amend. IV**

  U.S. Const., amend. IV provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

- **42 U.S.C. § 1983**

  42 U.S.C. § 1983 provides that every person who, under color of state law subjects, any citizen of the United States to the deprivation of any Constitutional right, shall be liable to the injured party.

INTRODUCTION

Houston Police Officer Wesley Blevins (hereinafter, Blevins), shot and killed Phillip Garcia, Jr. (hereinafter Garcia) in a restaurant parking lot where Blevins was working as a security guard. Garcia's parents sued Blevins for violating their son's Fourth Amendment rights. Both the district court and the appellate court held that while genuine disputes of fact were material to determining whether Blevins violated Garcia's constitutional rights, the courts erred by underestimating those disputes' relevance to the clearly established prong. Controlling authority and a robust consensus of persuasive authority counsel that the facts ignored below matter when analyzing the reasonableness of deadly force. At summary judgement, Garcia's parents offered eyewitness interviews demonstrating Blevins's claim that

Garcia pointed a gun at him was false. Everyone but Blevins claimed Garcia never pointed his gun nor threatened anyone and pointed at the ground. Controlling authority, and a robust consensus of persuasive authority relied on similar facts to hold that a person is not an immediate threat merely because he holds a gun. Nevertheless, the Fifth Circuit reasoned that had Garcia held a knife rather than a gun, this claim would have overcome qualified immunity. Even if this Court agrees that the law was not clearly established, this case is an ideal vehicle to take up an important constitutional question: whether a person fearing for his life has the right protect himself by simply holding a gun, without being shot and killed by police.

Even more alarming than the appellate courts ambivalence to dispositive facts, is its pattern of avoiding its own prior holdings in its treatment of unpublished opinions. While the Federal Rules of Appellate Procedure allow wide discretion among the sister circuits over which decisions to publish and the weight to assign unpublished opinions, the Fifth Circuit's exercise of that discretion raises serious questions that undermine the foundational principles of our common law system that like cases be treated alike.

The Garcias respectfully ask this Court review these practices for manifest unfairness as typified in the holding below, not just for their sake, but for similarly situated putative claimants in Fifth Circuit qualified immunity cases.

STATEMENT OF THE CASE

I. Factual Background

On January 16, 2015, Garcia met friends at a Houston restaurant where Blevins a City of Houston police officer, was working off duty as a security guard.

A verbal argument developed between Garcia's companions and another group of restaurant patrons. The argument then migrated to the restaurant's patio. Once outside, the other patrons made violent threats and Garcia began to fear for his life.

Several restaurant security guards, including Blevins, were present. All of them were armed. When the argument on the patio turned into a fistfight the security guards, including Blevins, broke up the fight and ordered both groups to leave the patio area. Next, the two groups exited the patio and entered the parking lot, where the argument resumed. Having been threatened with bodily injury and death and recognizing that he was outnumbered, Garcia retrieved a gun from his car to protect himself. One of the guards observed Garcia with his gun and broadcast to the others via police radio that a patron was armed; there was no communication suggesting that Garcia threatened anyone, pointed the gun at anyone, nor that he fired it. After hearing the broadcast, Blevins ran to the back of the parking lot and searched the area for an armed patron. Blevins eventually spotted Garcia holding the gun to Garcia's side.

What happened next is disputed. Blevins alleges he shouted twice before firing at Garcia. A fellow Houston police officer working at the restaurant, who was the

closest witness to Blevins, reported he did not hear Blevins shout anything. Among other police witnesses questioned at the scene some reported Blevins shouted only once, mere seconds before firing. Blevins alleged Garcia pointed his gun at the officer. But multiple witnesses repudiated that claim, stating that Garcia's gun was pointed down, at his hip, and that he was attempting to pass the gun to a friend, or otherwise temporarily dispose of it.

Blevins aimed to kill, firing three bullets that pierced Garcia's chin, chest, and abdomen. Garcia died in an ambulance en route to Clear Lake Regional Medical Center.

II. Procedural Background

Garcia's parents, Sonia Garcia and Phillip Garcia, Sr. (hereinafter, "the Garcias") filed this civil rights lawsuit in the United States District Court for the Southern District of Texas, Houston Division. The Garcias filed claims under 42 U.S.C. § 1983 for Fourth and Fourteenth Amendment violations of excessive force against Blevins. The Garcias also sought to hold the City of Houston liable for maintaining a policy that caused those same constitutional violations against their son. On February 6, 2018, the District Court dismissed all Fourteenth Amendment claims against both defendants. The case was then referred to a magistrate judge. On May 14, 2019, the magistrate judge recommended judgement against the Garcias, holding that although plaintiffs raised a genuine issue of material fact over the constitutional violation, they failed to demonstrate the violation was clearly established as a matter of law. The district court adopted the magistrate's

memorandum on June 13, 2019; the Garcias filed timely appeal. The United States Court of Appeals for the Fifth Circuit entered judgement on April 30, 2020, affirming the district court's ruling.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THIS CASE REPRESENTS WEIGHTY AND CONSEQUENTIAL LEGAL PROPOSITIONS THAT DEPART FROM FEDERAL QUALIFIED IMMUNITY LAW.

The reasonableness of deadly force is generally analyzed under *Graham v. Connor* (490 U.S. 386, 109 S.Ct. 1865 (1989)) and *Tennessee v. Garner* (471 U.S. 1, 105 S.Ct. 1694 (1985)). *See, e.g.*, *Plumhoff v. Rickard*, 572 U.S. 765, 774, 134 S.Ct. 2012, 2020 (2014). Courts consider "the totality of the circumstances" giving careful attention to the facts 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 or attempting to evade arrest. *Garner*, 471 U.S., at 8-9, 105 S.Ct., at 1699-1700; *Graham*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872 (1989). The most relevant *Graham* factor implicated in this case is the immediacy of the perceived threat.

