No. 20-585

In the Supreme Court of the United States

GREG VASQUEZ
ROBERT SANCHEZ

Petitioners

v.

MARITZA AMADOR, VANESSA FLORES;
MARISELA FLORES; CARMEN FLORES;
ROGELIO FLORES

Respondents

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

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

2. Every federal circuit has held that police officers violate "clearly established" law if they use force on suspects who are not resisting arrest. Does this rule still apply to suspects who have declared an intention to commit "suicide by cop," but cease to resist arrest? And if it does not, what effect would such a holding on the further development of civil-rights jurisprudence?

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INTRODUCTION

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

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

COUNTER-STATEMENT OF THE CASE

A. Background Facts

Petitioners Greg Vasquez and Robert Sanchez are officers with the Bexar County, Texas, Sheriff's Office. ROA.23. On August 28, 2015, Vasquez and Sanchez responded to a domestic disturbance call. ROA.23–24. The 911 dispatcher heard Gilbert Flores express an intention to commit "suicide by cop." ROA.1127.

Upon arrival, Petitioners encountered Gilbert Flores, who was agitated, combative, and mouthy. ROA.24. Specifically, Flores said, "I'm not going back, I just did ten years…I told you, you would have to kill me." ROA.113, 1399. Vasquez and Sanchez did exactly that. ROA.112–13. Whatever his goings-on *before* the fatal shooting, when both Petitioners shot Flores simultaneously and killed him, while he was in plain sight, was not advancing towards the deputies, had raised his arms in surrender as evidenced by the fact that he stood motionless for nearly five seconds. ROA.2790. Following the shooting, Petitioners reported to their supervisors that, at the time of the shooting, Flores "continued to engage" Petitioner Vasquez] with a knife and was "within eight to ten feet of him." ROA.2477. Unbeknownst to Petitioners at the time, however, a video of the shooting was recorded by a neighbor using his mobile phone, which reflected that, although Flores was more than twenty feet away from both deputies when they killed him and that he was not engaging them in any manner. ROA.2790 (flash drive containing video of the shooting.)

B. Proceedings in the District Court

Flores's wife, Maritza Amador, and parents Carmen Flores and Rogelio Flores, and children R.M.F, Vanessa Flores, and Marisela Flores, Respondents, filed the underlying lawsuit under the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983, alleging (among other things) that Petitioners violated Flores's civil rights by using excessive force. ROA.26–28. Respondents further alleged that the County was liable for failing to train Petitioners on the appropriate use of force under these circumstances. ROA.28–29. Following discovery, Petitioners filed a motion for summary judgment on their qualified-immunity defense. ROA.1391–1626.

In support of this defense, Petitioners claimed that the video evidence was dispositive and conclusively established that they reasonably believed that Flores posed a threat of serious harm to themselves and to others. ROA.1401–02. Respondents filed a response to Petitioners' motion, asserting that they violated Flores's Fourth Amendment rights, used clearly excessive and objectively unreasonable deadly force, and that the video evidence created—at the very least—a question of fact as to whether Flores posed an immediate threat of death or bodily injury to Petitioners or anyone else when they shot him. ROA.2216–17, 2222–30. The response also included a still photo from video taken at the time of the event, immediately before Flores was shot. Flores's hands are in the air, and he is well–distanced from Vasquez and Sanchez. ROA.2219.

In its detailed analysis of the record, the district court cited evidence showing the existence of the following factual disputes:

- Whether Flores attempted to enter Petitioners' patrol car;
- Whether Flores ever attempted to use a taser on Petitioners;
- Whether Flores placed Petitioners in an immediate threat of harm with a knife in the moments before they shot him;
- Whether Petitioners engaged in a discussion with each other in which they agreed to "end it" before shooting Flores; and
- Whether Flores was indicating signs of surrender before Petitioners shot him.

Pet.App.64a–65a. After construing the facts in a light most favorable to Respondents, the district court concluded that there were genuine issues of material fact with respect to Petitioners' arguments on each of these issues. Pet.App.62a.

The district court then surveyed the law as it existed on the day of the shooting. Pet.App.71a. Citing its own precedent, as well as precedent from other circuits, the district court concluded that the law was "clearly established" that it is unreasonable for officers to use deadly force when the suspect was armed with a knife "at a safe distance away from the

officers" and was not advancing toward them. Pet.App.65a.

Accordingly, because it concluded that Petitioners' could not prevail on either prong of the qualified-immunity analysis, it denied their motion for summary judgment. Pet.App.73a.

