APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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*,

Plaintiffs-Appellees,

v.

JEREMIAS GUADARRAMA; EBONY N. JEFFERSON,

Defendants-Appellants.

No. 20-10055

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:20-CV-7
Mark Timothy Pittman, U.S. District Judge

Filed: February 8, 2021

Bruce K. Thomas, Law Office of Bruce K. Thomas, Thomas Dean Malone, Law Offices of Dean Malone, P.C. Suite 730, Dallas, TX for Plaintiffs-Appellees.

Edwin Armstrong Price Voss, Jr., Esq., Brown & Hofmeister, L.L.P., Richardson, TX, Scott Douglas Levine, Banowsky & Levine, P.C., Dallas, TX, for Defendants-Appellants.

Jay Remington Schweikert, Cato Institute, Washington, DC, for Amici Curiae.

Before JOLLY, STEWART, and OLDHAM, *Circuit Judges.*

PER CURIAM:

This case arises out of the tragic death of Gabriel Eduardo Olivas. While responding to a 911 call reporting that Olivas was threatening to kill himself and burn down his family's house, Officers Guadarrama and Jefferson discharged their tasers at Olivas, striking him in the chest. Olivas had doused himself in gasoline, which ignited when the prongs of Guadarrama's taser came into contact with it. Olivas was engulfed in flames. The house burned down. Olivas died of his injuries several days later.

Olivas's widow and two children subsequently brought suit, alleging that Officers Guadarrama and Jefferson had violated Olivas's Fourth Amendment rights when they tased him. Guadarrama and Jefferson asserted the defense of qualified immunity and moved for dismissal. The district court denied their motion, stating that more factual development was needed. Guadarrama and Jefferson then filed this interlocutory appeal. We reverse the denial of

qualified immunity and remand to the district court with instructions to dismiss the claims against Guadarrama and Jefferson. With this background setting, we now proceed to explain more fully.

I

A.

On July 10, 2017, Gabriel Anthony Olivas called 911 and reported that his father was threatening to kill himself and burn down their house. Corporal Ray, Sergeant Jefferson, and Officers Scott, Elliott, and Guadarrama of the Arlington Police Department responded. Officer Guadarrama was first on the scene, and he began preparations while awaiting backup. Sergeant Jefferson and Officer Elliott were next to arrive, and the three of them proceeded to enter the house.

Upon entering, Officer Guadarrama detected the odor of gasoline. A woman directed the officers to a corner bedroom on the east side of the house. There they found Gabriel Eduardo Olivas ("Olivas") leaning against a wall and holding a red gas can. After turning his flashlight on Olivas, Officer Elliott allegedly shouted to Sergeant Jefferson and Officer Guadarrama, "If we tase him, he is going to light on fire." Elliott then discharged OC spray in Olivas's face, temporarily blinding him. It was at about this point—whether before or after being sprayed is not entirely clear from the record—that Olivas doused himself in gasoline. Guadarrama and Elliott, at least, and maybe Jefferson as well, noticed that Olivas was holding some object that appeared as though it might be a lighter. Guadarrama, followed in short succession by Jefferson, fired his taser at the gasoline-soaked man, causing him to burst into flames.

Corporal Ray and Officer Scott arrived at the scene at about this time. When they entered the house, they found Olivas engulfed in flames. The fire spread from Olivas to the walls of the bedroom, and the house eventually burned to the ground. The officers at the scene were able to evacuate the family members who had remained in the house, but Olivas was badly burned and later died from his injuries.

B.

Olivas's wife and son ("Plaintiffs") subsequently brought suit, under 42 U.S.C. § 1983, against Sergeant Jefferson, Officer Guadarrama, and the City of Arlington, Texas, alleging that the defendant officers violated Olivas's Fourth Amendment rights when they tased him. Guadarrama and Jefferson each raised qualified immunity as a defense and moved for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court denied their motions, finding that more factual development was needed.

Guadarrama and Jefferson filed a joint notice of appeal and then a motion for reconsideration. Because filing of the notice of appeal deprived the district court of jurisdiction, it denied the defendant officers' motion for reconsideration. Guadarrama and Jefferson then moved this court for a limited remand, which we granted, so that the district court could rule on their motion for reconsideration. The district court then denied their motion on the merits. Guadarrama and Jefferson then filed this appeal.

II

This court reviews *de novo* a denial of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *In re Katrina Canal Breaches Litig.*, 495 F.3d

191, 205 (5th Cir. 2007). "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff[s]." *Id.* (internal quotation marks and citations omitted).

This court reviews appeals of qualified immunity *de novo*. *Cantrell v. City of Murphy*, 666 F.3d 911, 918 (5th Cir. 2012) (citation omitted). "When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense." *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (per curiam). We now proceed to the analysis.

III

A.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (citations omitted). Because qualified immunity is an *immunity from suit*, not merely a defense to liability, "it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). It is for this reason that a denial of qualified immunity is immediately appealable and that a defendant's entitlement to qualified immunity should be determined at the earliest possible stage of the litigation. *Id.* at 526–27, 105 S.Ct. 2806; *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). This scheme prevents a defendant entitled to immunity

from being compelled to bear the costs of discovery and other pre-trial burdens.

The qualified immunity analysis has two components: (1) whether a plaintiff alleges or shows[1] the violation of a federal constitutional or statutory right; and (2) whether the right in question was clearly established at the time of the alleged violation. *Pearson*, 555 U.S. at 232, 129 S.Ct. 808. Since *Pearson*, a reviewing court may tackle these questions in whatever order it deems most expeditious. *Id.* at 236, 129 S.Ct. 808. The second question, addressing whether a right was "clearly established," encompasses another question, discussed separately in some of this court's opinions, about the objective reasonableness of a defendant official's conduct. *See Kinney v. Weaver*, 367 F.3d 337, 349–50 (5th Cir. 2004). In order for a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). The reasonableness of the official's conduct and the degree to which the particular right in question was clearly established are thus merged into one issue for purposes of the qualified immunity analysis.

B.

We now turn to the first prong of the qualified immunity analysis. Plaintiffs allege that Guadarrama and Jefferson violated Olivas's Fourth Amendment

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[1] The relevant standards differ depending on whether the issue is raised in a motion to dismiss or a motion for summary judgment.

rights by use of excessive force when they fired their tasers at him. The question is thus whether Olivas had a constitutional right not to be tased, not as a general proposition but under the particular circumstances present in this case. Plaintiffs have the burden of showing that such a right existed and that this was clearly established at the time of the incident.

The Fourth Amendment protects individuals from being subjected to excessive force when they are physically apprehended or subdued by agents of the government. *Graham v. Connor*, 490 U.S. 386, 393–94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The question of what is "excessive" is thus intertwined with the issue of reasonableness that is embedded within the Fourth Amendment. "To establish the use of excessive force in violation of the Constitution, a plaintiff must prove: (1) injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Elizondo v. Green*, 671 F.3d 506, 510 (5th Cir. 2012) (internal quotation marks and citation omitted). We now turn to address those elements as they apply in this case.

IV

A.

Here Plaintiffs can easily show injury: Olivas died, and their house was destroyed. Next we must ask whether Guadarrama or Jefferson employed excessive force.

We view the disputed facts in the light most favorable to Plaintiffs: Guadarrama, Jefferson, and Elliott arrived at the house in response to a 911 call, having been told that Olivas was threatening to kill

himself and burn down the house.[2] They found Olivas in a bedroom that smelled of gasoline. Olivas was holding a gas can. Officer Elliott shouted, "If we tase him, he is going to light on fire." Elliott then discharged OC spray at Olivas, temporarily blinding him. Olivas began to shout nonsense and yell that he was going to burn the place to the ground. He poured gasoline over himself. At some point before either taser was discharged, Officers Guadarrama and Elliott noticed an object in Olivas's hand that appeared to them to be a lighter. Guadarrama fired his taser, striking Olivas in the chest. Olivas burst into flames. Jefferson then fired his taser, which also struck Olivas in the chest.