The Garcias concede that the Fifth Circuit's reasoning is correct, in that whether Garcia posed an immediate threat is too general an inquiry to clearly define the constitutional right at issue with the specificity required. *See, e.g. Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 2083 (2011). However, in extending qualified immunity, the appellate court erred by ignoring controlling and

a robust consensus of persuasive authority that put the reasonableness of Blevins's specific actions beyond debate. The appellate court compounded that error by relying on disputed facts to resolve the clearly established question, in derogation of the rule that limits courts from resolving such disputes at the summary judgement stage. *See* FED. R. CIV. P. 56(a). These two are reasons enough for this Court to reverse the dangerous precedent set below.

A. The Appellate Court Committed Legal Error by Relying on Facts Not in Evidence to Accord Qualified Immunity.

The holding below represents an unprecedented legal proposition *that* the Fourth Amendment tolerates deadly force against a man suspected of no crime, who was not fleeing, and was holding a gun pointed at the ground because he "could" have turned the gun on officers. *Garcia v. Blevins*, 957 F.3d 596, 602 (5th 2020). If that were the law, then the fact "that a person was armed would always end the inquiry." *Glenn v. Washington County*, 673 F.3d 864, 872 (9th Cir. 2011). However, courts in virtually every circuit—including the Fifth Circuit prior to *Garcia*—recognize that facts similar to the ones relevant here are central to analyzing the reasonableness of deadly force.

In *Tolan v. Cotton* (572 U.S. 650, 656, 134 S.Ct. 1861, 1866 (2014)) the Supreme Court emphasized that "under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." A dispute of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986).

Exceeding mere materiality, facts such as where the weapon was and what was happening with the weapon are inquiries crucial to the reasonableness determination. *Greer v. Ivey*, 767 F.App'x 706, 710 (11th Cir. 2019); *Thomas v. City of Columbus, Ohio*, 854 F.3d 361, 366 (6th Cir. 2017); *Lopez v. Gelhaus*, 871 F.3d 998 (9th Cir. 2017). Before *Garcia*, courts in the Fifth Circuit similarly understood that, with respect to the reasonableness of deadly force, the relevant inquiry focuses on "the act that led [the officer] to discharge his weapon." *Manis v. Lawson*, 585 F.3d 839, 845 (5th Cir. 2009). A plaintiff overcomes qualified immunity by establishing a genuine issue of material fact over whether that act supplied probable cause. *Hobart*, 582 Fed.App'x. 348, 355 (quoting *Manis*, 585 F.3d at 843). Here, the act that led Blevins to discharge his weapon is disputed, not just by the Garcias, but by multiple police witnesses, including another officer.

Nevertheless, the appellate court conceded on one hand that these factual disputes preempted qualified immunity with respect to the inquiry's first prong, while on the other hand claiming those same facts were irrelevant to dispose of the clearly established prong. While it is true that courts may exercise discretion under *Pearson v. Callahan* (555 U.S. 223, 236, 129 S.Ct. 808, 818 (2009)) to end a qualified immunity inquiry on clearly established alone, they may not resolves disputes in favor of the movant to do so. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970).

In this case the version of events, as recited by the appellate court, is even more favorable to Blevins than his own recitation. *See, e.g.*, *Garcia* at 599 (Blevins

unholstered his own gun and ordered Garcia to drop his. Garcia did not. Instead, he kept walking, passing between two parked vehicles.") *cf. Garcia*, Brief of Appellees 2019 WL 6003418 (5th Cir. 2019), *3 ("Blevins then observed Garcia take cover between two vehicles. Blevins ordered him to drop his gun and get on the ground."). It is one thing to say that relevant facts are irrelevant; it is legal error to contort the facts and distinguish *those* from clearly established law. The appellate court's recitation paints a very different picture than the Garcias, witnesses, and Blevins himself supplied the courts.

We know this misstep was outcome-determinative for two reasons. For one, the appellate court's decision turned entirely on the single fact of the alleged failure to comply, rather than engaging the totality-of-the-circumstances analysis required under *Graham*. In fact, this Court admonished a lower court for evaluating facts in this manner, finding the totality-of-circumstances test "precludes this sort of divide-and-conquer analysis." *District of Columbia v. Wesby*, 138 S.Ct. 577, 583-85 (2018). Likewise, a central element of the Garcias's attack on immunity is the fact that their son did not fail to comply, but that Blevins shot him before Garcia could react. The appellate court's erroneous resequencing on this point devastates the Garcias's claim because it reads as though more time transpired between the command and the shot. It also contradicts evidence that Blevins's command preceded his shot by a

"3 Mississippi count",[1] another eyewitness, a Houston police officer, who claimed that Blevins issued no command at all, and Blevins's own retelling of events in a different sequence than the one the court adopted and used to justify its case-dooming holding. *See Garcia* at 602.

Finally, the appellate court erroneously found the fact that Garcia was aware of Blevins's presence was "undisputed"—a painfully unfair assumption, given the only person who could offer proper evidence of what Garcia "was aware" in his final moments is, of course, unable to speak for himself here. A shout from a security guard who happened to be an off-duty Houston Police Department officer, from across a crowded parking, lot is hardly sufficient evidence to demonstrate Garcia was aware a police officer had issued him a specific command. *See Brown v. Nocco*, 788 F.App'x 669, 674 (11th Cir. 2019) (noting "we cannot credit an officer's version of events just because a plaintiff cannot personally rebut it"). Which of the various stories most accurately reflects what occurred is unequivocally, in our courts, a question for a jury. *See Tolan* at 656 ("'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'")(quoting *Anderson*, 106 S.Ct. 2505, 2510).

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[1] *Garcia v. City of Houston, Texas*, No. CV H-17-0117, 2019 WL 2477326, at *5 (S.D. Tex. May 14, 2019), report and recommendation *adopted sub nom. Garcia v. Blevins*, No. 4:17-CV-117, 2019 WL 2474653 (S.D. Tex. June 13, 2019), *aff'd*, 957 F.3d 596.

A litany of controlling precedent emphasizing the importance of the precise facts disputed here (that Garcia's gun was pointed down and that Blevins gave Garcia no time to comply, or if he even issued a command before shooting him) are explicated below. What is important here, is that the appellate court impermissibly contorted the facts to ignore genuine material disputes to avoid application of controlling precedent.

B. The Appellate Court Erred by Departing from Controlling Authority, and a Robust Consensus of Persuasive Authority, Demonstrating That the Law at Issue Was Clearly Established.

