No. 21-__

IN THE
Supreme Court of the United States

SELINA MARIE RAMIREZ, Individually and as Independent Administrator of, and on behalf of, THE ESTATE OF GABRIEL EDUARDO OLIVAS, and as Parent, Guardian, And Next Friend of and for Female Minor SMO; GABRIEL ANTHONY OLIVAS, Individually,

Petitioners,

v.

JEREMIAS GUADARRAMA; EBONY N. JEFFERSON,

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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QUESTION PRESENTED

After being called to assist a man suffering from a mental-health crisis who had doused himself with gasoline, police officers deployed their tasers on the man despite recognizing that "[i]f we Tase him, he is going to light on fire." Use of the tasers lit the man on fire and killed him. In this Section 1983 action brought by the victim's survivors, the Fifth Circuit held—at the motion-to-dismiss stage—that the complaint failed to state an excessive-force claim as a matter of law because it did not identify an alternative course of action that "would have" resolved the situation without "potential tragedy." The question presented is:

To defeat a motion to dismiss in a Section 1983 suit alleging that officers used excessive force, must plaintiffs plead as an element of their claim that the officers had an available alternative that "would have" avoided the harm?

PARTIES TO THE PROCEEDING

Selina Marie Ramirez, individually and as independent administrator of, and on behalf of, the estate of Gabriel Eduardo Olivas, and as parent, guardian, and next friend of and for female minor SMO; and Gabriel Anthony Olivas, individually, petitioners on review, were the appellees below.

Jeremias Guadarrama and Ebony N. Jefferson, respondents on review, were the appellants below.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit:

- *Ramirez* v. *Guadarrama*, No. 20-10055 (5th Cir. Feb. 8, 2021) (reported at 3 F.4th 129) (per curiam)
- *Ramirez* v. *Guadarrama*, No. 20-10055 (5th Cir. June 25, 2021) (reported at 2 F.4th 506)

U.S. District Court for the Northern District of Texas:

- *Ramirez* v. *City of Arlington*, No. 4:20-cv-00007-P (N.D. Tex. Jan. 7, 2020) (unreported, available at 2020 WL 10231309)
- *Ramirez* v. *City of Arlington*, No. 4:20-cv-00007-P (N.D. Tex. July 26, 2021) (unreported, available at 2021 WL 3816334)

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Selina Marie Ramirez and Gabriel Anthony Olivas respectfully petition for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 3 F.4th 129. Pet. App. 1a-14a. That court's order denying rehearing and rehearing en banc is reported at 2 F.4th 506. *Id.* at 18a-60a. The Northern District of Texas's opinion is not reported but is available at 2020 WL 10231309. *Id.* at 15a-17a.

JURISDICTION

The Fifth Circuit entered judgment on February 8, 2021. Petitioners filed a timely motion for rehearing and rehearing en banc, which was denied on June 25, 2021. Pursuant to this Court's order of March 19, 2020, the deadline to petition for a writ of certiorari was extended to 150 days from the date of the order denying a timely petition for rehearing. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment, 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, 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.

The Fourteenth Amendment, U.S. Const. amend. XIV, provides in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law.

42 U.S.C. § 1983 provides in relevant part:

> 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.

INTRODUCTION

In the throes of a mental-health crisis, Gabriel Eduardo Olivas threatened to commit suicide by dousing himself in gasoline and lighting himself on fire. When police arrived, they cornered Olivas in a bedroom. Two officers then fired their tasers at him despite knowing that doing so would set him on fire. Which is to say, police officers lit a man on fire to stop him from lighting himself on fire. One might think this conduct was excessive and unreasonable—and one certainly might think a jury might think so.

The Fifth Circuit disagreed. It held that the Fourth Amendment excessive-force claim brought by Olivas's family against the officers should be dismissed at the outset because the complaint did not offer an alternative course the officers should have followed that "would have led to an outcome free of potential tragedy." Pet. App. 11a. Following the panel's ruling, to stave off dismissal out of the gate, a plaintiff in any excessive-force case in the Fifth Circuit must allege in her complaint that officers had an alternative course of action guaranteed to avoid the harm.

The Fifth Circuit's holding defies this Court's precedents. A plaintiff alleging that officers used excessive force must plausibly allege that the use of force was objectively unreasonable. There is no companion element requiring that the plaintiff also allege that some other approach would have avoided the harm altogether. The Fifth Circuit was able to dismiss this case only by adopting a heightened pleading standard for excessive-force claims.

Given the Fifth Circuit's obvious error, it comes as no surprise that its decision creates a circuit split. Plaintiffs often do allege that an officer used excessive force by pointing to alternatives available to the officer. But no circuit treats alternatives as a *required element* of excessive-force claims. And five circuits have declined to require plaintiffs to satisfy the court that these alternatives would have succeeded in order to stave off dismissal. The panel's decision below may well be the only appellate decision rejecting an excessive-force claim at the motion-to-dismiss stage where police killed a suicidal person alleged to be threatening no one but himself. Plaintiffs' complaint would have survived a motion to dismiss had it been brought in any of at least five other circuits. It was dismissed only because it was brought in the Fifth Circuit.

As Judge Willett explained in his dissent from the denial of rehearing en banc, the "complaint alleges a plausible Fourth Amendment violation, and an obvious one at that." *Id.* at 49a. The decision below, if left uncorrected, may make it all but impossible for victims of police brutality in Texas, Louisiana, and Mississippi to obtain relief. This short-circuiting of federal litigation will deprive victims of a remedy for police misconduct, encourage the use of excessive force without fear of consequence, and fall hardest on individuals who, like Olivas, interact with the police while suffering a mental-health crisis.

The Fifth Circuit's error in this Section 1983 suit is not an isolated one. It is one in a long line. Just last Term, this Court summarily rejected two Fifth Circuit decisions granting qualified immunity. *See Taylor* v. *Riojas*, 141 S. Ct. 52 (2020) (per curiam); *McCoy* v. *Al-*

amu, 141 S. Ct. 1364 (2021). The decision below responds to *Taylor* and *McCoy*—not by heeding them, but by creating a new way to insulate officers in cases of egregious wrongdoing. This Court should grant certiorari and reverse.