Having set forth this factual background, we now consider the reasonableness of the force that was employed. *Graham* sets forth certain specific factors to be considered in the Fourth Amendment reasonableness inquiry: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396, 109 S.Ct. 1865. Here, the severity of the threatened crime, i.e., felony arson, was considerable. *See* Tex. Penal Code § 28.02. Olivas posed a substantial and immediate risk of death or serious bodily injury to himself and everyone in the house. He was covered in gasoline. He had been threatening to kill himself and burn down

[2] The First Amended Complaint indicates that Corporal Ray was aware of an allegation that Olivas was under the influence of methamphetamine. Nothing in the complaint, however, indicates that any of the other officers were aware of this allegation.

the house. He appeared to be holding a lighter. At that point, there were at least six other people in the house, all of whom were in danger. The final *Graham* factor in the reasonableness inquiry is whether Olivas was attempting to flee or evade arrest, which is of minimal relevance here.

B.

Arguing that the officers' conduct was unreasonable, Plaintiffs cite a number of cases, most of which are unpublished or not from this circuit. Although true that use of a taser in unwarranted circumstances can be unconstitutional, the facts of this case do not resemble those of *Samples v. Vadzemnieks*, 900 F.3d 655 (5th Cir. 2018), or *Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012), the only published Fifth Circuit cases cited by Plaintiffs. *Samples* involved the tasing of an apparently intoxicated man who supposedly had "growled at" a police officer and adopted a "fighting stance." *Samples*, 900 F.3d 655 at 658. *Newman* involved an arrestee who was tased after getting into an altercation with the arresting officer while he was being patted down. *Newman*, 703 F.3d at 760. Given the degree of granularity involved in the qualified immunity analysis,[3] we see no reason to engage in a detailed discussion of these cases. The only commonality they share with the instant case is that police officers in these cases also used tasers.

[3] *See Morrow v. Meachum*, 917 F.3d 870, 875 (5th Cir. 2019) ("[T]he dispositive question is whether the violative nature of *particular* conduct is clearly established. That is because qualified immunity is inappropriate only where the officer had fair notice—in light of the specific context of the case, not as a broad general proposition—that his *particular* conduct was unlawful." (internal quotation marks and citation omitted)).

Certainly, neither involved a suicidal individual, flammable material, a credible threat of arson, or the potential immolation of others.

Plaintiffs also cite extensively to the unpublished case of *Peña v. City of Rio Grande*, 816 F. App'x 966 (5th Cir. 2020) (per curiam). In *Peña*, this court reversed a grant of qualified immunity. Police officers had tased a juvenile who was running away from them, saying that they believed she might run into oncoming traffic. *Id.* at 968. As an unpublished case, *Peña* is persuasive authority only, and we find it unpersuasive because it bears minimal resemblance to the instant case. For example, Peña had, at most, committed a minor misdemeanor infraction. She had not threatened harm to herself or anyone else. There was no particular reason to think she would run into the street. *See id.* at 973–74. By contrast, Olivas was credibly threatening to kill himself and feloniously burn down a house containing at least six other people.

C.

We now turn to the officers' arguments that their conduct did not violate any right of Olivas's, or at least that they violated no right whose existence was clearly established at the time of the incident. Guadarrama cites a number of cases in which police officers employed deadly force in at least somewhat comparable circumstances and in which this court found no constitutional violation. Examples include *Rice v. Reliastar Life Ins. Co.*, 770 F.3d 1122, 1134 (5th Cir. 2014) (finding no constitutional violation where officer shot allegedly suicidal individual, who had been ordered multiple times to drop the gun he was carrying, while he was walking to his kitchen);

Harris v. Serpas, 745 F.3d 767, 770, 772–73 (5th Cir. 2014) (finding no constitutional violation where officers, responding to an ex-wife's 911 call stating that she feared her ex-husband may have taken an overdose of sleeping pills, breached the barricaded door to the ex-husband's bedroom and shot him when he raised a knife over his head and advanced toward them); and *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011) (finding no constitutional violation where officers breached allegedly suicidal individual's bedroom door and shot him after he attacked them with knives).

These cited cases recognize the principle that "[t]he use of deadly force is constitutional when the suspect poses a threat of serious physical harm to the officer or other." *Elizondo*, 671 F.3d at 510. Plaintiffs refer us to case law purportedly establishing that deadly force may not be employed against individuals threatening only themselves. This discussion, however, is not apropos. Olivas may only have been threatening to harm himself, but he was threatening to do so in a way that put everyone in the house (and possibly others) in danger.

V

Although the employment of tasers led to a tragic outcome, we cannot suggest exactly what alternative course the defendant officers should have followed that would have led to an outcome free of potential tragedy. We emphasize that the reasonableness of a government official's use of force must be judged from the perspective of a reasonable official on the scene, not with the benefit of 20/20 hindsight. *See Graham*, 490 U.S. at 396, 109 S.Ct. 1865. The 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. If, reviewing the facts in hindsight, it is still not apparent what might have been done differently to achieve a better outcome under these circumstances, then, certainly, we, who are separated from the moment by more than three years, cannot conclude that Guadarrama or Jefferson, in the exigencies of the moment, acted unreasonably.

While the preceding discussion applies to both officers, we now must distinguish between the actions of Guadarrama and those of Jefferson.[4] Given that Guadarrama fired first, the most readily apparent justification for his use of his taser was to prevent Olivas from lighting himself on fire.[5] Jefferson fired

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[4] The issue of whether the district court erred by treating both officers' actions collectively rather than individualizing its analysis was briefed by Sergeant Jefferson. Our precedent makes clear that "we examine each individual's entitlement to qualified immunity separately." *Carroll v. Ellington*, 800 F.3d 154, 174 (5th Cir. 2015) (internal quotation marks omitted) (citing *Meadours v. Ermel*, 483 F.3d 417, 422 (5th Cir. 2007) (holding that it was error for the district court to consider the actions of multiple police officers together)); *see also Hernandez v. Tex. Dep't of Protective and Regulatory Servs.*, 380 F.3d 872, 883–84 (5th Cir. 2004) (engaging in an individualized analysis of multiple public officials); *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 253 (5th Cir. 2005) (same); *Tarver v. City of Edna*, 410 F.3d 745, 752–54 (5th Cir. 2005) (same). We agree with Jefferson that the district court failed to engage in an individualized analysis, and that its collective treatment of the defendant officers' actions was error. This point is, however, inconsequential, as we find that both officers are entitled to qualified immunity.

[5] It is appropriate for this court to evaluate the actions in question by reference to an objective standard of reasonableness. We need not try to determine what Guadarrama or Jefferson was

second, and while at one point he claimed to have fired instinctively, Plaintiffs allege that he did so intentionally. Accepting Plaintiffs' allegation as true, Jefferson still had good reason to try to immobilize Olivas, namely, to prevent him from spreading fire around the house. Moreover, at that point there was no risk that using a taser might ignite a fire since Olivas was already engulfed in flames.

Accepting the pleaded facts as true and construing them in the light most favorable to Plaintiffs, neither officer's conduct was unreasonable, nor was the force they employed clearly excessive. We thus find that Plaintiffs' factual allegations do not make out a violation of Olivas's Fourth Amendment rights.

The plaintiffs have asserted that Officers Guadarrama and Jefferson violated the Fourth Amendment rights of their deceased husband and father by using excessive and unreasonable force, causing his death. The officers have invoked qualified immunity from the lawsuit, arguing that there was no constitutional violation because their use of force was reasonable under the circumstances. We have found that, given the horrendous scene that the officers were facing, involving the immediate potential for the destruction of lives and property, the force used—firing tasers—was not unreasonable or excessive, and consequently we hold that the officers did not violate the Fourth Amendment and are thus entitled to qualified immunity.