Federal circuit courts generally agree that the mere presence of a gun, without more, will not vindicate the reasonableness of deadly force. *See, e.g.*, *Perez*, 809 F.3d 1213, 1220. That consensus included the Fifth Circuit, prior to the appellate court's ruling in *Garcia*. *See Cole v. Carson*, 935 F.3d 444, 454-55 (5th Cir. 2019) (*en banc*); *Graves v. Zachary*, 277 F.App'x 344, 348 (5th Cir. 2008). Likewise numerous persuasive holdings accord that a person possessing a firearm is not an immediate threat *per se*; this proposition was clearly established before[2] Blevins fatally shot Garcia and not just in the Fifth Circuit. U.S. courts of appeals in the First,[3] Third,[4]

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[2] Even cases that postdate Blevins's actions base their findings that the right at issue here was clearly established on precedent decided before January 2015.

[3] *McKenney v. Mangino*, 873 F.3d 75 (1st Cir. 2017) (" . . . precedents make pellucid that the most relevant factors in a lethal force cases . . . are the immediacy of the danger posed by the decedent and the feasibility of remedial action.") (citing *Garner*, 471 U.S. at 11-12, 105 at 1694); *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 23 (1st Cir. 2005).

Fourth,[5] Sixth,[6] Seventh, [7] Eighth,[8] Ninth,[9] and Eleventh[10] all held that possession of a firearm is not sufficient to establish the reasonableness of deadly force for

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[4] *Bennett ex rel. Estate of Bennett v. Murphy*, 120 F.App'x 914, 919 (3d Cir. 2005) (a "reasonable officer would understand, without reference to any other case law" shooting suspect who refused to drop gun but never pointed it was unconstitutional) (citing *Bennett v. Murphy,* 274 F.3d 133, 136 (3d Cir.2001)).

[5] *Hensley on behalf of N. Carolina v. Price*, 876 F.3d 573, 584 (4th Cir. 2017) (finding fact that officers witnessed plaintiff engaged in physical altercation did not change reasonableness calculus to affirm denial of immunity); *Cooper v. Sheehan*, 735 F.3d 153, 159 (4th Cir. 2013) (recognizing "an officer does not possess the unfettered authority to shoot" someone "because that person is carrying a weapon"); *Pena v. Porter*, 316 Fed.App'x. 303, 312 (4th Cir. 2009) (Mere presence of weapon is not sufficient to justify deadly force.").

[6] *King v. Taylor*, 694 F.3d 650, 653, 662-63 (6th Cir. 2012); *Brandenburg v. Cureton*, 882 F.2d 211, 213, 215 (6th Cir. 1989); *cf. Bell v. City of E. Cleveland*, 125 F.3d 855 (6th Cir. Oct. 14, 1997), at * 1 (suspect shot after he pointed a gun at the officer); *Boyd v. Baepler*, 215 F.3d 594, 599 (6th Cir. 2000) (officers facing a man who repeatedly pointed his gun at them, and continued to point his gun as he fled).

[7] *Childs v. City of Chicago*, No. 13-CV-7541, 2017 WL 1151049, at *9 (N.D. Ill. Mar. 28, 2017) (denying immunity, even where officer mistakenly believed plaintiff fired gun at him); *Weinmann*, 787 F.3d 444, 450 (clearly established where plaintiff had a shotgun but never aimed it); *cf. Horton v. Pobjecky*, 883 F.3d 941, 951 (7th Cir. 2018) (deadly force reasonable where officer witnessed commission of felony and plaintiff made threats).

[8] *Partridge v. City of Benton*, 929 F.3d 562, 566 (8th Cir. 2019); *Craighead v. Lee*, 399 F.3d 954, 961 (8th Cir. 2005) (deadly force objectively unreasonable where suspect pointed gun upward); *cf. Rogers v. King*, 885 F.3d 1118, 1121-22 (8th Cir. 2018) (deadly force objectively reasonable where

qualified immunity. In surveying those numerous cases, two points regarding the factual circumstance that should have been considered by the *Garcia* court emerge. Specifically, controlling cases and a robust consensus of persuasive authority gave fair warning to any reasonable officer that, where the victim was holding a gun pointed down and did not have time to comply (or was attempting to comply) before being shot, the use of deadly force violates a constitutional right. *See, e.g. Garner*, 471 U.S. 1, 11-12, 105 S.Ct. 1694, 1701 (finding deadly force constitutionally unreasonable unless suspect[11] "threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm").

1. The Right to Be Free from Deadly Force When Carrying a Gun That Is Not Pointed at, or Used to Threaten, Anyone Was Clearly Established

Distilling from the general principle that possession of a firearm, without more, fails to satisfy *Graham*'s threat factor, the federal courts also agree that specific facts present here clearly established a constitutional violation. Specifically, the

suspect raised gun toward person); *Nance v. Sammis*, 586 F.3d 604, 611 (8th Cir. 2009) (finding clearly established that suspect does not pose an immediate threat though he seemingly possesses a gun).

[9] *Glenn*, 673 F.3d 864 (9th Cir. 2011); *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997) (officers "may not kill suspects . . . simply because they are armed."); *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991).

[10] *Perez v. Suszczynski*, 809 F.3d 1213, 1220 (11th Cir. 2016); *Mercado*, 407 F.3d 1152, 1159-1160.

[11] As a reminder, Garcia was not suspected of any crime.

appellate court dismissed the relevance of the Garcias's evidence that their son held his gun pointed at the ground when Blevins killed him. Insisting that "'[w]e have never required officers to wait until a defendant turns towards them, with weapon in hand'" (*Garcia* at 602 (quoting *Salazar-Limon v. City of Houston*, 826 F.3d 272, 279 n.6 (5th Cir. 2016), *as revised* (June 16, 2016))), the appellate court lost sight of the fact that our jurisprudence does not require a plaintiff to present a case directly on point in order to overcome a qualified immunity defense. *City of Escondido, Cal. v. Emmons*, 139 S.Ct. 500, 505, 202 (2019); *D.C. v. Wesby*, 138 S.Ct. 577, 590, 199 (2018); *al-Kidd*, 563 U.S. 731, 741 (2011); *Anderson*, 483 U.S. 635, 640, 107 S.Ct. 3034 (1987).