STATEMENT

A. Factual Background

In July 2017, Gabriel Anthony Olivas called 911 because his father, Gabriel Eduardo Olivas, was threatening to commit suicide by dousing himself with gasoline and lighting himself on fire. Pet. App. 69a-70a, 73a-74a. Sergeant Ebony Jefferson, Officer Jeremias Guadarrama, and Officer Caleb Elliott of the City of Arlington Police Department responded to the call. *Id.* at 74a, 81a-82a, 85a.

As the three officers approached the front door of the house, Jefferson noticed that Guadarrama had his firearm drawn and told Elliott "to draw 'less lethal.' " *Id.* at 79a. Elliott accordingly unholstered his taser, as did Jefferson. *Id.* The officers entered the house and found Olivas in a first-floor bedroom. *Id.* at 74a, 79a, 83a. Olivas stood at the far side of the room, "leaning against [the] wall and holding a red gas can." *Id.* at 3a. The room smelled of gasoline. *Id.* at 75a, 79a, 83a. Olivas's wife, Selina Ramirez, and Gabriel were in the room, "yelling and screaming" and attempting to pull the gas can away from Olivas. *Id.* 83a.

When the officers arrived, Ramirez and Gabriel "moved behind the officers and stood closer to the room's doorway." *Id.* at 84a. Elliott shouted at them to leave; Ramirez and Gabriel backed to the doorway, but remained in the room, "not adjacent to Mr. Olivas" and behind Elliott. *Id.* at 76a, 84a. As Guadarrama

later reported, Olivas was a "safe distance away from his family members." *Id.* at 76a. And the officers "did nothing to physically remove the family from the situation." *Id.* at 84a.

Because a taser delivers an electrical charge into its target, deploying a taser on a person doused in gasoline poses obvious risks. All three officers had been trained against using tasers in the presence of flammable substances—indeed, their training included a vivid graphic of a fire accompanied by a warning that tasers "can ignite explosive materials, liquids, fumes, gases, vapors, or other flammable substances and materials such as gasoline." *Id.* at 99a. Recognizing that risk, Elliott shouted a warning to Jefferson and Guadarrama: "If we Tase him, he is going to light on fire." *Id.* at 84a-85a.

Elliott then holstered and turned off his taser, unholstered his pepper spray, and pepper-sprayed Olivas in the face. *Id.* at 85a. Use of the pepper spray temporarily blinded Olivas, who began rubbing his eyes. *Id.* at 85a-86a. But the officers did not move to subdue him then. *Id.* at 86a-87a. Nor did any of the officers take the opportunity to remove Olivas's family members from the room. *See, e.g.*, *id.* at 87a-88a.

After being pepper-sprayed, Olivas poured gas on himself and began screaming something unintelligible. *Id.* at 85a-86a. Elliott and Guadarrama noticed that Olivas was holding an object that may have been a lighter. *Id.* at 87a-88a, 75a. Despite Elliott's warning, Jefferson aimed his taser at Olivas. So did Guadarrama. *Id.* at 75a-76a, 88a. Guadarrama and Jefferson then fired their tasers at the gasoline-soaked Olivas, causing him to burst "in[to] flame." *Id.* at 88a.

Elliott turned to Gabriel and Ramirez, pushed them out of the room, and ran out of the house to make sure all family members were outside. *Id.* at 88a. When Elliott returned to the room, two of the bedroom's walls were on fire. Olivas was thrashing on the floor, still on fire, still conscious, and screaming in pain. *Id.* at 88a-89a.

Olivas suffered burns over 85% of his body. *Id.* at 90a. He died from his injuries several days later. *Id.* at 70a.

B. Procedural History

1. Ramirez and Gabriel sued Jefferson and Guadarrama under 42 U.S.C. § 1983, alleging that the officers violated Olivas's Fourth Amendment rights by tasing him when he was doused in gasoline. *Id.* at 4a. Plaintiffs alleged that the officers *knew*, based on their training and Elliott's contemporaneous shouted warning, that tasing Olivas would cause him to "light on fire." *Id.* at 74a, 76a, 77a, 82a, 83a, 85a, 98a, 99a, 100a-110a. Their complaint added that the officers had alternatives available to them: The officers could have removed the family members from the home, subdued Olivas after they pepper-sprayed him, or retreated and waited for the SWAT or Crisis Negotiation/Intervention Teams to arrive. *See id.* at 71a-73a, 86a-88a, 110a-111a.

The officers raised qualified immunity as a defense and moved for dismissal. *Id.* at 4a. Observing that "[a] motion under [Rule] 12(b)(6) is certainly a poor vehicle for resolving claims of qualified immunity," *id.* at 16a (citing cases), the District Court denied the officers' motions without prejudice to their asserting the defense in a later summary judgment motion, *id.* at 17a. The court's order contemplated circumscribed

discovery tailored to factual evidence "needed to make a determination on defendants' qualified immunity defenses." *Id.*

2. The Fifth Circuit reversed, holding as a matter of law "that the officers did not violate the Fourth Amendment and are thus entitled to qualified immunity." *Id.* at 13a.

After recognizing that the facts were "disputed," *id.* at 7a, the panel concluded that the officers' conduct was reasonable because "Olivas posed a substantial and immediate risk of death or serious bodily injury to himself and everyone in the house," *id.* at 8a. The panel did not explain how this conclusion could be consistent with the complaint's allegations that Olivas "did not threaten to harm his wife, his son, or anyone else in his home," *id.* at 69a-70a; that he did not "put anyone in his home in a position that such persons would be harmed or injured" if he took his own life, *id.* at 71a; and that Guadarrama acknowledged that Olivas was a "safe distance away from his family members," *id.* at 76a. Instead, the panel cited three cases—all of them decided on summary judgment—holding that the use of force is reasonable where undisputed facts show that a suspect poses a threat of serious physical harm to another. *Id.* at 10a-11a (citing *Rice* v. *ReliaStar Life Ins. Co.*, 770 F.3d 1122, 1134 (5th Cir. 2014); *Harris* v. *Serpas*, 745 F.3d 767, 770, 772-773 (5th Cir. 2014); *Rockwell* v. *Brown*, 664 F.3d 985, 991 (5th Cir. 2011)).