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actually thinking at the time. *See Mason v. Lafayette City-Parish Consol. Gov't*, 806 F.3d 268, 275 (5th Cir. 2015) (quoting *Graham*, 490 U.S. at 397, 109 S.Ct. 1865)

For the reasons given, we REVERSE the order of the district court denying qualified immunity to Officer Guadarrama and Sergeant Jefferson and REMAND this case for entry of an order dismissing all claims against Guadarrama and Jefferson.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DISTRICT

SELINA MARIE RAMIREZ, *et al.*,

Plaintiffs,

v.

CITY OF ARLINGTON, *et al.*,

Defendants.

Civil Action No. 4:20-cv-00007-P

Signed: January 7, 2020

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Robert H. Fugate, Cynthia Withers, City of Arlington, City Attorney's Office, Arlington, TX, for Defendant City of Arlington Texas.

Edwin P. Voss, Jr., Michael Lee Martin, Brown & Hofmeister LLP, Richardson, TX, for Defendant Jeremias Guadarrama.

Scott D. Levine, Baxter W. Banowsky, Banowsky & Levine PC, Dallas, TX, for Defendant Ebony N. Jefferson.

ORDER

Mark T. Pittman, UNITED STATES DISTRICT JUDGE

Before this Court is Defendant Ebony N. Jefferson's Motion to Dismiss (ECF No. 21), Defendant City of Arlington's Motion to Dismiss (ECF No. 23), Defendant Jeremias Guadarrama's Motion to Dismiss (ECF No. 25), Plaintiffs Selina Marie Ramirez and Gabriel Anthony Olivas's Response (ECF No. 29), Guadarrama's Reply (ECF No. 30), Jefferson's Reply (ECF No. 31), and Arlington's Reply (ECF No. 32). Having considered the motions and briefing, the Court finds that Defendants' Motions to Dismiss should be and hereby are **DENIED**.

A motion under Federal Rule Civil Procedure 12(b)(6) is certainly a poor vehicle for resolving claims of qualified immunity. *See Thomas v. City of Desoto*, No. 3:02-CV-0480-H, 2002 WL 1477392, at *1 n.1 (N.D. Tex. July 8, 2002) (accepting recommendation of Mag. J.). "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) (cited with approval in *Thomas*). For many cases, it is difficult to disagree with the sentiment that "summary judgment is the right way to handle claims of immunity." *Jacobs*, 215 F.3d at 775 (Easterbrook, J., concurring). Courts have discretion to dismiss Rule 12(b)(6) motions without prejudice to the defendant asserting the defense in a later motion filed pursuant to Fed. R. Civ. P. 12(c) or 56. *Randall v. Lockwood*, 666 Fed. App'x 333, 337 n.6

(5th Cir. 2016) (per curiam). The Court's discretion to defer ruling on qualified immunity when "further factual development is necessary" is a "narrow exception to the general rule that qualified immunity should be decided as early in the litigation as possible." *Id.*

The Court finds that more factual evidence is needed to make a determination on defendants' qualified immunity defenses. Accordingly, Jefferson's Motion to Dismiss (ECF No. 21), Arlington's Motion to Dismiss (ECF No. 23), and Guadarrama's Motion to Dismiss (ECF No. 25) are hereby **DENIED** without prejudice as to defendants raising this defense in a later motion.

SO ORDERED on this **7th day** of **January, 2020**.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SELINA MARIE RAMIREZ, *individually and as Independent Administrator of, and on behalf of,* THE ESTATE OF GABRIEL EDUARDO OLIVAS *and the heirs-at-law of* GABRIEL EDUARDO OLIVAS, *and as parent, guardian, and next friend of and for female minor* SMO; GABRIEL ANTHONY OLIVAS, *individually*,

Plaintiffs-Appellees,

v.

JEREMIAS GUADARRAMA; EBONY N. JEFFERSON,

Defendants-Appellants.

No. 20-10055

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:20-CV-7
Mark Timothy Pittman, U.S. District Judge

Filed: June 25, 2021

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Scott Douglas Levine, Banowsky & Levine, P.C., Dallas, TX, for Defendant-Appellant Ebony N. Jefferson.

Jay Remington Schweikert, Cato Institute, Washington, DC, for Amici Curiae.

Before JOLLY, STEWART, and OLDHAM, *Circuit Judges*.

ON PETITION FOR REHEARING EN BANC

PER CURIAM:

The court having been polled at the request of one of its members, and a majority of the active judges who are in regular service and not disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), rehearing en banc is DENIED. In the en banc poll, four judges voted in favor of rehearing (Judges Smith, Graves, Higginson, and Willett) and thirteen judges voted against rehearing (Chief Judge Owen and Judges Jones, Stewart, Dennis, Elrod, Southwick, Haynes, Costa, Ho, Duncan, Engelhardt, Oldham, and Wilson).

E. GRADY JOLLY, Circuit Judge, concurring in denial of rehearing en banc:[1]

The dissent and I must have received different sets of dots and dashes from the 1844 telegraph message that it attempts, strangely, to metaphorically adapt to this appeal. *See post*, at 515-24 (Willett, J., dissenting). For this appeal is not the "particularly egregious" case the dots and dashes transmitted to it. *See id.* Instead, this appeal is a textbook case for the grant of qualified immunity, as the doctrine presently is promulgated.

A 13–4 majority of the court has voted not to rehear, en banc, this factually horrifying but—legally speaking—transparent qualified-immunity appeal. The unanimous panel opinion explains why we must grant immunity to Officer Jeremias Guadarrama and Sergeant Ebony Jefferson. *See Ramirez v. Guadarrama*, 844 F. App'x 710, 713–17 (5th Cir. 2021) (per curiam). The unanimous panel opinion also explains why we cannot quarterback from our Delphic shrines, three years later, the split-second decision-making required of these officers in response to a suicidal man (1) doused in gasoline, (2) reportedly high on methamphetamine, (3) screaming nonsense, (4) holding a lighter, and (5) threatening to set himself on fire and to burn down the home, occupied by six people, which he had earlier covered in gasoline.[2] *See id.*

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[1] This response speaks only to the dissenting opinion penned by Judge Willett.

[2] The unanimous panel resolved this appeal on the constitutional-violation prong of qualified immunity, concluding that plaintiffs had not pleaded a Fourth Amendment violation.

With respect, the dissenting opinion emotes; it does not reason.[3] Indeed, when reading the dissent, one questions why these officers have not been charged with first-degree murder. According to the dissent, the officers simply arrived at a suicidal man's home and burned him alive—for no reason. *See post*, at 515-24 (Willett, J., dissenting). Of course, that is not what happened and not what the complaint alleges. May I redirect the dissent from its *rhetoric* to the *factual allegations* of the complaint:

- Officers arrived at the home in response to a 911 call by a member of Olivas's family. Compl. ¶14.
- The family member had told dispatch that Olivas "was threatening to burn down the house." Compl. ¶15.
- The family member had told dispatch that Olivas "was pouring gasoline in the house." Compl. ¶15.

Ramirez, 844 F. App'x at 713–17. The unanimous panel did not reach the "clearly established law" prong. *Id.*

[3] Unable itself to say—over three years after the fact—what a reasonable officer might have done, the dissent says that "[e]xploring that vital question is precisely why discovery exists." *Post*, at 520 (Willett, J., dissenting). That is a misguided view of both pleading standards and the purposes of discovery, a practice called in the vernacular "fishing" for a cause of action. "[T]he question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process." *Ashcroft v. Iqbal*, 556 U.S. 662, 684–85, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The dissent's "we need discovery" argument reduces to the proposition that qualified immunity cannot be resolved on a motion to dismiss.