Adding specificity to the *Garner* holding, other cases controlling here indeed found that the position of a weapon and the proximity of potential victims, including whether the suspect faced officers, were relevant factors in determining reasonableness of deadly force. *Hobart v. Estrada*, 582 Fed.App'x. 348, 355 (5th Cir. 2014); *Giardina v. Lawrence*, 354 Fed.App'x. 914, 916 (5th Cir. 2009); *Bazan v. Hidalgo County*, 246 F.3d 481, 488 (5th Cir. 2001) (quoting *Garner*, 471 U.S. at 11). While the line between reasonable and excessive force often lies in a "hazy border" (*Saucier v. Katz*, 533 U.S. 194, 206, 121 S.Ct. 2151 (2001)) deadly force usually does not; the reasonableness of its use is clearly established. *Reyes v. Bridgewater*, 362 F.App'x 403, 406 (5th Cir. 2010); *see also Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018) (emphasizing the suspect's proximity to potential victim); *Cf. Winzer v.*

Kaufman Co., 916 F.3d 464, 468 (5th Cir. 2019) (granting qualified immunity because the suspect fired shots at officer).

Disregard for precedent is nowhere more evident than in the *Garcia* court's handling of *Cole*, 935 F.3d 444, 454-55. The appellate court found that case distinguishable from the facts here, even though it involved an individual with a gun who "made no threatening movements toward the officers, was facing away from the officers, was not warned by the officers . . . and may have been unaware of the officers' presence." *Garcia* at 601. Unfortunately for the Garcias, the court based its contravening holding here on disputed facts. *Id.* ("Here, by contrast, it is undisputed Garcia was aware of Blevins's presence and that Blevins ordered Garcia to put down his weapon, but Garcia refused to do so.")

In other circuits, the fact that a suspect points his weapon at the ground has long and consistently been recognized as foreclosing qualified immunity. *See*, *Cole Estate of Richards v. Hutchins*, 959 F.3d 1127, 1134 (8th Cir. 2020); *Gelhaus*, 871 F.3d 998, 1008 (9th Cir. 2017), cert denied; *David v. City of Bellevue*, 706 Fed.App'x. 847 (6th Cir. 2017); *Papineau v. Heilman*, 667 F.App'x 210, 211 (9th Cir. 2016) (clearly established where plaintiff was not pointing gun at officer); *Weinmann v. McClone*, 787 F.3d 444, 450 (7th Cir. 2015); *George v. Morris*, 736 F.3d 829, 838-39 (9th Cir. 2013) (noting "unsurprising[ly]" officers' use of deadly force would be objectively unreasonable if gun "trained on the ground" and made no "serious verbal threat"); *Cooper*, 735 F.3d 153, 159-160 (4th Cir. 2013) (deadly force objectively unreasonable and contrary to clearly established law where plaintiff held shotgun

pointed ground and made no "threats"); *King v. Taylor*, 694 F.3d 650, 653, 662-63 (6th Cir. 2012); *Nance*, 586 F.3d 604, 611; *Wilson v. City of Des Moines*, 293 F.3d 447, 451-54 (8th Cir. 2002) (whether possibly armed suspect turned and faced officers was "the most important fact" in the reasonableness analysis); *Curley v. Klem*, 298 F.3d 271, 283 (3d Cir. 2002) (dispute over whether suspect pointed gun at officer or at the ground precluded qualified immunity as a matter of law); *Cureton*, 882 F.2d 211, 213, 215.

Nevertheless, the appellate court shrugged off the fact that Garcia's gun, according to everyone but Blevins, was pointed down, and insisted that the only fact that mattered here was Blevins's allegedly ignored command. Putting aside for the moment that fact was also disputed, overwhelming authority belies the appellate court's reasonableness analysis here. Given controlling case law and a robust consensus of persuasive authority, it should have been obvious to Blevins that holding a gun pointed at the ground was not enough to provoke a constitutional use of deadly force.

2. It Was Clearly Established That Deadly Force Is Unconstitutional When an Officer Fires Before the Victim Has Time to Comply with Command to Drop His Gun

Another equally relevant fact the appellate court ignored is that Blevins began firing on Garcia within seconds of yelling, from a distance, for Garcia to drop his gun. "When, as here, a police officer does not give sufficient time to comply with an order prior to initiating force against a person, that person's resulting failure to comply immediately with the order cannot, without more, give rise to a governmental

interest in the use of significant force." *Singleton v. Darby*, 609 F.App'x 190, 204, J. Dennis, concurring (5th Cir. 2015); *See also Smith v. City of Troy, Ohio*, 874 F.3d 938, 946 (6th Cir. 2017) (holding clearly established in 2014 "that a police officer violates a suspect's right to be free from excessive force by repeatedly tasing the suspect without giving him a chance to comply with orders"); *Tenorio v. Pitzer*, 802 F.3d 1160, 1166 (10th Cir. 2015) (holding lack of time to comply precluded qualified immunity); *Nance*, 586 F.3d 604, 607; *Mercado v. City of Orlando*, 407 F.3d 1152, 1157 (11th Cir. 2005). (denying qualified immunity where officer fired a shot "within seconds" of command); *Cf. Chappell v. City of Cleveland*, 585 F.3d 901, 912 (6th Cir. 2009) (granting qualified immunity where evidence did not support plaintiff's claim that he was not given time to comply). Unlike the *Chappell* plaintiff, the Garcias offered eyewitnesses evidence that Blevins fired within seconds of shouting at Garcia, while a Houston police officer, stated he did not hear Blevins say anything.

In other cases where the appellate court upheld qualified immunity based on failure to comply, the officers who successfully raised the defense issued multiple commands before resorting to deadly force. *See Estate of Shepherd v. City of Shreveport*, 920 F.3d 278, 281 (5th Cir. 2019); *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991); *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985).