The panel acknowledged in passive voice that "the employment of tasers led to a tragic outcome." *Id.* at 11a. But the three judges posited that they could not "suggest exactly what alternative course the defendant officers should have followed that would have led

to an outcome free of potential tragedy." *Id.* Without referencing the allegations of the complaint, the panel concluded that "[t]he fact that Olivas appeared to have the capability of setting himself on fire in an instant and, indeed, was threatening to do so, meant that the officers had no apparent options to avoid calamity" or "achieve a better outcome." *Id.* at 11a-12a.

The court accordingly held that knowingly setting Olivas on fire "was not unreasonable or excessive." *Id.* at 13a. Although the complaint did not allege the order in which Guadarrama and Jefferson fired their tasers, the panel resolved that factual question by accepting the defendants' argument that Guadarrama fired first and Jefferson fired second. The panel then concluded as to Guadarrama that "the most readily apparent justification for his use of his taser was to prevent Olivas from lighting himself on fire." *Id.* at 12a. As to Jefferson, the panel concluded that even if he fired at Olivas "intentionally" after Olivas was already engulfed in flame, Jefferson "still had good reason to try to immobilize Olivas, namely, to prevent him from spreading fire around the house." *Id.* at 13a. The panel therefore concluded that the officers "did not violate the Fourth Amendment." *Id.* The panel reversed the District Court and remanded "for entry of an order dismissing all claims against Guadarrama and Jefferson." *Id.*[1]

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[1] Ramirez also sued the City of Arlington, Texas, alleging that the city was liable under *Monell* v. *Department of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978). *See* Pet. App. 4a. The District Court initially denied the city's motion to dismiss, *see id.* at 17a, but dismissed those claims after the Fifth Circuit found that the officers were entitled to qualified immunity, *see Ramirez* v. *City*

3. Plaintiffs' petition for rehearing en banc was denied in an order that generated five separate opinions and from which four judges dissented. *Id.* at 19a.

Concurring in the denial of rehearing en banc, Judge Oldham, a member of the three-judge panel, defended the panel's decision on the theory that the "*only*" way to consider the reasonableness of an officer's conduct is to "compar[e] the officers' conduct to a hypothetical reasonable response under the circumstances." *Id.* at 32a. Because the complaint failed to include a "superior alternative"—which Judge Oldham described as "an element" of the claim—the complaint had to be dismissed. *Id.* at 36a. Judge Ho issued a separate concurring opinion agreeing that "the police officers committed no constitutional violation" because "there was no reasonable alternative course of action that the officers could have taken instead to protect innocent lives." *Id.* at 25a. Judge Jolly—who, like Judge Oldham, was a member of the panel—likewise could not identify what "the Fourth Amendment required [the officers] to do in the circumstances they confronted." *Id.* at 24a.

Judge Willett, joined by Judges Graves and Higginson, dissented from the denial of rehearing en banc.[2] Judge Willett explained that the complaint "alleges a plausible Fourth Amendment violation, and an

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of Arlington, No. 4:20-CV-00007-P, 2021 WL 3816334, at *1 (N.D. Tex. July 26, 2021). Ramirez has filed a notice of appeal in that case.

[2] Judge Smith agreed with the panel's ruling, but separately dissented from the denial of rehearing en banc in light of his belief that the Fifth Circuit had reached contrary results in materially similar qualified-immunity cases. *See* Pet. App. 40a-41a.

obvious one at that." *Id.* at 49a. Accepting the complaint's "horrific allegations as true," the defendants violated the Fourth Amendment by "knowingly inflict[ing] the very tragedy they were called to prevent." *Id.* at 44a.

As the dissenting judges explained, the panel "applied a too-stringent standard at the 12(b)(6) stage." *Id.* at 43a. The panel committed a series of errors in service of that heightened standard, including "crediting the officers' allegations instead of Plaintiffs', and speculating about what nonlethal options the officers had" at the motion-to-dismiss stage. *Id.* at 46a. The dissenting judges concluded that it was at the very least "plausibly unreasonable" to set a man "on fire to prevent him from setting himself on fire," and that it "is unfathomable to conclude with zero discovery * * * that no facially plausible argument exists that these officers acted unreasonably." *Id.* at 49a.

The dissenters further faulted their colleagues for "assert[ing] * * * that specifying superior alternatives is an element of any Fourth Amendment claim." *Id.* at 51a. While "identifying alternatives is likely to be important as a *practical* matter," the dissent noted, neither the text of the Fourth Amendment, nor this Court's case law, nor Fifth Circuit precedent requires a plaintiff to plead superior alternatives as an element of an excessive-force claim. *Id.* at 51a-53a. In any event, Plaintiffs *had* identified reasonable alternatives, and exploring the viability of those alternatives "is precisely why discovery exists." *Id.* at 50a.

Finally, the dissent noted that this Court had twice "recent[ly] rebuke[d]" the Fifth Circuit by summarily rejecting its decisions granting qualified immunity in cases involving obvious constitutional violations. *See*

id. at 58a, 54a-58a (citing *Taylor* and *McCoy*). By "giving a pass to alleged conscience-shocking abuse at the motion-to-dismiss stage," the Fifth Circuit "provided the Supreme Court yet another * * * opportunity" for reversal. *Id.* at 59a, 42a.

This petition follows.