- Another officer was dispatched to the home based on reports of "an alleged suicidal subject." Compl. ¶19.
- This officer was told that the "alleged suicidal suspect" was "high on methamphetamines." Compl. ¶19.
- This officer was told that the "alleged suicidal suspect" who was "high on methamphetamines" was also "pouring gasoline inside the home." Compl. ¶19.
- After receiving the call from dispatch, Officer Guadarrama stated that Olivas might be "the same subject" he had encountered on a previous call, who had "want[ed] suicide by cop at the time." Compl. ¶38.
- When officers arrived at the home, they saw Olivas's wife "in the front yard waving … and yelling '[h]urry up.' " Compl. ¶ 17.
- When officers entered the home, they smelled gasoline. Compl. ¶23.
- When officers entered the bedroom where Olivas was located, they saw Olivas pour gasoline on his head while holding a lighter. Compl. ¶23.
- There were six people in the bedroom: Olivas, Olivas's wife and son, and three officers. Compl. ¶25.
- Olivas—gasoline-soaked and armed with a lighter in a gasoline-drenched bedroom occupied by five other people—"began screaming 'non-sense' [*sic*] and yelling that he

was going to burn the place to the ground." Compl. ¶49.

- Olivas stood just six feet away from the closest of the officers at the time he threatened to "burn the place to the ground." Compl. ¶50.

These factual allegations—demonstrating the intense, fast-moving, and incredibly dangerous circumstances under which the officers must make a choice when there are no good choices—make no appearance in the dissent. *See post*, at 515-24 (Willett, J., dissenting). If "facts are *all* that matter," *id.*, at 521-22, surely the omission must be an oversight of such facts from the dissent's "officers gone wild" narrative.[4] Perhaps the dissent would like another opportunity to look at and try to understand the record.

* * *

From purple prose, to the astonishment of what God has wrought, to images of nineteenth-century Justices in green eyeshades hovering over a telegraph transmitter tapping out opinions in Morse code, to the patriotic celebration of 42 U.S.C. § 1983, and finally to the sermonette that good can come even from the tragedy of the unanimous panel opinion, much as it did to Samuel F.B. Morse in the invention of the

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[4] The dissent faults the unanimous panel for "invok[ing] something resembling summary-judgment review" in its Rule 12(b)(6) analysis. *Post*, at 518 (Willett, J., dissenting). This charge ignores the kaleidoscopic character of the complaint, which spans fifty four pages (117 paragraphs) and recounts the incident from the occasionally dueling perspectives of everyone on the scene. To the extent the unanimous panel opinion speaks of "dispute[s]," *Ramirez*, 844 F. App'x at 714, such differences are alleged in the complaint.

telegraph, the dissent packs it all in—except for a fair and complete rendition of the facts and law.

Three years after the fact, the dissent is unable to articulate what the Fourth Amendment required Officer Guadarrama and Sergeant Jefferson to do in the circumstances they confronted. As for the "obviousness" of the Fourth Amendment violation, if a distinguished United States Circuit Judge—after months of research, thought, and contemplation—does not now know what the Constitution then required, it seems "obvious" that "these officers had no 'fair and clear warning of what the Constitution require[d]' " in the split-second, life-or-death encounter. *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 617, 135 S.Ct. 1765, 191 L.Ed.2d 856 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 746, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) (Kennedy, J., concurring)).[5]

In short, I write to say the dissent is quite unfair to the record, to the law, and to the officers.

[5] The opinions of Judge Ho and Judge Oldham, with which I fully concur, examine the dissent's "obvious case" and "need for discovery" arguments. There is no need to duplicate their critique of the dissent here.

JAMES C. HO, Circuit Judge, joined by JOLLY and JONES, Circuit Judges, concurring in denial of rehearing en banc:

A robust majority of this court has voted to deny rehearing en banc in this matter. I concur and write separately to offer a brief response to the dissent authored by Judge Willett.

A unanimous panel of our court found that the police officers committed no constitutional violation in this admittedly tragic case. Their reason is simple—there was no reasonable alternative course of action that the officers could have taken instead to protect innocent lives:

> Although the employment of tasers led to a tragic outcome, we cannot suggest exactly what alternative course the defendant officers should have followed that would have led to an outcome free of potential tragedy. We emphasize that the reasonableness of a government official's use of force must be judged from the perspective of a reasonable official on the scene, not with the benefit of 20/20 hindsight. *See Graham* [*v. Connor*], 490 U.S. [386,] 396 [109 S.Ct. 1865, 104 L.Ed.2d 443] [(1989)]. The 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. If, reviewing the facts in hindsight, it is still not apparent what might have been done differently to achieve a better outcome under these circumstances, then, certainly, we, who are separated from the moment by more than three years, cannot

> conclude that [officers] Guadarrama or Jefferson, in the exigencies of the moment, acted unreasonably.

Ramirez v. Guadarrama, 844 F. App'x 710, 716 (5th Cir. 2021).

Olivas didn't just threaten to light himself on fire. He also "posed a substantial and immediate risk of death or serious bodily injury to … everyone in the house"—including members of Olivas's own family, as well as the officers themselves. *Post*, at 519 (Willett, J., dissenting). So the officers' actions "turned risk into reality"—but only for the one person who actively sought to bring about his own death. *Id.* No one else was harmed, notwithstanding the "risk of death or serious bodily injury to … everyone in the house." *Id.*

I.

According to the dissent, however, the officers committed an "obvious," "egregious," and "conscience-shocking" "constitutional violation." *Id.* at 516, 519, 519-20, 524, 524. This despite the dissent's admission that the panel may well be right that "the officers had no apparent options." *Id.* at 519.

But how can a constitutional violation be "obvious," "egregious," and "conscience-shocking," when the dissent can't tell the officers what they should have done differently to keep people safe?

The dissent responds that, if we allowed discovery, we might uncover some reasonable alternative action that the officers could have taken.

Two responses. First, the dissent does not explain how discovery would impact the analysis. To the contrary, the dissent has already decided that the officers here engaged in an "obvious," "egregious," and

"conscience-shocking" constitutional violation. So the defendants should be held liable, regardless of what discovery might uncover.

Second, let's assume the premise that discovery is necessary to prove the existence or absence of reasonable alternatives. If the only way to know what the Constitution requires is to consult lawyers and conduct discovery, what message does that send to police officers? What are they supposed to do in extremely dangerous situations such as this? What are the rules of engagement they can follow, so they know how to protect innocent people from violent criminals, while avoiding a career-ending lawsuit?

The dissent has no answer.

II.

Another problem: The dissent says the constitutional violation here was "obvious." But apparently not so in *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc). There our court subjected officers to trial for shooting and killing a potential school shooter. But it did so over a number of dissenting opinions. *See, e.g.*, *id.* at 470 (Willett, J., dissenting).[1]

So let's take the dissent at its word: Our en banc court got it wrong in *Cole*—and got it wrong here as well. What, then, is the law?

No one would deny that the threat of lethal violence in *Cole* was *less* imminent than the danger presented here. In *Cole*, the potential school shooter was merely on the way to the school when officers shot and killed

[1] *See also id.* at 457 (Jones, J., dissenting); *id.* at 469 (Smith, J., dissenting); *id.* at 473 (Ho & Oldham, JJ., dissenting); *id.* at 479 (Duncan, J., dissenting).

him. *See id.* at 448. Here, by contrast, the suspect was at home, in the very same room as—and in dangerously close proximity to—the officers and citizens he was endangering.

So what is the dissent telling police officers in our circuit—that they can use lethal force, but only when the lethal threat is *less* imminent than the one presented here? What kind of rule is that?[2]

* * *

Reasonable people can disagree with the doctrine of qualified immunity. *See, e.g.*, *Horvath v. City of Leander*, 946 F.3d 787, 800–03 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part). But that debate has nothing to do with this appeal. As the dissent acknowledges, the panel decided this case based on the absence of a constitutional violation, not on whether any such violation was "clearly established" for purposes of qualified immunity.