The Fifth Circuit made much of the difference between a knife and a gun in distinguishing otherwise like cases. However, where the issue is time to comply, that distinction cuts in the Garcias's favor. Of course it takes longer to charge at someone with a knife than it does to fire a gun. But where the issue is lack of time

to comply, that is the wrong comparison. Facility of use is irrelevant; a logical analysis recognizes that it takes longer to drop a gun than a knife because the former can discharge if not carefully lowered to the ground. Therefore, a reasonable officer would have allowed Garcia more time to comply than a suspect with a knife, for safety reasons alone.

II. THIS CASE RAISES AN IMPORTANT FEDERAL QUESTION OVER THE ROLE OF UNPUBLISHED OPINIONS AS EVIDENCE OF CLEARLY ESTABLISHED LAW FOR QUALIFIED IMMUNITY.

When determining which sources may clearly establish the law, this Court places great discretion in the hands of the United States courts of appeals to develop rules. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1982) (reasoning "we need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.'" (quoting *Procunier v. Navarette*, 434 U.S. 555, 565 (1978)). However, this Court defined parameters around clearly established that are notably more expansive than the Fifth Circuit's stagnating analysis, by waiving the requirement for controlling precedent for 'obvious cases' and where there exists a "robust consensus of persuasive authority." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002); *Ashcroft*, 131 S.Ct. at 2084. Though at one time the Court of Appeals for the Fifth Circuit mindfully exercised these principles, recently the court has failed to apply them. *See, e.g.*, *Morgan v. Swanson*, 659 F.3d 359, 371-72 (5th Cir. 2011) (*en banc*) (recognizing that a robust consensus of persuasive authority may theoretically clearly establish the law). But Supreme

Court guidance on qualified immunity analysis is not a theory and the appellate court's consistent failure to give due weight to persuasive authority has created a "Catch-22" where plaintiffs' constitutional rights are stagnating under the appellate court's heavy thumb on the scale against clearly established.

The *Garcia* court's refusal to consider unpublished opinions as evidence of clearly established law merits this Court's attention for three reasons. First, it represents a departure from Supreme Court precedent. Second, this case is an apt vehicle for this Court to issue guidance that would encourage uniformity among the circuits, in an area that badly needs it. Finally, if ultimately resolved in the Garcias's favor, such guidance would bolster public perception of the fairness of qualified immunity.

A. The Fifth Circuit's Break with Controlling Authority Raises Concerns About the Stagnation of Constitutional Law and the Integrity of Stare Decisis.

The appellate court's announcement in *Garcia* that unpublished cases may not clearly establish law raises three important issues worthy of this Court's review: its failure to recognize obvious constitutional violations, avoidance in creating important precedent by not publishing the few opinions that do recognize them, and, most unfairly, its newly consecrated practice of improperly burdening plaintiffs with the appellate court's own fear of Supreme Court reversal.

First, the opinion below referenced two cases for the proposition that unpublished opinions cannot clearly establish the law. *Garcia* at 601. But that was not the holding in either case cited, both of which relegated to footnotes the appellate court's view toward unpublished opinions. *See McCoy v. Alamu*, 950 F.3d

226, 233 n. 6 (5th Cir. 2020); *Cooper v. Brown*, 844 F.3d 517, 525 n.8 (5th Cir. 2016)). In fact, the *Cooper* footnote expressly recognizes unpublished opinions' power to "illustrate clearly established law." 844 F.3d at 525 n.8. ("although an unpublished case may not create clearly established law, it may yet evince established law").

If *Garcia*'s sweeping application of *Cooper* is a correct, and courts in the Fifth Circuit could never rely on unpublished opinions to resolve the clearly established prong, why would the court bury such weighty doctrine in footnotes? The answer is *Garcia*'s announcement sounds a dog that never barked before. In fact, *Delaughter v. Woodall* (909 F.3d 130, 140 (5th Cir. 2018)) demonstrates that *Garcia* and *McCoy* both misread *Cooper*. In *Delaughter*, the appellate court cited to *Cooper* to justify its reliance on three unpublished cases to find clearly established law in a qualified immunity case. 909 F.3d 130, 140.

Turning back to the *McCoy* footnote, not only is it a misreading of *Cooper*, its reasoning benefits the Garcias by revealing the fact that the appellate court improperly factors probability of reversal into its clearly established calculus. The footnote's language is so revealing it merits full citation:

> "Some might find this [grant of qualified immunity] a puzzling result, insofar as QI might have us find a violation in one breath, but, in the next, hold it too debatable to prevent immunity. No matter . . . . The Supreme Court has repeatedly reversed courts of appeals for failing to define established law narrowly, and we must follow that binding precedent." *McCoy* at note 6 (citing *Wesby v. District of Columbia*, 816 F.3d 96, 102 (D.C. Cir. 2016) and William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 83 (2018)).

Perhaps the strongest evidence that the appellate court is improperly motivated by fear of reversal comes from *Morrow v. Meachum*, 917 F.3d 870 (5th 2019). The *Morrow* court demonstrated how impossibly high the bar is set for Fifth Circuit plaintiffs to overcome qualified immunity when it held that even if a plaintiff managed to carry its "doozy" of a burden, a court may yet withhold remedy when, for any inarticulable reason, it may discern a whiff of existential dread of reversal from above. *See Id.* at 874-877.

Furthermore, the decision not to publish *Bridgewater* in the first instance violates the Fifth Circuits' rule that provides "opinions that may in any way interest persons other than the parties to a case should be published." 5th Cir. R. 47.5.1. The very nature of qualified immunity analysis, insofar as it requires plaintiffs to point to factually similar cases, means no qualified immunity case in the Fifth Circuit should go unpublished. In practice, despite the rule's sweeping language, the Fifth Circuit withholds publication of qualified immunity decisions at a rate higher than the national average. *Neilsen*, *supra* note 22. Following circuit rules and prior holdings, *Bridgewater* must be brought to bear in *Garcia*, because its precedential status should never have come into question.

The appellate court's similar exercise of discretion in the context of obvious cases, specifically its failure to recognize them, raises serious concerns over the stagnation of individual rights and the integrity of *stare decisis.* The appellate court insisted it is bound by Supreme Court analysis of the clearly established prong to grant qualified immunity, even over the existence of factual disputes. *See Garcia* at

602. But a long line of cases make clear this Court's permissive guidance on persuasive authority as a source of clearly established law is no more pronounced than in cases where, as here, the unconstitutionality of the conduct at issue is obvious. *Hope*, 536 U.S. 730, 741; *Tolan*, 572 U.S. 650, 656.