REASONS FOR GRANTING THE PETITION

The decision below adopts a heightened pleading standard, unique among the circuits, for excessive-force cases brought under Section 1983. In doing so, the decision opens a new frontier in the Fifth Circuit's effort to circumvent this Court's Section 1983 precedents by insulating officials from accountability for clear wrongdoing. The decision below is wrong; creates a circuit split on a recurring issue; and implicates a question of exceptional importance to those who find themselves in fraught encounters with the police. This Court's review is urgently needed.

I. THE FIFTH CIRCUIT'S DECISION IS WRONG.

The Fifth Circuit's new pleading standard, specially tailored for excessive-force claims, is wrong. It invents a new element for such claims. It ratchets up Rule 8's plausibility requirement into one few plaintiffs could hope to satisfy. And it disregards civil-procedure fundamentals by neither taking the complaint's allegations as true nor construing them in the light most favorable to the plaintiffs.

1. To survive a motion to dismiss, a complaint must state a facially plausible claim for relief. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009); Fed. R. Civ. P. 8(a)(2). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw

the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Two principles guide the plausibility analysis: Courts must accept all well-pled allegations as true. *See, e.g.*, *Hernandez* v. *Mesa*, 137 S. Ct. 2003, 2005 (2017) (per curiam). And courts must construe the complaint's allegations in the light most favorable to the plaintiff. *See, e.g.*, *Brower* v. *County of Inyo*, 489 U.S. 593, 598 (1989).

To state a cause of action under Section 1983, a plaintiff "must allege that some person has deprived him of a federal right" while acting under color of state law. *Gomez* v. *Toledo*, 446 U.S. 635, 640 (1980). A person has been deprived of his Fourth Amendment right to be free from unreasonable seizures when an officer uses excessive force. *See, e.g.*, *Graham* v. *Connor*, 490 U.S. 386, 395 (1989); *Tennessee* v. *Garner*, 471 U.S. 1, 7 (1985). Courts determine whether an officer used excessive force by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the "governmental interests at stake." *Graham*, 490 U.S. at 396 (quotation marks omitted).

"Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' * * * its proper application requires careful attention to the facts and circumstances of each particular case." *Id.* (citation omitted). As this Court recently reaffirmed, "specificity is 'especially important in the Fourth Amendment context,' where it is 'sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.' " *City of Tahlequah* v. *Bond*, No. 20-1668,

2021 WL 4822664, at *2 (U.S. Oct. 18, 2021) (per curiam).

Because excessive-force claims call for a balancing of competing interests in light of specific factual circumstances, they are ill-suited to resolution at the motion-to-dismiss stage. That is true even if the officer raises the defense of qualified immunity. "The case-by-case, incremental decisionmaking of balancing tests * * * make[s] it difficult for a defendant to claim qualified immunity on the pleadings *before discovery* and before the parties (much less the courts) know what is being balanced against what." *Evans-Marshall* v. *Board of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 428 F.3d 223, 235 (6th Cir. 2005) (Sutton, J., concurring). "Rule 12(b)(6) is a mismatch for immunity and almost always a bad ground of dismissal." *Jacobs* v. *City of Chicago*, 215 F.3d 758, 775 (7th Cir. 2000) (Easterbrook, J., concurring in part and concurring in judgment). Qualified immunity is instead "typically addressed at the summary judgment stage," *Corbitt* v. *Vickers*, 929 F.3d 1304, 1311 (11th Cir. 2019) (quotation marks omitted), where the court can consider the *evidence*—as opposed to the plaintiff's allegations, *Behrens* v. *Pelletier*, 516 U.S. 299, 306-307 (1996).

2. Plaintiffs' complaint states a particularly egregious claim of excessive force. As the facts are alleged in the complaint, "the Fourth Amendment violation is obvious." Pet. App. 48a (alteration and quotation marks omitted) (Willett, J., dissenting from the denial of rehearing en banc).

The complaint alleges that the officers arrived at Olivas's house after receiving a call that Olivas was threatening to commit suicide by lighting himself on fire. *Id.* at 69a-70a, 73a-74a. The complaint alleges

that Olivas had not "threaten[ed] to harm his wife, his son, or anyone else in his home." *Id.* at 69a-71a, 77a, 80a. The complaint alleges that his wife and son were not in immediate danger; they had "moved behind the officers and stood closer to the room's doorway." *Id.* at 84a. The complaint alleges that consistent with the training all three officers had received, Elliott warned Jefferson and Guadarrama that "[i]f we Tase him, he is going to light on fire." *Id.* at 85a, 98a-99a. And the complaint alleges that the officers were standing close enough to Olivas that they could have subdued him in less than a second after pepper-spraying him. *Id.* at 86a-88a.

But they didn't. Instead, Guadarrama and Jefferson fired their tasers, causing Olivas to burst into flames. *Id.* at 88a.

Taking these allegations as true, the officers violated the Fourth Amendment by setting "someone on fire to prevent him from setting himself on fire." *Id.* at 49a (Willett, J., dissenting from the denial of rehearing en banc). "[O]fficers may not use deadly force against suicidal people unless they threaten harm to others, including the officers." *Weinmann* v. *McClone*, 787 F.3d 444, 450 (7th Cir. 2015). "Indeed, it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself." *Glenn* v. *Washington County*, 673 F.3d 864, 872 (9th Cir. 2011). While the panel ventured without reference to the complaint that everyone in the house was "in danger," Pet. App. 9a, 11a, the complaint alleges the opposite: that Olivas did not "put anyone in his home in a position that such persons would be harmed or injured" if he took his own life, *id.* at 71a.

As the facts are alleged in the complaint, the defendants' conduct was manifestly unreasonable. "[I]t is unfathomable to conclude with zero discovery, yet 100% finality, that no facially plausible argument exists that these officers acted unreasonably." *Id.* at 49a (Willett, J., dissenting from the denial of rehearing en banc).