C. Proceedings in the Court of Appeals

The Fifth Circuit affirmed the district court's analysis. The court of appeals meticulously set forth each "encounter" as described by the testimony of witnesses and recorded on a neighbor's cellphone. Pet.App.4a–7a. After "considering the totality of the circumstances, focusing on the act that led the officers to discharge their weapons, the court of appeals agreed with the genuine issues of material fact that the district court identified in the record. Pet.App.13a–14a. The court of appeals further concluded that "every reasonable officer would have understood that using deadly force on a man holding a knife, but standing nearly thirty feet from the deputies, motionless, and with his hands in the air for several seconds, would violate the Fourth Amendment." Pet.App.17a. Accordingly, the court of appeals held that genuine issues of material fact precluded interlocutory review of Petitioners' summary–judgment motion and dismissed the appeal. Pet.App.18a.

D. Misstatements in the Petition

Petitioners assert that the trial court and the Fifth Circuit analyzed the "freeze frame" of the seconds before the shooting without regard to the preceding twelve minutes. Pet. at 7, 14. That assertion is not correct. Both the trial court and the Fifth Circuit analyzed the various "deadly force" encounters as well as the seconds preceding the shooting in extensive detail, Pet.App.3a–7a; 38a–42a; 61a–64a, specifically focusing on careful attention to the facts and circumstances of the *entire* case, including the severity of the crime at issue, whether Flores posed an immediate threat to the safety of the officers or others, and whether he was actively resisting arrest or attempting to evade arrest by flight. This is the very definition of a "totality of the circumstances" analysis. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985).

Petitioners also misleadingly suggest that it was undisputed that Flores held his knife "in an attack hold." Pet. at 12. But as the district court noted—and the court of appeals agreed—the record reflected a factual dispute as to whether Flores presented an "immediate threat of harm" when he was holding the knife. Pet.App. 17a, 64a.

REASONS FOR DENYING THE WRIT

This case required nothing more than the application of the well-established standard of review for summary judgment of the qualified-immunity defense, which the Fifth Circuit faithfully applied. And because its opinion does not conflict with the holdings of this Court or any other circuit court of appeals, this Court should deny certiorari.

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

"Because of this case's posture ... review is limited to determining whether the factual disputes that the district court identified are material to the application of qualified immunity." *Samples v. Vadzemnieks*, 900 F.3d 655, 660 (5th Cir. 2018) (emphasis omitted). The Fifth Circuit concluded that the genuine issues of material fact identified by the district court are material and, therefore, it lacked interlocutory appellate jurisdiction, and that this case should proceed to trial. Pet.App.18a.

The Fifth Circuit correctly recognized that if a factual dispute exists about what actually occurred, there is necessarily a factual dispute about how a reasonable officer would have responded to the occurrence. Such a holding is consistent with this Court's 2014 decision in *Tolan v. Cotton*, in which this Court reversed a summary judgment and remanded an excessive-force case to the Fifth Circuit when it failed to acknowledge a clear factual dispute in the

record and credited the movant's evidence over the non–movant's. 572 U.S. 650 (2014). Clearly, the Fifth Circuit received this Court's message from the reversal in *Tolan*, and considered the evidence under the proper standard of review in *this* case.

A. The Fifth Circuit carefully considered the totality of the circumstances.

Petitioners assert that the Fifth Circuit failed to consider the officers' perspective or the totality of the circumstances. Pet. at 13–14, ¶ I.a. Petitioners ignore the Fifth Circuit's detailed description of the eight "encounters." Pet.App.4a–7a. The Fifth Circuit noted that the same video evidence on which Petitioners rely also supports Respondents' claims, especially when courts follow the law and construe the facts in the non-movant's favor. Although Respondents do not disagree that courts should consider the "totality of the circumstances" under these circumstances, that is a truism, not an argument. Because the standard of review required the courts below to consider the evidence of the "totality of the circumstances" in a light most favorable to Respondents, and because it correctly noted that genuine issues of material fact remain in dispute with respect to the relevant "circumstances," Petitioners' tacit request for error correction does not present an issue that merits this Court's extraordinary limited review.

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

Contrary to Petitioner's representation, the Fifth Circuit's analysis does not create any conflict with existing precedent from this Court, itself, or any other circuit court of appeals.

For example, Petitioners rely on this Court's opinion in *Plumhoff v. Rickard* for the proposition that an officer did not use excessive force in shooting a driver and passenger in a car during a temporary stoppage following a high-speed chase. Pet. at 9 (citing 572 U.S. 765, 766 (2014)). Petitioners correctly state that courts must look to the "totality of the circumstances." *Plumhoff*, 572 U.S. at 766. What Petitioners fail to acknowledge about *Plumhoff* is that the suspect's car came to a temporary stop after the chase because it was bumped up against a police car, the suspect was still maneuvering the vehicle to get away and continue the chase, and—in fact—*did* get away. 572 U.S. at 765. By contrast, the record in this case reflects —at the very least—a factual dispute as to whether Flores was moving and the distance between himself, the officers, and his family.