The Fifth Circuit's aberrant reluctance among the courts of appeals to recognize the 'obvious case' has attracted scholarly attention: "Compared to other circuits, the Fifth Circuit appears to misconstrue the concept of an obvious case and fails to allow for a reasonably expansive analysis of sources of clearly established law."[12]

What makes this creep away from Supreme Court precedent particularly disturbing, is the appellate court's exercise of discretion not to publish the few opinions in which it does apply the obviousness doctrine. *See Pena v. City of Rio Grande City, Texas*, No. 19-40217, 2020 WL 3053964, at *7, ___ F.App'x ___ (5th Cir. 2020); *Hickson v. City of Carrollton*, No. 3:18-CV-02747-B (BH), 2020 WL 3810360, at *6 (N.D. Tex. June 16, 2020), report and recommendation adopted *sub nom. Hickson on behalf of Estate of Hickson v. City of Carrollton*, No. 3:18-CV-02747-B, 2020 WL 3798856 (N.D. Tex. July 7, 2020); *Patterson v. Allen*, No. 3:12-CV-14, 2013 WL 4875092, at *3 (S.D. Tex. Sept. 11, 2013); *Bridgewater*, 362 F.App'x

[12] Amelia A. Friedman, Qualified Immunity in the Fifth Circuit: Identifying the "Obvious" Hole in Clearly Established Law, 90 TEX. L. REV. 1283, 1294 (2012); Thomas E. O'Brien, *The Paradox of Qualified Immunity: How a Mechanical Application of the Objective Legal Reasonableness Test Can Undermine the Goal of Qualified Immunity*, 82 TEXAS L. REV. 767 (2004) (arguing that the Fifth Circuit's application of "objective reasonableness" unnecessarily harms the interests of plaintiffs).

403, 408 (5th Cir. 2010); *Graves*, 277 F.App'x 344, 349; *Mitchell v. Cervantes*, No. 3:10-CV-0030-K-BH, 2010 WL 4628003, at *1, *6-7 (N.D. Tex. Oct. 12, 2010); *Strittmatter v. Briscoe*, 504 F.Supp.2d 169, 176 (E.D. Tex. 2007). The decision not to publish these cases, in derogation of Rule 47.5.1., dooms every subsequent plaintiff who presents similar facts.

The *Garcia* court's denouncement of unpublished opinions in the context of clearly established law, combined with its habit of withholding publication of opinions that recognize the unconstitutionality of force under novel factual circumstances should alarm this Court. This developing pattern that increasingly stacks the deck against Fifth Circuit plaintiffs in qualified immunity cases will lead to a dangerous environment where officers know that the more outrageous or bizarre their conduct, the less likely they will be held accountable for constitutional violations.

B. The Appellate Court's Refusal to Consider *Bridgewater* Broke with Supreme Court and Fifth Circuit Precedent Regarding the Role of Unpublished Opinions in Qualified Immunity Cases.

The importance of recognizing the analytical, albeit not precedential, value of unpublished opinions in the context of the clearly established prong flows from the very nature of the opinions themselves: 1) they articulate clearly established law as applied to varying fact patterns, 2) they represent important analyses by appellate courts, which for most litigants is their court of last resort, and 3) the volume of qualified immunity cases that go unpublished leave a vast corpus of important factual application of legal doctrine completely inaccessible, not just to putative

plaintiffs, but to the officials seeking clarity who qualified immunity doctrine was designed to protect.

First, the legal proposition announced in an unpublished opinion is by definition clearly established. We know this because if it were not, the decision would be ineligible for unpublished status; it is by now axiomatic that unpublished opinions do not make new law but only apply the established law. These are supposed to be the 'easy cases', relegated to federal reporter appendices because they purportedly have no impact beyond the parties at bar. *See, e.g.*, 5th Cir. R. 47.5.1. That criteria cannot be met in the context of qualified immunity because courts rely heavily on previous factual analysis. If an unpublished case may not be used as evidence of clearly established law, a plaintiff who brings to bar similar facts is automatically doomed, even if that opinion found those facts established a constitutional violation. Consequently, the decision to publish or not has a direct effect on qualified immunity analysis because evidence of clearly established law necessarily alters the "contours of the right" and the clarity with which an official would understand that the right has been violated. *See al-Kidd*, 563 U.S. at 742.

Second, the opinions of the United States courts of appeals are fundamentally important sources of law. Their deliberations over clearly established law in light of various factual circumstances, published or not, provide what the qualified immunity inquiry needs most from prior cases—applications of "extremely abstract rights" to specific facts that provide clear guidance to government officials about what rights exist and what conduct violates them. *Anderson*, 483 U.S. 635, 639;

Hope, 536 U.S. 730, 739. Qualified immunity requires careful drawing of lines—where a pending case differs just a little, but not too much, from an earlier one—that the federal judiciary is able to ever more sharply define the contours of the rights at issue.

To identify contours that will endure, the courts of appeals engage in a painstaking scrutiny of case-by-case adjudication. The lower courts rely on those opinions to refine their approach to difficult questions of constitutional law. "Deliberation on [these] question[s] over time winnows out the unnecessary and discordant elements of doctrine and preserves 'whatever is pure and sound and fine.'" *California v. Carney*, 471 U.S. 386, 400-01, 105 S.Ct. 2066, 2074 (1985). All this judicial heavy lifting, intrinsically valuable to qualified immunity, is lost in unpublished opinions. Where immunity for deadly force is concerned, the stakes are too high to abide such a loss.