3. The Fifth Circuit dismissed the suit anyway, concluding that Plaintiffs had failed to plead "exactly what alternative course the defendant officers should have followed that would have led to an outcome free of potential tragedy." *Id.* at 11a. As Judge Oldham declared in defending the decision of the panel on which he sat, such a "superior alternative" is "an element" of an excessive-force claim that must be adequately pled to survive a motion to dismiss. *Id.* at 36a.

The panel's decision is wrong on every level.

First, a plaintiff is not required to allege that an officer had "a superior alternative" as an element of a Fourth Amendment claim. The text of the Fourth Amendment prohibits unreasonable conduct. U.S. Const. amend. IV. "The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois* v. *Lafayette*, 462 U.S. 640, 647 (1983).

Of course, as Judge Willett observed in dissent, "identifying alternatives is likely to be important as a *practical* matter" further into the case, insofar as a "jury is more likely to deem challenged conduct unreasonable when the plaintiff details hypothetical, reasonable alternatives." Pet. App. 51a. "Depending on the circumstances, the 'perspective' of a reasonable officer may include consideration of alternative courses

of action available at the time force was used." *Retz* v. *Seaton*, 741 F.3d 913, 918 (8th Cir. 2014). "But that goes to the burden of persuasion and the ultimate question of liability, not to the elements of the claim or the facts that must be alleged to survive a motion to dismiss." Pet. App. 51a (Willett, J., dissenting from the denial of rehearing en banc). The Fifth Circuit wrongly elevated a factual means of arguing unreasonableness into a legal element of a Fourth Amendment excessive-force claim.

Second, even if an excessive-force plaintiff must plead alternatives as an element of her claim, Plaintiffs here did just that. The Fifth Circuit rejected those alternatives by applying an improperly heightened pleading standard.

Plaintiffs' complaint alleges numerous alternatives that would not have resulted in setting Olivas on fire. The complaint alleges that the officers could have removed family members from possible harm, emphasizing "how easy it would have been for officers inside to quickly remove family members from the house." *See id.* at 72a; *see also id.* 71a-72a, 73a, 75a, 79a, 83a, 84a, 87a (similar). The complaint further alleges that "Olivas could have easily been subdued by Officer Elliott," that "other officers in the room could have done the same," and that the "officers could have closed the distance between themselves and Mr. Olivas in much less than a second and physically restrained him from doing anything to himself." *Id.* at 86a-87a; *see also id.* at 87a-88a. And the complaint alleges that the officers could have "evacuate[d] the home and formulate[d] a plan to remove" Olivas. *Id.* at 87a-88a. As to that last alternative, moreover, the complaint alleges that the officers "should have effectively contained the

residence by establishing a perimeter and requesting Arlington Police Department Special Weapons and Tactics (SWAT) and the Arlington Police Department Crisis Negotiation/Intervention Team to respond to the location." *Id.* at 110a-111a.

The Fifth Circuit panel ignored these lesser measures, tersely concluding instead based on "disputed facts" that Plaintiffs had failed to plead alternatives that "would have led to an outcome free of potential tragedy," *id.* at 7a, 11a, and that "the officers had no apparent options to avoid calamity," *id.* at 12a. This selective theorizing was manifestly inappropriate at the motion-to-dismiss stage. By "hesitating over 'disputed facts' " and "speculating about what nonlethal options the officers had," the panel "invoked something resembling summary-judgment review" before Plaintiffs had any opportunity to make their case. *Id.* at 46a (Willett, J., dissenting from the denial of rehearing en banc).

The comparison of the panel's approach in this case to a summary-judgment proceeding is not an exaggeration. *Every* decision on which the panel relied arose at summary judgment. Thus, in each decision, the claim was denied only after factual development confirmed that the victim did indeed pose a danger. *See Rockwell*, 664 F.3d at 989 (undisputed evidence showed victim "rushed towards [a police officer] and attacked him with the knives"); *Harris*, 745 F.3d at 770 (undisputed evidence showed victim "raised the knife above his right shoulder in a stabbing position"); *Rice*, 770 F.3d at 1127 (undisputed evidence showed victim ignored multiple police commands to "put the gun down"). In this case, by contrast, Plaintiffs spe-

cifically alleged that Olivas did not pose such a danger, and there has been no factual development that could conceivably refute that allegation. The panel cited no case dismissing an excessive-force claim in comparable circumstances. Nor did the panel attempt to distinguish cases refusing to dismiss on comparable facts. *See Weiland* v. *Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1326-27 (11th Cir. 2015) (reversing dismissal where officers shot a suicidal man who was holding a gun but was alleged to pose no danger to others); *Kelley* v. *O'Malley*, 787 F. App'x 102, 105-107 (3d Cir. 2019) (reversing dismissal where officers shot a man who was holding a knife but was alleged to pose no danger to others).

There may be questions of fact about whether the alternatives proposed in the complaint were viable. But "[t]his is exactly why we have discovery." Pet. App. 44a (Willett, J., dissenting from the denial of rehearing en banc). And "[d]iscovery can be tightly circumscribed, if need be," to focus on evidence relevant to qualified immunity. *Id.* at 50a (Willett, J., dissenting from the denial of rehearing en banc). Indeed, that is exactly the sort of discovery the District Court appeared to envision. *See id.* at 17a.

This Court has previously rejected attempts to lighten the perceived burdens on defendants in civil-rights litigation by imposing a heightened standard on certain types of Section 1983 suits. In *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998), for example, this Court rejected the D.C. Circuit's heightened "clear and convincing evidence" standard for certain Section 1983 suits. In *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 165 (1993), this Court similarly rejected an effort

by the Fifth Circuit to impose a "heightened pleading standard" for certain Section 1983 actions. And in *Johnson* v. *City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam), this Court summarily reversed yet another Fifth Circuit decision imposing a "heightened pleading rule" regarding Section 1983.

After *Crawford-El*, *Leatherman*, and *Johnson*, the panel below knew better than to describe its decision as adopting a "heightened pleading standard." But there can be no doubt that its decision does just that. The Court should again reject the Fifth Circuit's attempt to heighten the standard that victims of unconstitutional conduct must meet to state a claim under Section 1983.