Petitioners also cite this Court's opinion in *Scott v. Harris*. Pet. at 14 (citing 550 U.S. 372 (2007)) to suggest that the video evidence entitles them to qualified immunity as a matter of law. Again, Petitioners' reliance is misplaced. *Scott* involved a plaintiff who was involved in a high-speed vehicle chase with police and was badly injured when a

pursuing officer ran his car off the road. 550 U.S. at 374–75. The plaintiff sued for excessive force, and the defending officer moved for summary judgment on his qualified-immunity defense. *Scott*, 550 U.S. at 376. In response to the motion, the plaintiff included a declaration which stated:

> There was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [the plaintiff] remained in control of his vehicle. … remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and [the officer] rammed [the plaintiff], the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.

Scott, 550 U.S. at 378–79. The summary-judgment record, however, also included a videotape, which the Court said depicted the following:

> We see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a

> dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit.[6] We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

Scott, 550 U.S. at 379–80. Because the plaintiff's story was "*blatantly* contradicted by the record, so that *no reasonable jury could believe it*," this Court concluded that the district court should not have adopted that version of the facts for purposes of ruling on the motion for summary judgment. *Scott*, 550 U.S. at 380 (emphasis added). Here, by contrast, no such disparity exists. Instead, as the courts below correctly recognized the videos in evidence demonstrate that genuine issues of material fact remain in dispute.

Finally, Petitioners' attempt to analogize this Court's opinion in *Kisela v. Hughes* to the facts of this case also fails. Pet. at 17 (citing 138 U.S. 1148 (2018)). There—unlike here—the knife-wielding suspect was six feet away from her potential victim; and the officers were separated from the suspect and victim by

a chain-link fence, thereby preventing other methods of de-escalation. *Kisela*, 138 S. Ct. at 1151. Although Petitioners' describe Flores as in a "preattack position," the courts below correctly concluded that this evidence is disputed, construed the evidence in Flores's favor and, therefore, properly concluded that neither summary judgment—nor interlocutory appellate review—were appropriate.

C. The Fifth Circuit decision does not create any splits among the several circuits.

Petitioners lament that the Fifth Circuit's decision creates conflict with the Third Circuit, Sixth Circuit, Eighth Circuit, and Ninth Circuit in cases involving use of deadly force. Pet. at 18–19. Petitioners are mistaken.

First, Petitioners examine *James v. New Jersey State Police*, 957 F.3d 165 (3d Cir. 2020). Pet. at 19. In *James,* a state police officer fatally shot a suspect who was armed with a gun and who did not drop his weapon when ordered to do so. 957 F.3d at 171. The Third Circuit found that the police officer did not violate the suspect's "clearly established" right. *James*, 957 F.3d at 171. But importantly, the Third Circuit reached this holding after acknowledging that the following facts in *James* were *undisputed*: (1) the suspect was armed with a large knife; (2) the suspect ignored officers orders to drop the weapon'; *(3) the suspect 'was within striking distance of a bystander*; and (4) the situation unfolded in less than a minute. *James*, 957 F.3d at 170 & n.1 (citing *Kisela*, 138 S. Ct. at 1154 (emphasis added)). Accordingly,

because it was dealing with an undisputed record, the Third Circuit's analysis focused solely on the second prong of the qualified-immunity analysis (whether the right *allegedly* violated was "clearly established") and did not address the issue of whether the right was *actually* violated in the first place. *James*, 957 F.3d at 168.

Here, however, the parties *dispute* whether Flores was "within striking distance" of Petitioners. Pet.App.64a–65a. Accordingly, far from creating a "conflict" with *James*, the Fifth Circuit correctly recognized that *because* the record reflects a factual dispute as to how the events immediately preceding Flores's death unfolded, such a dispute *necessarily* precludes a summary judgment. Such a holding is consistent with the Fifth Circuit's own precedent, specifically, its 1994 opinion in *Mangieri v. Clifton*, in which it held that a district court simply cannot make a determination of the reasonableness of an officer's activities "without settling on a coherent view of *what happened in the first place*." 29 F.3d 1012, 1016 & n.6 (5th Cir. 1994) (emphasis added). Every other circuit court applies a similar version of this rule. *See Estate of Lopez v. Gelhaus*, 871 F.3d 998, 1021 (9th Cir. 2017); *Curley v. Klem*, 499 F.3d 199, 208 (3d Cir. 2007); *Arrington v. United States*, 473 F.3d 329, 339 (D.C. Cir. 2006); *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1312 (10th Cir. 2002); *Mitchell v. Randolph*, 215 F.3d 753, 755 (7th Cir. 2000); *Vathekan v. Prince George's County*, 154 F.3d 173, 179 (4th Cir. 1998); *Thomas v. Roach*, 165 F.3d 137, 143 (2d Cir. 1999); *Crumpton v. Morris*, 112 F.3d 513 (8th Cir. 1997); *McKinney v. DeKalb County, Ga.*, 997 F.2d 1440, 1443 (11th Cir.