Beyond this qualitative loss, the quantitative loss is substantial; unpublished opinions comprise the majority of federal opinions at 87 percent. *See* ADMIN. OFF. OF THE U.S. COURTS, *Annual Report of the Director: Judicial Business of the United States Courts* (2019), *available at* https://www.uscourts.gov/sites/default/files/data_tables/jff_2.5_0930.2019.pdf (showing percentage of unpublished opinions in the twelve-month period ending September 30, 2019). Fewer precedents mean less articulable law. It is not only plaintiffs who suffer from unclarity over what is clearly established. More opinions applying settled law to differing facts mean more factually specific sources from which government officials can judge the reasonable-

ness of a given action. Severely limiting the number of cases (to just 13 percent of all federal decisions) that may be analyzed for factual similarity to determine clearly established, functionally undermines the theoretical purpose of that prong, the gravamen of which is fair warning. Unpublished opinions hold a trove of information to guide the delicate analytical balance between arguably the gravest constitutional violations and an officer's ability to protect the public without fear of litigation. Consequently, when appellate courts ignore unpublished decisions in qualified immunity cases, they ignore not only the best evidence of what the clearly established law is, but also our largest source of it.

Even if unpublished opinions are not precedential and may not themselves announce new law, the fact of their unpublished status gives evidence that the law in their relevant area is clearly established. The appellate court knows this and articulated so in *Cooper* and other cases. To hold otherwise would be to assert that courts are using unpublished opinions to make *sui generis* decisions not justified by settled law. Although just such an argument has been advanced by some scholars and jurists using statistical and anecdotal support, it is an untenable position for this Court to take. [13]

[13] The Garcias understand concerns regarding court resources that led to the practice, and avoid debating the constitutionality of withholding publication, or precedential status. They beg only this Court's recognition of their value in qualified immunity analysis, whether or not it announces unpublished opinions are a proper source of clearly established law.

C. Erratic Application of Unpublished Opinions to the Clearly Established Prong Creates Intolerable Geographical Variances in Fourth Amendment Law and Undermines Americans' Faith in the Justice System.

The courts of appeals uniformly agree that their own binding decisions apply to qualified immunity cases within their own circuits. That is where the uniformity ends: whether the decisions of sister circuits, unpublished decisions, district court decisions, or state court decisions, may play a role in clearly establishing the law varies from circuit to circuit. These discrepancies persist despite the fact that this Court made clear that categorical exclusions of all but binding authority are unnecessary and expressly allows reliance on persuasive authority. *See United States v. Lanier*, 520 U.S. 259, 269 117 S.Ct. 1219 (1997) (rejecting proposition that only Supreme Court holdings may clearly establish the law); *Wilson v. Layne*, 526 U.S. 603, 616, 119 S.Ct. 1692, 1700 (1999); *Mitchell v. Forsyth*, 472 U.S. 511, 533, 105 S.Ct. 2806, 2819 (1985). In *Elder v. Holloway* (510 U.S. 510, 114 S.Ct. 1019 (1994)) this Court articulated a permissive view of which opinions may render law clearly established counselling courts to use their "full knowledge" of relevant precedents when analyzing clearly established. *Id.* at 516 (quoting *Davis v. Scherer*, 468 U.S. 183, 192, 104 S.Ct. 3012, 3018 n.9 (1984).

Nevertheless, courts of appeals for the Fourth,[14] Seventh,[15] and now the Fifth, Circuits have expressly dismissed unpublished opinions as sources of clearly

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[14] *See, e.g.*, *Hogan v. Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996).

[15] *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995).

established law. Meanwhile courts of appeals in the Eighth, Ninth,[16] Tenth[17] and Eleventh Circuits[18] recognize unpublished opinions' value to the clearly established prong.

The Eighth Circuit has raised a structural constitutional question about the general denial of unpublished opinions' precedential value when it held that its own appellate court rule that allowed the court to avoid the precedential effect of any prior cases "expand[ed] the judicial power beyond the bounds of Article III." *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000) ("The Framers of the Constitution considered these principles to derive from the nature of judicial power . . . ." (citing *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 264, 399 (1821); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 111 S.Ct. 2439) (finding "the applicability of rules of law is not to be switched on and off according to individual hardship").

Recently, the Tenth Circuit issued a destabilizing opinion, reasoning that courts may rely on unpublished opinions only when reliance benefits defendants, not plaintiffs, in a qualified immunity suit. *Grissom v. Roberts*, 902 F.3d 1162, 1168,

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[16] *Bahrampour v. Lampert*, 356 F.3d 969, 977 (9th Cir. 2004).

[17] *See, e.g.*, *Morris v. Noe*, 672 F.3d 1185, 1197 n. 5 (10th Cir. 2012); *but see Mecham v. Frazier*, 500 F.3d 1200, 1206 (10th Cir. 2007).

[18] *See Corbitt v. Vickers*, 929 F.3d 1304, 1319 n.14 (11th Cir. 2019) (citing *Waldron v. Spicher*, 954 F.3d 1297, 1307 (11th Cir. 2020).

1170-71 (10th Cir. 2018) ("even an unpublished opinion can demonstrate that the law was *not* clearly established.").

The remaining circuits, though not resolving the specific question, have issued opinions indicating courts may rely on unpublished opinions. See *Williams v. Bitner*, 455 F.3d 186, 193 n.7 (3d Cir. 2006) (holding that nonbinding opinions "nonetheless may be relevant to the 'clearly established' determination"); *McCloud v. Testa*, 97 F.3d 1536, 1555 n.28 (6th Cir. 1996) (finding unpublished decisions represent circuit court judgments of how settled law applies to specific examples); *but see Ohio Civil Serv. Emps. Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988).

Such variance across the sister circuits gives rise to two specific concerns relevant to this case. First, that a geographical variance in the development of constitutional law is intolerable in the context of qualified immunity. Worse, accusations about courts' self-motivated use of discretion in the treatment of unpublished opinions foments public questioning of the legitimacy of our courts.

1. Geographic Distortion Is Intolerable in the Context of Clearly Established Qualified Immunity Law.

Erratic consideration of sources of clearly established law "may reveal a geographic distortion in the development of constitutional law," suggesting that " . . . the Constitution means something different—and government actors are constrained by different clearly established rights—among the fifty states."[19]

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[19] Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 98 (2016).

Although Federal Rule of Appellate Procedure 32.1 tacitly permits the courts of appeals to decide what weight to assign unpublished opinions, this Court has made clear that a court should use its "full knowledge" of its own and other relevant authorities in determining whether a right is clearly established. *See* Fed. R. App. P. 32.1 Advisory Committee Notes ("Rule 32.1 is extremely limited . . . . It says nothing about what effect a court must give to one of its unpublished opinions . . . "); *Elder* at 516 (quoting *Davis* at 192 n.9).