Third, in service of its impermissibly demanding Rule 8 analysis, the Fifth Circuit neither took the complaint's allegations as true nor viewed them in the light most favorable to Plaintiffs.

Consider the Fifth Circuit's fixation on alternatives. Even if Plaintiffs were required to plead as an element of their claim an alternative that would have led to Olivas not being lit on fire, their allegation that the "officers could have closed the distance between themselves and Mr. Olivas in much less than a second and physically restrained him from doing anything to himself" clears that bar. Pet. App. 87a. So does the complaint's allegation that the officers "should have removed everyone other than Mr. Olivas from the home" rather than tasing him. *Id.* at 72a. And so does the complaint's allegation that the officers "should have effectively contained the residence by establishing a perimeter" and seeking assistance from the city's crisis negotiation team. *Id.* at 110a-111a. The Fifth Circuit ignored those allegations; instead it construed the

complaint in *the officers'* favor by declaring that "the officers had no apparent options to avoid calamity." *Id.* at 12a.

Consider also the panel's resolution of disputed facts against Plaintiffs. The panel accepted Jefferson's factual argument that he fired his taser after Guadarrama had already tased Olivas. *Id.* at 8a, 12a-13a. But there is nothing to support that argument in the complaint, which alleged that both officers fired their tasers and does not specify who fired first. *See, e.g.*, *id.* at 88a. As Judge Willett noted, the panel's resolution of this question in the officer's favor illustrates "how the panel credited the officers' narrative and second-guessed Plaintiffs' facts rather than accepting them." *Id.* at 46a n.11.

There is more. The Fifth Circuit construed the complaint to mean that Olivas "posed a substantial and immediate risk of death or serious bodily injury to * * * everyone in the house." *Id.* at 8a. But Plaintiffs repeatedly alleged that the family and the officers could have been evacuated. And they alleged that the family members and officers were positioned such that they would not have been harmed had Olivas lit himself on fire—an allegation the plausibility of which is confirmed by the fact that no one was injured when the *officers* lit Olivas on fire. Construed in the light most favorable to Plaintiffs, the complaint plausibly alleges that the only person Olivas was threatening was himself.

Rather than accept these facts as true at the motion-to-dismiss stage, the Fifth Circuit emphasized Officer Elliott's statement, cited in the complaint, that Olivas had threatened to burn the house down. *Id.* at 8a-9a;

see also id. at 86a. But (again), the complaint specifically alleged that Olivas had not "threaten[ed]" anyone in the home, and that his family could have been safely evacuated had he harmed himself. *Id.* at 71a. The Fifth Circuit also selectively overlooked the accompanying allegation in the complaint that Olivas made that statement when he was cornered, blinded by pepper spray, and "not making any gestures or aggressive moves toward anyone." *Id.* at 85a-86a. The Fifth Circuit's decision to ignore the complaint's repeated references that Olivas did not pose a danger to others is yet another impermissible inference against Plaintiffs.

This is not the first time the Fifth Circuit has failed to adhere to civil-procedure basics in a decision granting qualified immunity to officials accused of excessive force. In *Tolan* v. *Cotton*, 572 U.S. 650 (2014) (per curiam), this Court summarily reversed a Fifth Circuit decision granting qualified immunity at the summary-judgment stage to officers who shot an unarmed victim on his front porch. As this Court explained, the Fifth Circuit's decision granting qualified immunity "failed to view the evidence at summary judgment in the light most favorable to [the plaintiff] with respect to the central facts of this case." *Id.* at 657. Reversal was warranted because the Fifth Circuit's decision "reflect[ed] a clear misapprehension of summary judgment standards in light of [this Court's] precedents." *Id.* at 659.

What was true of the Fifth Circuit's summary-judgment decision in *Tolan* is all the more true of the Fifth Circuit's motion-to-dismiss decision here. This Court should grant the petition and reverse.

II. THE DECISION BELOW CREATES A CIRCUIT SPLIT.

The decision below creates a circuit split regarding the proper pleading standard in excessive-force cases. The panel held that plaintiffs must plead less intrusive alternatives as an element of their claim and must satisfy the court at the motion-to-dismiss stage that those alternatives "would have" avoided the harm. Five courts of appeals have rejected this heightened standard.

1. The First, Third, Fourth, Ninth, and Eleventh Circuits all have rejected the approach the Fifth Circuit adopted below.

Begin with the Eleventh Circuit, which confronted a case similar to this one and reached the opposite conclusion. In *Weiland*, 792 F.3d at 1326-27, two officers arrived at the residence of a man threatening suicide, and, after locating him in his bedroom with a shotgun on his lap, shot the man and then tased him. The officers contended that their conduct was reasonable because the suicidal man with the shotgun posed a threat. The district court dismissed. The Eleventh Circuit reversed. *Id.* at 1327. As the court explained: "Construing the allegations in the light most favorable to the plaintiff," the complaint alleges that the officers shot the victim "without warning when he was not posing a threat to the deputies or anyone else" and then tased him "while he was on the ground bleeding from the gunshot wound." *Id.* The court concluded that these allegations "state[ ] an excessive force claim upon which relief can be granted." *Id.*

The complaint in *Weiland* proposed various alternative courses the officers could have followed—some of

them resembling the alternatives alleged here. *Compare* Fourth Am. Compl. ¶ 30, *Weiland* v. *Palm Beach Cnty. Sheriff's Off.*, 9:12-cv-81416-WPD (S.D. Fla. Oct. 7, 2015) (alleging that the officers could have retreated and "call[ed] for a Crisis Intervention Team"), *with* Pet. App. 110a-111a (alleging that the officers should have called "the Arlington Police Department Crisis Negotiation/Intervention Team to respond to the location"). But the Eleventh Circuit did not inquire into these alternatives at the motion-to-dismiss stage, and it certainly did not demand to know that the alternatives *would have* necessarily avoided the harm. *See also Mercado* v. *City of Orlando*, 407 F.3d 1152, 1158 (11th Cir. 2005) (refusing to grant qualified immunity to officers who shot a suicidal person where officers were "aware that alternative actions, such as utilizing a crisis negotiation team, were available means of resolving the situation").