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[2] Tellingly, the dissent does not even attempt to reconcile its position here with its position in *Cole*. Instead, it changes the subject, claiming that "my colleagues risk" making "qualified immunity an impenetrable shield against every manner of wrongdoing, however ghastly." *Post*, at 521 (Willett, J., dissenting). Of course, the dissent offers zero evidence that our circuit is at any risk of heading toward this dystopian future. *Cf., e.g.*, *Horvath v. City of Leander*, 946 F.3d 787, 800–03 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) (arguing that qualified immunity is incorrect as a textualist and originalist matter); *Cole*, 935 F.3d at 477–79 (Ho & Oldham, JJ., dissenting) (same); *Delaughter v. Woodall*, 909 F.3d 130, 141 (5th Cir. 2018) (Ho, J., concurring in the judgment) (agreeing with denial of qualified immunity); *Webb v. Stone*, 821 F. App'x 369, 371 (5th Cir. 2020) (same).

Reasonable people can disagree with what the police officers did here. But assuming that the police had the duty to do *something* here to protect innocent lives, no one has explained: What should the officers have done instead? The dissent acknowledges that that is a "perfectly sensible question." *Post*, at 520 (Willett, J., dissenting). But it offers no answer.

Reasonable people can advocate in favor of greater restrictions on the police than what the Fourth Amendment requires. Our Nation is currently engaged in a rigorous debate over the need for police reform. Some argue the police should not use force, even in cases involving deadly threats—or that we should defund the police altogether. But that is a policy debate for the political branches, not the judiciary. As judges, we apply our written Constitution, not a woke Constitution.

I am grateful for the overwhelming vote to leave the panel ruling intact. That includes Judge Smith, whose dissent notes that the panel "got it exactly right." *Post*, at 515 (Smith, J., dissenting).

But the fact remains that we are sending some awfully confusing and discomfiting signals to police officers. I fear that officers in our circuit will stop taking on these difficult and dangerous duties, if they have to worry about which panel of our court they will draw in the event tragedy strikes. I fear that officers will decline to put their careers and families on the line because they're unable to predict the outcome of our en banc votes. I fear that officers will choose to stand by and watch, rather than to protect and to serve, if the rules of engagement are unclear and unknowable at the time of the incident—determinable only after discovery is completed.

I concur in the denial of rehearing en banc.

ANDREW S. OLDHAM, Circuit Judge, joined by JOLLY, JONES, HO, and ENGELHARDT, Circuit Judges, concurring in the denial of rehearing en banc:

This case is tragic, as so many of our cases are. But the question is not whether it's tragic. The question is whether the plaintiffs pleaded a violation of the Fourth Amendment. Judge Willett says the answer is obviously yes. I respectfully disagree for three reasons. [1]

I.

First, I do not understand how the dissent can say the officers' split-second decision was "unreasonable"—much less plainly unreasonable—when no one can specify what reasonable alternative the officers had.

Many understand the Fourth Amendment's use of the word "unreasonable" to create a font of excessive-force tort law. *E.g.*, *Roque v. Harvel*, 993 F.3d 325, 333 (5th Cir. 2021). I have elsewhere expressed my skepticism of that view. *See* Andrew S. Oldham, *Official Immunity at the Founding*, https://ssrn.com/abstract=3824983 (questioning whether originalists' qualified-immunity debate is framed in the correct terms or the correct time period); *cf. County of Sacramento v. Lewis*, 523 U.S. 833, 848, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (noting the Constitution "is not a font of tort law to be superimposed upon whatever systems may already be administered by the States" (quotation omitted)). But

[1] I respectfully disagree with Judge Smith that this case is a suitable vehicle for revisiting *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc). The balance of this opinion addresses the arguments raised by Judge Willett.

for those who think the Fourth Amendment gives us a roving commission to decide when officers commit torts, we can do it *only* by comparing the officers' conduct to a hypothetical reasonable response under the circumstances.

Take negligence. The common law "theory of negligence presupposes some uniform standard of behavior." W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 32, at 173 (5th ed. 1984). Common law courts fabricated a "man of ordinary prudence" to set the standard. *See id.* at 174 (stating that "[t]he 'man of ordinary prudence' was perhaps first set forth in ordinary negligence cases in *Vaughan v. Menlove*, 1837, 3 Bing.N.C. 468, 132 Eng. Rep. 490"). This imaginary "reasonable person" is no "ordinary individual, who might occasionally do unreasonable things," but "rather a personification of reasonable behavior." *Id.* at 174–75. The reasonable person is never negligent. So to show that a tort defendant acted negligently, the tort plaintiff must explain what course the reasonable person would have taken instead of the defendant's. *See id.* at 175 ("[N]egligence is a failure to do what the reasonable person would do under the same or similar circumstances." (quotation omitted)); *id.* at 239 ("The burden of proof of the defendant's negligence is quite uniformly on the plaintiff, since he is asking the court for relief, and must lose if his case does not outweigh that of the defendant's.").

If we take seriously the dissent's view that the Constitution is a font of tort law, then the excessive-force plaintiff (like the tort one) must establish as part of his prima facie case what the reasonable officer would've done. This is functionally identical to the

reasonable-alternative requirement that the Supreme Court imposes upon method-of-execution plaintiffs under *Baze v. Rees*, 553 U.S. 35, 47–52, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). Only if the State "refuses to adopt such an alternative" could its "refusal to change its method … be viewed as 'cruel and unusual' under the Eighth Amendment." *Id.* at 52, 128 S.Ct. 1520. In my view, so too with the Fourth.

Here, at the moment the officers acted, they were confronting a suicidal man (Gabriel Olivas) who was dousing himself in gasoline, holding a lighter, and threatening to burn his house down. The officers, Olivas, and members of his family were all in one room—and Olivas was only six feet away from the closest officer. The officers were forced to make a "split-second judgment[ ]" regarding how to subdue Olivas. *Kisela v. Hughes*, — U.S. ——, 138 S. Ct. 1148, 1152, 200 L.Ed.2d 449 (2018) (per curiam) (quoting *Graham v. Connor*, 490 U.S. 386, 396–97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). And in that split second, the officers decided to tase him.

If the officers couldn't try to incapacitate Olivas with a taser, what *could* they reasonably have done? The dissent speculates that perhaps the officers had "options galore"—but the dissent is unable to identify a single one. *Post*, at 520 (Willett, J., dissenting). For their part, the plaintiffs alleged the officers could have tackled Olivas—and presumably prayed to survive. Compl. ¶ 51 ("Mr. Olivas being only 6 feet away from Officer Elliott, and only a bit more than that away from other officers in the room, such 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."). And

at argument, the plaintiffs instead suggested the officers could "wait for the crisis intervention team" while "engag[ing] in negotiations." Both options are absurd—so absurd in fact that today's dissent cannot even bear to mention them, let alone embrace them. And that's for good reason because each of the officers' "options galore" would put the lie to Justice Jackson's admonition that the Constitution is not "a suicide pact." *Terminiello v. Chicago*, 337 U.S. 1, 37, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) (Jackson, J., dissenting).

The dissent's only response is a fallacious invocation of *Illinois v. Lafayette*, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983). *See post*, at 520-21 & n.24 (Willett, J., dissenting). In *Lafayette*, the Supreme Court held that a *reasonable* search does not become *unreasonable* simply because the officer might've had other reasonable alternatives. *See* 462 U.S. at 647, 103 S.Ct. 2605. That's obviously true: If an officer has two reasonable alternatives (X and Y), she can choose either of them and behave reasonably. But it should be equally obvious that a Fourth Amendment plaintiff cannot show that a third alternative (Z) is *unreasonable* without any reference to X or Y. In fact, *Lafayette* expressly states that the "real [Fourth Amendment] question" is "whether the … Amendment require[d]" officers to do something other than what they did. *Ibid.* (emphasis omitted). That comparison is impossible when a plaintiff cannot specify the "range of conduct which is objectively 'reasonable' under" the circumstances. *Post*, at 520-21 n.24 (Willett, J., dissenting) (quoting *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995)). The dissent's contrary assertion is illogical and unsupported by any precedent from any court.

II.