1993); *Apostol v. Landau*, 957 F.2d 339, 342 (7th Cir. 1992); *Prokey v. Watkins*, 942 F.2d 67, 73 (1st Cir. 1991); *Jackson v. Hoylman*, 933 F.2d 401, 403 (6th Cir. 1991). Put otherwise, if there is a dispute as to *what actually happened to violate someone's rights*, a court cannot rule *as a matter of law* as to whether the right was clearly established. As such, there is no "conflict" with *James*.

Petitioners also examine the Sixth Circuit's opinion in *Cass v. City of Dayton,* 770 F.3d 368 (6th Cir. 2014). Pet. at 19. Again, Petitioners' concern that this case creates a split in the circuits is misplaced. In *Cass,* a city police officer shot through the windshield of a car that had run over his leg and hit the hand of another police officer in an attempt to escape. 770 F.3d at 372. The passenger of the car was fatally injured. *Cass*, at 373. *Cass* is yet another case in which there was not a "buffer zone" between the officer and the suspect. The driver of the car was still "wielding" the dangerous instrument, in that case, a vehicle, and was in close enough proximity to the officers to seriously injure or kill someone. By contrast, the summary-judgment evidence in this case shows that Flores was distant from the officers and any bystanders by at least twenty feet, and he was armed with a knife. Petitioners' concern is misplaced.

Petitioners next argue that the Eighth Circuit's decision in *Lock v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012) conflicts with the Fifth Circuit's decision in this case. Pet. at 20. Petitioners are mistaken. In *Lock,* the suspect had a handgun and had threatened to commit suicide with it. While the suspect had

discarded his handgun, the responding police officer did not know that fact. Thus, because the suspect approached the officer, refused demands to stop and get on the ground, and came within shooting range, the Eighth Circuit found that the officer's use of force was objectively reasonable under the circumstances. *Lock*, 689 F.3d at 966. That finding does not conflict with the Fifth Circuit's decision in this case, because it underscores the importance of viewing the underlying facts. In this case, there is evidence that Flores was still and at a safe distance from others. There is also a factual dispute as to whether Flores, who was armed with a knife, was capable of harming as far away as Petitioners were at the time they shot him.

Finally, Petitioners assert that the Fifth Circuit's decision conflicts with the Ninth Circuit's decision in *Lal v. California*, 746 F.3d 1112 (9th Cir. 2014). Pet. at 20-21. Again, Petitioners are mistaken. While this is another case in which a suspect verbally expressed a desire to commit "suicide by cop," in this *Lal*, the facts were also undisputed: the suspect actively threw rocks at officers and had approached to within a few feet of the officers with a large rock in his hands before he was fatally shot. 746 F.3d at 1115. Once again, the factual discrepancies in the record in this case, combined with the contemporaneous actions of the suspect at the time of the officers' actions, demonstrate the *lack* of conflict. Instead, the cases are both legally and factually distinguishable.

In every case that Petitioner cites for a "split" in the circuits, the facts do not support Petitioner's

concern. This Court has explained that courts must examine the facts in each case. *See Kisela,* 138 S. Ct. at 1153 ("Use of excessive force is an area of the law 'in which the result depends very much on the facts of each case'"). The district court examined the facts and video evidence. The Fifth Circuit examined the facts and video evidence. In sum, Flores was not within striking distance of a bystander, nor did he have a gun with which to shoot anyone, unlike in *Kisela* or *James.* Flores was not operating a motor vehicle in a dangerous manner, as in *Cass.* Flores was not approaching within a few feet of the deputies in spite of orders to stay back, as in *Lock* and *Lal.* Rather, there is video evidence in the record that supports Respondents' argument that Flores was still, had his hands in the air, and had abandoned his belligerence for at least a breathing space. No matter how many times Petitioners use the phrase "suicide by cop" in their petition, (Pet. at 4, 12, 13, 17, 20, 21, 22), or the functional equivalent, when describing Flores's actions *before* he attempted to surrender do not, and cannot, confer qualified immunity in and of themselves in the absence of actual danger to the officers or bystanders. Instead, the courts below properly concluded that the reasonableness of Petitioners' conduct should be determined by a jury.

CONCLUSION

The Fifth Circuit's proper application of well-established precedent does not create a split in the Circuits, as Petitioners lament. Nor did the Fifth Circuit jettison precedent and analyze the circumstances "in vacuo." The lower courts faithfully

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

Respectfully submitted,

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