The Third Circuit has held similarly. In *Kelley*, the court reversed the dismissal of an excessive-force claim in part because "there [we]re fact questions about why the officers did not attempt to use alternative, less lethal means of force." 787 F. App'x at 106. *Kelley* involved a person cornered in front of a house by police officers. The officers threatened to "sic" a German Shepherd on the cornered man; when they did, he stabbed the dog, and the police shot him dead. *Id.* at 103-104. The district court dismissed the claim, but the Third Circuit reversed. As the court explained, the facts alleged in the complaint indicated that the officers did not "attempt[ ] to deescalate the situation" and in fact "heightened tensions by threatening to have the" dog attack the victim, such that "a rational jury could conclude" the officers acted unlaw-

fully. *Id.* at 106. Although the complaint alleged alternatives available to the officers, the court never hinted that those alternatives were an element of the claim. Nor did the court require the plaintiff to show at the motion-to-dismiss stage that any alternative necessarily *would have* succeeded.

The Fourth Circuit took the same approach in *Brockington* v. *Boykins*, 637 F.3d 503 (4th Cir. 2011). The officer there had confronted the unarmed victim "on the backyard steps of a vacant house" in Baltimore. *Id.* at 505. The officer shot the victim twice, then, as the victim lay on his back, shot him again multiple times. *Id.* The officer argued on appeal from the denial of a motion to dismiss that "he had probable cause to act because he reasonably believed his life was in danger." *Id.* at 507. The Fourth Circuit found that conclusion premature even though the plaintiff did not plead alternatives at all. The court reasoned that, "[r]ather than shoot [the victim] as he lay helpless on the ground, a reasonable police officer would have asked him to surrender, called for backup or an ambulance, or retreated." *Id.* The court did not deem it necessary to conclude at the motion-to-dismiss stage that an alternative necessarily *would have* succeeded. Instead, the court explained that this analysis could not be completed at the Rule 12(b)(6) stage because it "depend[ed] on the facts that emerge through discovery." *Id.*

Other courts have reached a similar conclusion even at the summary-judgment stage—underscoring just how far the panel strayed from the consensus approach when it ended this case on a motion to dismiss.

In *Glenn*, 673 F.3d at 879-880, for example, the Ninth Circuit reversed the grant of summary judgment to officers who shot and killed a suicidal teenager. The court noted that "the availability of less intrusive alternatives to the force employed" is merely one "relevant factor[ ]" in evaluating the reasonableness of an officer's use of force. *Id.* at 872. And the court concluded that disputed questions of fact existed regarding whether the officers could have used an "available lesser alternative[ ]" to subdue the victim, such as by "attempt[ing] the tactics of 'persuasion' or 'questioning' " or by using nonlethal force to subdue the victim. *Id.* at 876, 878. The Ninth Circuit did not require the plaintiff to point to facts—even at the summary-judgment stage—showing that the alternatives *would have* avoided the victim's death; it remanded for trial to resolve that factual dispute.

The First Circuit reached a similar conclusion in *McKenney* v. *Mangino*, 873 F.3d 75 (1st Cir. 2017), which refused to grant qualified immunity at the summary-judgment stage to an officer who killed a suicidal man carrying a gun. The court rejected the officer's argument "that he reasonably perceived" the victim to be "an imminent danger at the time of the shooting, such that he was left with no real choice but to fire his weapon." *Id.* at 83. The court explained that, "taking the facts and the reasonable inferences therefrom in the light most favorable to the plaintiff, the threat presented lacked immediacy and alternatives short of lethal force remained open." *Id.* The First Circuit did not require the plaintiff to establish that alternatives *would have* succeeded, but instead recognized that whether "viable remedial measures" had been exhausted was a fact question for the jury. *Id.* at 83.

2. The Fifth Circuit below held that a plaintiff must plead the existence of an alternative that "would have" avoided the harm as an element of an excessive-force claim. Pet. App. 11a. That approach cannot be reconciled with the decisions of the First, Third, Fourth, Ninth, and Eleventh Circuits. Each of these courts treats the existence of reasonable alternatives as an *evidentiary* question, one that sheds light on the unreasonableness of an officer's actions, not as a stand-alone element of the claim. And each of these courts declines to subject plaintiffs to the nearly impossible task of persuading the court at the motion-to-dismiss stage that any proposed alternative would have necessarily succeeded.

The Fifth Circuit's heightened pleading standard was outcome-determinative in this case. The complaint alleges that the officers had multiple alternative options that did not involve deploying their tasers against Olivas after being warned that doing so would light him on fire. Each proposed alternative describes a plausibly more reasonable course of action than setting Olivas on fire. And the availability of these alternatives suffices to raise a plausible inference that the decision to tase Olivas was unreasonable. Applying the proper pleading standard, plaintiffs should not have been required to plead a foolproof alternative as an element of their claim.

III. THE QUESTION PRESENTED IS CRITICALLY IMPORTANT.

The decision below implicates one of the most important features of police work: responding to 911 calls reporting an ongoing mental-health crisis. If the decision stands, police officers in Texas, Louisiana, and Mississippi will be free to respond to such calls

with unreasonable force, knowing that Section 1983 liability for their actions is virtually inconceivable.