Second, the dissent says that none of this matters because the plaintiffs should be allowed to take discovery and only then (maybe) tell us what a reasonable officer would've done in a split-second confrontation with a suicidal man doused in gasoline and holding a lighter in a room with innocent family members. *But see Pearson v. Callahan*, 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." (quotation omitted)).

I doubt that ever has been the Rule 12(b)(6) standard, *cf. Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), but it's certainly not the standard today. In *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99 (2d Cir. 2005), the court of appeals (like the dissent today) said it would be unfair to require plaintiffs to plead an actual legal violation where so much of the information necessary to so plead is unknown to the plaintiffs before discovery. *Id.* at 110–11, 114. In the Second Circuit's view, *Conley v. Gibson* required plaintiffs to plead only enough to put the defendants on notice of the claim; after that, the plaintiffs were entitled "to potentially limitless fishing expeditions—discovery pursued just in case anything turns up—in hopes, perhaps, of a favorable settlement in any event." *Id.* at 115 (quotation marks, alterations, and footnotes omitted). The Supreme Court reversed in a landmark decision, abrogated *Conley*, and held that all plaintiffs—even those who want to go fishing in discovery—must plausibly plead every element of their claim to withstand Rule 12(b)(6). *Bell Atl. Corp.*

v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

By all accounts, the plaintiffs in our case are missing an element of their claim. Alleging the officers behaved unreasonably without any facts to support a superior alternative [2] is materially identical to alleging an antitrust conspiracy without any facts to support a conspiracy. Both fail Rule 12(b)(6). In fact, this case is far easier than *Twombly* because our plaintiffs have alleged nary one fact they hope to uncover in discovery if given the chance to go fishing. (At least in *Twombly*, the plaintiffs hoped to uncover some smoking-gun conspiracy that they did not have a basis to allege.) Supreme Court precedent squarely forecloses the dissent's assertion that plaintiffs can fail to allege an element of their claim and then use discovery to find it.

The dissent's only response is to dismiss *Twombly* as just "an antitrust rule." *Post*, at 521 (Willett, J., dissenting). Again, we've been down that road before. In the years following *Twombly*, the Second Circuit

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[2] As noted in Part I, plaintiffs pleaded that officers could've tackled Olivas and risked immolation. I am not ignoring that allegation because it's "sufficiently fantastic to defy reality as we know it"—on par with "claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel." *Ashcroft v. Iqbal*, 556 U.S. 662, 696, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (Souter, J., dissenting). To the contrary, I accept it as true. Even accepting plaintiffs' tackle-and-pray hypothetical, however, the complaint fails to state a claim because it alleges nothing to show their hypothetical is superior to the officers' chosen alternative. (In fact, as plaintiffs alleged it, their hypothetical is patently *inferior*.) And without a superior alternative, the plaintiffs are without a Fourth Amendment claim.

attempted to read it as largely "limited to the antitrust context." *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir. 2007). After the Supreme Court granted cert in *Iqbal*, the respondent defended the Second Circuit by arguing "*Twombly* should be limited to pleadings made in the context of an antitrust dispute." *Ashcroft v. Iqbal*, 556 U.S. 662, 684, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (reversing *Iqbal v. Hasty*). The Supreme Court emphatically disagreed, reversed, and emphasized that its holding—in both *Iqbal* and *Twombly*—governs *all* complaints and *all* motion-to-dismiss proceedings. *Ibid.* Today's dissent cannot both wrap itself in the Rule 12 standard, *see post*, at 518-19 (Willett, J., dissenting) ("This is 12(b)(6)."), and ignore the Supreme Court's canonical Rule 12 precedents.

III.

Third and finally, the dissent is quite right to focus on the Supreme Court's recent qualified-immunity orders. This Term, the Court summarily reversed one of our grants of qualified immunity and vacated another. *Taylor v. Riojas*, — U.S. ——, 141 S. Ct. 52, 208 L.Ed.2d 164 (2020) (per curiam), *summarily reversing* 946 F.3d 211 (5th Cir. 2019); *McCoy v. Alamu*, — U.S. ——, 141 S. Ct. 1364, 209 L.Ed.2d 114 (2021), *granting, vacating, and remanding* 950 F.3d 226 (5th Cir. 2020). It's true that summary reversals can constitute sharp rebukes. *See Cole v. Carson*, 935 F.3d 444, 473 (5th Cir. 2019) (en banc) (Ho & Oldham, JJ., dissenting) (noting that "[t]he Supreme Court has not hesitated to redress … intransigence from our sister circuits—often through the 'extraordinary remedy of a summary reversal' " (quoting *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting))). And these

summary orders are particularly remarkable because they are the Court's first- and second-ever invocations of the obvious-case exception to the clearly established law requirement.

But *Taylor* and *McCoy* both tell us to look for "particularly egregious facts" where there is "no evidence" of "necessity or exigency." *Taylor*, 141 S. Ct. at 54 (applying *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)). It's unclear how we should apply these orders where there *is* overwhelming evidence of dire, life-threatening exigencies. It's one thing to say, "it should've been obvious that you cannot house prisoners in feces-covered cells for days" (*Taylor*), or "it should've been obvious that you cannot gratuitously pepper-spray people who are no threat to anybody" (*McCoy*). But it's altogether different—and much harder—to figure out the "obvious" answer in a split-second confrontation with a suicidal man doused in gasoline and holding a lighter in a room with innocent family members. *Cf. Kisela*, 138 S. Ct. at 1152 (" '[T]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.' " (quoting *Graham*, 490 U.S. at 396–97, 109 S.Ct. 1865)); *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 612, 135 S.Ct. 1765, 191 L.Ed.2d 856 (2015) ("The Constitution is not blind to 'the fact that police officers are often forced to make split-second judgments.' " (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 775, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014))); *Ryburn v. Huff*, 565 U.S. 469, 477, 132 S.Ct. 987, 181

L.Ed.2d 966 (2012) (per curiam) (reversing the circuit court's denial of qualified immunity because, *inter alia*, "the majority did not heed the District Court's wise admonition that judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation").

* * *

This is a tragic case. But the Fourth Amendment is not an antidote to tragedy. It's a cornerstone of our Bill of Rights, with an august history and profound original meaning. We cheapen it when we treat it like a chapter from Prosser & Keeton. And we transmogrify it beyond recognition when we say officers act "unreasonably" without any effort to say what a reasonable officer would've done.

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

In reversing the denial of qualified immunity, the unanimous panel got it exactly right:

> … "The use of deadly force in constitutional when the suspect poses a threat of serious physical harm to the officer or others." *Elizondo* [*v. Green*, 671 F.3d 506, 510 (5th Cir. 2012)]. … Olivas may only have been threatening to harm himself, but he was threatening to do so in a way that put everyone in the house (and possibly others) in danger.
>
> … The 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. If, reviewing the facts in hindsight, it is still not apparent what might have been done differently to achieve a better outcome under these circumstances, then, certainly we, who are separated from the moment by more that three years, cannot conclude that Guadarrama or Jefferson, in the exigencies of the moment, acted unreasonably.

Ramirez v. Guadarrama, 844 F. App'x 710, 716 (5th Cir. 2021) (per curiam).

So why should this matter be reviewed en banc? It is because it bears an uncanny resemblance to a recent case, *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc), *cert. denied*, — U.S. ——, 141 S. Ct. 111, 207 L.Ed.2d 1051 (2020), also involving a deranged person, in which the court reached a result that is not only grave error but is legally and factually

irreconcilable with the commendable panel decision here. *See id.* at 469-70 (Smith, J., dissenting); *see also id.* at 457-69 (Jones, J., joined by Smith, Owen, Ho, Duncan, and Oldham, JJ., dissenting); *id.* at 470-73 (Willett, J., dissenting); *id.* at 473-79 (Ho and Oldham, JJ., joined by Smith, J., dissenting); *id.* at 479-85 (Duncan, J., joined by Smith, Owen, Ho, and Oldham, JJ., dissenting).