The degree of disuniformity tolerated in other areas of the law is profoundly disquieting in the context of shielding state officials from suit, even when courts determine the official violated a constitutional right. Because the substantive test for qualified immunity turns on whether the right at issue was clearly established at the time of its violation, it matters a great deal whether an unpublished opinion can clearly establish a right.

Whatever the value of comity in our federalist common law system, the Framers never intended it should eclipse fairness in the rule of law and the foundational precept that like cases should be treated alike. *See Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2036 (2014).

2. Public Perception That Courts Strategically Withhold Publication and Precedential Value Undermines the Legitimacy of the Federal Judiciary.

A second concern relevant to the *Garcia* holding implicates not only this and future cases, but the legitimacy of the federal judiciary. Scholars[20] and past and current jurists[21] have raised constitutional, ethical, and prudential concerns, in the context of qualified immunity over both the decision whether to publish and what value to assign if not published. The most alarming aspect of that criticism is the suggestion that judges may be strategically asserting their discretion, publishing opinions that follow Supreme Court precedent and declining to publish opinions that do not, with the goal of avoiding reversal.

Recently, Justice Thomas forcefully rebuked an appellate court's handling of an unpublished opinion in a qualified immunity case, calling it a "disturbing aspect of the Fourth Circuit's decision, and yet another reason to grant review. . . . It is hard to imagine a reason that the Court of Appeals would not have published this opinion

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[20] Caleb E. Mason, *An Aesthetic Defense of the Nonprecedential Opinion: The Easy Cases Debate in the Wake of the 2007 Amendments to the Federal Rules of Appellate Procedure*, 55 UCLA L. REV. 643, 646 (2008) (collecting authorities relating to "[t]he jurisprudential, political, equitable, ethical, and constitutional issues raised by the use of [unpublished opinions]" (footnotes omitted)).

[21] *See Plumley v. Austin*, 135 S.Ct. 828, 831 (2015) (Thomas, J., dissenting from the denial of certiorari); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995); Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 222 (1999).

except to avoid creating binding law for the Circuit." *Plumley v. Austin*, 135 S.Ct. 828, 831 (2015).

As discussed above, *Morrow v. Meachum* all but made a court's fear of reversal a factor in resolving clearly established inquiries in the Fifth Circuit (917 F.3d 870, 876). This shocking directive for courts to default, when in doubt, to the movant for summary judgement makes it difficult to deny that the appellate court is so afraid of being reversed that, even when genuine issues of material (and in this case dispositive) facts exist as to the conduct in question, the court would rather shrug off a possible constitutional violation than risk the court's own embarrassment on being reversed. This is precisely the sort of self-interested decision making that jurists and scholars have warned against for the sake of public faith in the legitimacy of the federal judiciary.

To be sure, ideology's impact on judicial decisions is frequently overstated.[22] Confidence in the justice systems depends on the perception that judges try in earnest to 'get the law right,' in that they apply traditional legal principles to reach predictable results, and the statistics seem to bear that perception out as reality.[23] Nevertheless, the importance of maintaining that perception cannot be overstated.

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[22] Alex Kozinski & Fred Bernstein, *Clerkship Politics*, 2 GREEN BAG 57, 59-60 (1998).

[23] Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 396 (2007). *But see, Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1484 (2004) ("Even if there were no credible evidence of misconduct or structural inequality in the

The "foundation stone of the rule of law" is that like cases be treated alike. *Bay Mills*, 134 S.Ct. 2024, 2036; *see also* Aristotle, *Ethica Nicomachea*, BK. V, at 1131a-b (W. D. Ross trans., Oxford Univ. Press 1925) (c. 350 B.C.E.)). The fairness of our common law system lies substantially in the appellate process, in which the higher courts ensure "inferior tribunals obey the law, thereby promoting the perception of legitimacy by ensuring that the ultimate outcome of litigation is based on impersonal and reasoned judgments." David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 75 (2003).

Of course, the Garcias do not here accuse the appellate court of strategic publication to avoid review or backtrack from precedent. Nevertheless, to the degree this case highlights trends that stray from settled intra-circuit precedent and Supreme Court law, the Garcias beg attention to these issues on certiorari. However, if the Court determines this case is not the appropriate vehicle, or for some prudential reason, that now is not the time to take up this question, the Garcias pray in the alternative for a narrower ruling: this Court could either summarily reverse or remand to the court of appeals to reconsider in light of the robust consensus of persuasive authority, as catalogued above, holding Garcia's right to be free of deadly force when he was holding a gun pointed at the ground, was suspected of no crime, threatened no one, and had no time to comply before being fatally shot, was clearly established.

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operation of unpublication, the lack of transparency it produces damage[s] the legitimacy of the judicial system . . . .").

CONCLUSION

In *Staples v. United States*, 511 U.S. 600, 610-611, 114 S.Ct. 1793, 1799 (1994) this Court rejected the proposition that "owning a gun is not an innocent act" when it refused to impose strict liability for possession of an illegal firearm. If, "despite their potential for harm, guns generally can be owned in perfect innocence," it follows that they can be legally carried in innocence as well. *See Id.* at 611; *Id.* at 614 (noting that "there is a long tradition of widespread lawful gun ownership by private individuals in this country."). The *Staples* majority was not willing to subject the gun owner in that case to a criminal trial and potential imprisonment, strictly because the item at issue was a gun. But here, there was no judge and jury; there was only executioner and Garcia paid the ultimate price for retrieving his gun to protect himself from violent threats. A holding that stands for such an irrational result—that the victim of deadly force would have a clearly established Fourth Amendment right if he were holding a knife rather than a gun—should not stand.

Because this case represents pure legal error and weighty constitutional questions regarding individual rights and the integrity of the federal judiciary, the Garcias pray this Court grant review over what is developing into a pattern of misapplication of its qualified immunity doctrine in the Fifth Circuit.

Respectfully submitted,

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APPENDIX

OPINIONS AND ORDERS