1. Like many other aberrant behaviors, excessive force is learned behavior, instilled "as part of group processes, such as socialization, fear of ridicule, status seeking, and conformity." George Wood et al., *The Network Structure of Police Misconduct*, 5 Socius: Socio. Rsch. for a Dynamic World 1, 3 (2019). Excessive force therefore "spreads among officers in the same network, as officers learn from each other how and when to use excessive force." Daria Roithmayr, *The Dynamics of Excessive Force*, 2016 U. Chi. Legal F. 407, 409 (2016). Police officers are more likely to employ excessive force when they see others use it and suffer no consequences, or worse, earn a reward. *Id.* at 429; *see also Wood*, *supra*, at 13 ("police misconduct appears to be a networked phenomenon"); Marie Ouellet et al., *Network Exposure and Excessive Use of Force: Investigating the Social Transmission of Police Misconduct*, 18 Criminology & Pub. Pol'y 675, 689 (2019) ("exposure to colleagues with a history of use of force is positively and significantly associated with use of force complaints"). Put another way: excessive force breeds excessive force.

The Fifth Circuit's decision will harm not only the victims of excessive force, but also the police themselves. Police brutality undermines police legitimacy. Roithmayr, *supra*, at 424; *see also* Ouellet, *supra*, at 676 ("Police misconduct, abuse, and violence * * * rattles the foundation of trust between residents and police."). This loss of legitimacy in turn "makes civilian deference and cooperation less likely, and civilian resistance or defiance more likely in future encounters."

Roithmayr, *supra*, at 424. Excessive force thus "escalates over time" because of the "feedback loop between officer use of force" and civilian refusal to defer to police officers. *Id.* at 425.

By adopting a heightened pleading standard for excessive-force claims, the decision below eliminates a crucial tool for breaking this dangerous feedback loop. Shielded by the decision below, the use of excessive force in the police ranks can be expected to metastasize throughout Texas, Louisiana, and Mississippi. This Court's intervention is needed to ensure that the Fourth Amendment protects individuals in the Fifth Circuit from the use of excessive force in fraught encounters with the police.

2. The consequences of the Fifth Circuit's decision will fall hardest on individuals who suffer from mental illness—as Olivas did.

"The lack of mental health crisis services across the U.S. has resulted in law enforcement officers serving as first responders to most crises."[3] These crises are, unfortunately, all too common.[4] And yet, "researchers estimate officers are 1.4 to 4.5 times more likely to use force" during interactions with individuals suffering mental-health crises, "increasing the risk of harm for

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[3] *Crisis Intervention Team (CIT) Programs*, Nat'l All. on Mental Illness, https://bit.ly/3GnHACW (last visited Nov. 21, 2021).

[4] Eric Westervelt, *Mental Health and Police Violence: How Crisis Intervention Teams Are Failing*, N.P.R. (Sept. 18, 2020, 5:00 AM ET), https://n.pr/3oCsLEm ("It's estimated that those situations make up at least 20% of police calls for service.").

both the officer and the individual in crisis."[5] Since 2015, nearly a quarter of all people killed by police officers in the United States have had a mental illness.[6] And deaths at the hands of police are highest in neighborhoods with the greatest concentrations of low-income residents and residents of color—neighborhoods like the one where Olivas lived.[7]

The frequency of police interactions with people suffering from mental illness makes it all the more important to ensure accountability for officers who use manifestly unreasonable force in these encounters. And yet the decision below mandates that plaintiffs plead an alternative that "would have" avoided a "potential tragedy" as a prerequisite to proceeding with a case. Pet. App. 11a. Unless corrected, that standard will all but preclude recovery for those who bear the brunt of excessive force.

3. The Fifth Circuit's decision in this case is of a piece with its recent refusal to abide by this Court's Section 1983 precedents. *See Tolan*, 572 U.S. at 659; *Taylor*, 141 S. Ct. at 53; *McCoy*, 141 S. Ct. at 1364; *Cope* v. *Cogdill*, 3 F.4th 198 (5th Cir. 2021), *petition for writ of cert. filed* (U.S. Nov. 22, 2021).

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[5] Alysson Gatens, *Law Enforcement Response to Mental Health Crisis Incidents: A Survey of Illinois Police And Sheriff's Departments*, Ill. Crim. Just. Info. Auth. (Dec. 14, 2018), https://bit.ly/3b92pU6.

[6] *See Fatal Force*, Wash. Post, https://wapo.st/2ZjyJS1 (Updated Nov. 18, 2021).

[7] *See* Justin M. Feldman et al., *Police-Related Deaths and Neighborhood Economic and Racial/Ethnic Polarization, United States, 2015-2016*, 109 AJPH 458, 458 (Mar. 2019).

The Fifth Circuit has displayed a regrettable habit of reflexively granting qualified immunity to officers accused of grievous misconduct, reversing multiple district courts in the process. In *Tolan*, this Court summarily reversed the Fifth Circuit's grant of qualified immunity to officers who shot an unarmed victim on the front porch of his house from 15 to 20 feet away. 572 U.S. at 651. In *Taylor*, this Court summarily reversed the Fifth Circuit's grant of qualified immunity to prison officials who confined a prisoner in a cell "teeming with human waste" for six days. 141 S. Ct. at 53-54 (quotation marks omitted). In *McCoy*, this Court vacated a Fifth Circuit decision granting qualified immunity to a prison guard who pepper-sprayed an inmate for no reason. 141 S. Ct. at 1364. As Judge Willett recognized below, this Court's summary dispositions in *Taylor* and *McCoy* "sent the message that not only were we wrong, we were *obviously* wrong." Pet. App. 57a.

The Fifth Circuit's errors in this case are just as obviously wrong. The court engrafted a new element onto excessive-force claims, ratcheted up the pleading standard, and disregarded Plaintiffs' well-pled allegations while drawing inferences against them. Whether these errors are the product of mistake or defiance, the result is the same: Once again, the Fifth Circuit has ignored this Court's precedents and distorted fundamental principles of law to prevent recovery for a victim of excessive force.

CONCLUSION

"[W]e have stumbled through the looking glass when we conclude—as a matter of constitutional law at the motion-to-dismiss stage—that government officials can burn someone alive and not even be troubled with discovery." Pet. App. 44a (Willett, J., dissenting from denial of rehearing en banc).

The petition for a writ of certiorari should be granted and the decision reversed.

Respectfully submitted,

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