"The en banc court is not, and should not be, primarily a court of error. … The decision to take a case en banc is a prudential one." *United States v. Calderon-Pena*, 383 F.3d 254, 268 (5th Cir. 2004) (per curiam) (en banc) (Smith, J., joined by Barksdale, J., dissenting). Reconsideration of *Ramirez* by the en banc court is the ideal vehicle for the court to modify or overrule *Cole* before it achieves immortality in this court's jurisprudence. The refusal to do that is understandable—given that the panel reached the right result—but it is nonetheless regrettable in the wake of *Cole*.

I respectfully dissent from the denial of rehearing en banc.

DON R. WILLETT, Circuit Judge, joined by GRAVES and HIGGINSON, Circuit Judges, dissenting from the denial of rehearing en banc:

When painter-turned-inventor Samuel Morse sent the first telegraph message—"What hath God wrought?"—he was standing in the chamber of the United States Supreme Court, a place that specializes in sending historic messages. Long before 1844, when Morse tapped out his dots and dashes, and for 177 years since, the Supreme Court has issued countless directives—some more emphatic than others, but all of which we must heed.

In recent months, the Court has signaled a subtle, perhaps significant, shift regarding qualified immunity, pruning the doctrine's worst excesses. The Justices delivered that message in back-to-back cases, both from this circuit and both involving obvious, conscience-shocking constitutional violations.[1] This case is of a piece—yet more troubling. Whereas the Supreme Court's two summary dispositions checked us for holding, on summary judgment, that there was no violation of "clearly established" law, despite obvious constitutional violations, here we held, on a motion to dismiss, that there was no violation of law whatsoever, despite an obvious constitutional violation. By giving a premature pass to egregious behavior, we have provided the Supreme Court yet another message-sending opportunity.

* * *

[1] *Taylor v. Riojas*, — U.S. —, 141 S. Ct. 52, 208 L.Ed.2d 164 (2020), *summarily reversing* 946 F.3d 211 (5th Cir. 2019); *McCoy v. Alamu*, — U.S. —, 141 S. Ct. 1364, 209 L.Ed.2d 114 (2021), *GVR-ing* 950 F.3d 226 (5th Cir. 2020).

Gabriel Eduardo Olivas was burned alive. According to the facts alleged in the complaint—which we must accept as true—and drawing all reasonable inferences in Plaintiffs' favor, two police officers tased the suicidal Olivas, despite:

1. knowing that he was soaked in gasoline,
2. knowing from recent training that tasers ignite gasoline, and
3. knowing from a fellow officer's explicit warning in that instant, "If we tase him, he's going to light on fire!"

They fired their tasers anyway, knowing full well that using a taser was tantamount to using a flamethrower. Olivas burst into flames and later died.

The district court declined to dismiss the suit, concluding that "more factual evidence is needed to make a determination on defendants' qualified immunity defenses." The panel disagreed, needing nothing more to declare that the officers had done nothing wrong. Case dismissed.

I dissent from the court's denial of rehearing en banc for three reasons:

First, the panel applied a too-stringent standard at the 12(b)(6) stage. Respectfully, the panel assessed Plaintiffs' facts instead of accepting them. [2] The question at the motion-to-dismiss stage is simply stated: Have Plaintiffs alleged "enough facts to state

[2] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ("[O]f course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable.").

a claim to relief that is plausible on its face"?[3] That's the test—facial plausibility—and these appalling allegations satisfy it.

Second, the panel held that setting Olivas on fire was perfectly lawful under the Fourth Amendment. Igniting Olivas could not have been unreasonable, the panel surmised, because "the officers had no apparent options to avoid calamity," and it was "not apparent what might have been done differently to achieve a better outcome."[4] Such speculation is out of place at the motion-to-dismiss stage. This is exactly why we have discovery. In what legal universe is it not even *plausibly* unreasonable to knowingly immolate someone?

Third, the panel opinion is at odds with recent Supreme Court decisions reinvigorating the "obviousness" principle in cases involving clear constitutional abuses. Twice in recent months, the Court has directed this court to be less reflexive in granting qualified immunity in cases involving, and absolving, egregious behavior. Taking Plaintiffs' horrific allegations as true—*as we must at this stage*—these officers knowingly inflicted the very tragedy they were called to prevent. It seems incontestable that this case, at minimum, merits factual development.

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[3] *Id.* at 570, 127 S.Ct. 1955 ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.").

[4] *Ramirez v. Guadarrama*, 844 F. App'x 710, 716 (5th Cir. 2021).

I

Standards matter. The panel quoted the correct 12(b)(6) standard but blurred it with a heightened one.[5] This is an appeal from the district court's refusal to dismiss, meaning:

- We *must* accept the facts in the complaint as true.[6]
- "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."[7]
- Dismissal is appropriate only when a plaintiff has not alleged "enough facts to state a claim to relief that is plausible on its face" and has failed to "raise a right to relief above the speculative level."[8]
- We *must* allow discovery if those facts permit a "reasonable expectation that discovery will reveal evidence of illegal[ity]."[9]

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[5] "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff[s]." *Ramirez*, 844 F. App'x at 713 (quoting *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007)).

[6] *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955 (describing "the assumption that all the allegations in the complaint are true (even if doubtful in fact)").

[7] *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

[8] *Twombly*, 550 U.S. at 555, 570, 127 S.Ct. 1955.

[9] *Id.* at 556, 127 S.Ct. 1955.

In sum, at the motion-to-dismiss stage, "it is the defendant's conduct as alleged in the complaint that is scrutinized."[10]

These are commands, not suggestions.

The panel opinion, however, invoked something resembling summary-judgment review, hesitating over "disputed facts," crediting the officers' allegations instead of Plaintiffs', and speculating about what nonlethal options the officers had—declaring that Officer Guadarrama fired first and had a "readily apparent justification for use of his taser" and that Officer Jefferson fired second and "had good reason" to tase an already-ignited Olivas.[11]

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[10] *McClendon v. City of Columbia*, 305 F.3d 314, 322–23 (5th Cir. 2002) (en banc).

[11] *Ramirez*, 844 F. App'x at 714, 716; *accord* https://www.ca5.uscourts.gov/OralArgRecordings/20/20-10055 12-1-2020.mp3, at 5:58–6:04 (asking counsel whether the district court "identified a disputed issue of material fact"). The "who fired first" question is one example of how the panel credited the officers' narrative and second-guessed Plaintiffs' facts rather than accepting them. *Compare, e.g.*, Am. Compl. ¶¶ 24, 54, 62–63, 68 (leaving doubt as to whether the tasings were simultaneous or successive), *with Ramirez*, 844 F. App'x at 712 (removing doubt and declaring that Jefferson tased Olivas "in short succession" after Guadarrama). This was not our first qualified-immunity decision to conflate motion-to-dismiss and summary-judgment standards. *See, e.g.*, *Clark v. Massengill*, 641 F. App'x 418, 419 (5th Cir. 2016) ("It is axiomatic that at the summary judgment stage '[w]e must accept all well-pleaded facts as true ….' ") (internal citation omitted).

Interestingly, the panel also merged the two steps of the immunity inquiry, rejecting Plaintiffs' claim on the constitutional merits while also assessing whether the officers violated clearly established law. 844 F. App'x at 713 ("The reasonableness of the official's conduct and the degree to which

Unable to ascertain the best alternative or to resolve these disputed facts, the panel ruled for the officers. But that's exactly the point—how could we have disputed facts? This is 12(b)(6). There has been no discovery. Instead, we must determine whether the alleged facts, if proven true, could plausibly demonstrate excessive force. Guesswork about whether the officers had "apparent justification" or a "good reason" to tase a gasoline-soaked Olivas, or alternatives to doing so, is misplaced at this stage. The issue is whether this case goes to discovery, not to trial. "At this stage, we do not determine what

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the particular right in question was clearly established are thus merged into one issue for purposes of the qualified immunity analysis."); *id.* at 713–14 (turning to the "first prong" of the immunity analysis yet stating, "Plaintiffs have the burden of showing that such a right existed and that this was clearly established at the time of the incident."); *id.* at 715 & n.3 (mentioning "clearly established" twice and relying on "fair notice"). But even had the panel expressly pivoted on step two, my conclusion would be unchanged. The officers indeed had "fair notice" because they were literally warned—by a fellow officer on the scene—that if they tased Olivas, "he's going to light on fire!"

This case reveals an additional inconsistency in our qualified-immunity precedent. Some of our decisions reviewing 12(b)(6) dismissals on immunity grounds recognize the "obviousness" principle when assessing "clearly established" law, and others do not. This panel, for example, in deeming the officers' conduct reasonable, remarked that the only published Fifth Circuit cases cited by Plaintiffs "do not resemble" what happened here. *Ramirez*, 844 F. App'x at 715. By contrast, this court in *Alexander v. City of Round Rock* denied qualified immunity at the motion-to-dismiss stage despite the fact that "officers in this circuit had not "faced this precise factual situation before," holding that "taking the facts as alleged," the violation was obvious and thus "clearly established." 854 F.3d 298, 305 (5th Cir. 2017).

actually is or is not true; we only ask whether Plaintiffs' plausible allegations state a claim."[12]

II

The panel held that tasing a combustible Olivas did not violate his constitutional protection against excessive force. More to the point, such a claim was not even facially *plausible*. I have a different view: "As the facts are alleged … the [Fourth] Amendment violation is obvious."[13]

According to the panel, igniting Olivas does not get past the constitutional inquiry, whether the force was plausibly excessive. For support, the panel cited the rule that "reasonableness of a government official's use of force must be judged from the perspective of a reasonable official on the scene, not with the benefit of 20/20 hind-sight."[14] Fair point, but wholly inapt here. There is no need for 20/20 hindsight when there is 20/20 foresight. *Before* they discharged their tasers, Officers Guadarrama and Jefferson were affirmatively warned by "a reasonable official on the scene"—their fellow officer, right then and there, who shouted, "If we tase him, he's going to light on fire!" Not only that, the officers had recently been trained

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[12] *Converse v. City of Kemah*, 961 F.3d 771, 779–80 (5th Cir. 2020) (reversing a 12(b)(6) dismissal on qualified-immunity grounds because the allegations were adequate to support an inference that the officers' knowledge rose to the level of deliberate indifference).

[13] *See Hope v. Pelzer*, 536 U.S. 730, 738, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) ("As the facts are alleged by Hope, the Eighth Amendment violation is obvious.").

[14] *Ramirez*, 844 F. App'x at 716.

on the fiery consequences of deploying tasers in the presence of gasoline.

Second, the panel stressed that because Olivas "posed a substantial and immediate risk of death or serious bodily injury to himself and everyone in the house," it was reasonable for the officers to tase Olivas to "prevent Olivas from lighting himself on fire."[15] But according to the complaint, the officers' tasing Olivas is what turned risk into reality, engulfing him in flames and *ensuring* that he "posed a substantial and immediate risk of death or serious bodily injury to himself and everyone in the house."

The complaint alleges a plausible Fourth Amendment violation, and an obvious one at that. How is it reasonable—more accurately, not plausibly unreasonable—to set someone on fire to prevent him from setting himself on fire? To my mind, it is unfathomable to conclude with zero discovery, yet 100% finality, that no facially plausible argument exists that these officers acted unreasonably. Perhaps discovery would have supplied crucial facts that cut the officers' way. But we 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.

Accepting as true Plaintiffs' allegations and drawing reasonable inferences in their favor, Officers Guadarrama and Jefferson knew that tasing Olivas would engulf him in flames. This is not, as the panel opinion says, "determin[ing] what Guadarrama or

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[15] *Id.* at 714.

Jefferson was actually thinking at the time." [16] Accounting for these alleged facts is entirely objective; it simply takes stock of the information allegedly available to the officers, "the facts that were knowable to" them at the time of the incident.[17]

Well, what *should* these officers have done? After all, this was a suicidal man drenched in gasoline experiencing a severe mental health crisis. A perfectly sensible question—but a premature one. Perhaps the panel is correct that "the officers had no apparent options."[18] Perhaps, as Plaintiffs allege, there were options galore, with the officers picking the *one* measure of force that was obviously off limits—a flamethrower. I cannot predict, at this stage, whether discovery will substantiate the existence of superior alternatives.[19] But exploring that vital question is precisely why discovery exists.

Rule 26 vests district courts with broad discretion in managing the factfinding process.[20] Discovery can be tightly circumscribed, if need be. As the district court sensibly stated here, it can tailor the scope of discovery to factual evidence "needed to make a determination on defendants' qualified immunity

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[16] *Ramirez*, 844 F. App'x at 716 n.5.

[17] *White v. Pauly*, — U.S. ——, 137 S. Ct. 548, 550, 196 L.Ed.2d 463 (2017).

[18] *Ramirez*, 844 F. App'x at 716.

[19] *Contra ante*, at 512-13 (Oldham, J., concurring) ("The dissent suggests the officers had 'options galore' ….").

[20] FED. R. CIV. P. 26; *see also Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) (discussing the various procedural techniques available to the district court to avoid "unnecessary and burdensome discovery or trial proceedings").

defenses." Rule 12(b)(6) is not license to pull the plug on cases that may strike judges as doubtful or nettlesome. Here, on this undeveloped, pre-discovery record, Plaintiffs need only allege facts permitting a reasonable inference that tasing a gasoline-soaked Olivas plausibly amounted to excessive force.

And in the end, alternatives are *not the point*. My colleagues assert, without authority, that specifying superior alternatives is an element of any Fourth Amendment claim.[21] This requirement, they say, protects the Constitution from becoming "a font of excessive-force tort law."[22] To be sure, identifying alternatives is likely to be important as a *practical* matter: A jury is more likely to deem challenged conduct unreasonable when the plaintiff details hypothetical, reasonable alternatives. 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.

This is true for several reasons. First, whether conduct was "*unreasonable*" is the question designated by the text of the Fourth Amendment.[23] We therefore must probe the reasonableness of conduct challenged (what officers actually did), not the reasonableness of conduct imagined (what officers could have done).

Second, to the extent further clarity is needed, the Supreme Court has already provided it: "The

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[21] *Ante*, at 511-14 (Oldham, J., concurring).

[22] *Id.* at 509.

[23] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ….").

reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means."[24] The Court said nothing about this concept being unidirectional in favor of finding searches reasonable.[25]

Third, our circuit has adopted no rule that requires plaintiffs to plead alternatives as an element of a Fourth Amendment claim. The Ninth Circuit, by contrast, expressly endorses consideration of alternatives in certain excessive-force cases.[26] What is

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[24] *Illinois v. Lafayette*, 462 U.S. 640, 647, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983); *accord United States v. Martinez–Fuerte*, 428 U.S. 543, 556–57 n. 12, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). Our sister circuits dependably heed this common-sense admonition. *See, e.g.*, *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995) ("The Fourth Amendment inquiry focuses not on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within a range of conduct which is objectively 'reasonable' under the Fourth Amendment. Alternative measures which 20/20 hindsight reveal to be less intrusive (or more prudent), such as waiting for a supervisor or the SWAT team, are simply not relevant to the reasonableness inquiry."); *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) ("[T]he appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them." (citing, inter alia, *Illinois*, 462 U.S. at 647, 103 S.Ct. 2605)).

[25] *But see ante*, at 512-13 (Oldham, J., concurring).

[26] *Compare* MANUAL OF MODEL CIVIL JURY INSTRUCTIONS 9.25 (U.S. Court of Appeals for the Ninth Circuit 2021) ("In determining whether the officer used excessive force in this case, consider all of the circumstances known to the officer on the scene, including … the availability of alternative methods …."), *with* PATTERN JURY INSTRUCTIONS 10.1 (U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT 2020) (mentioning no consideration of

more, we *have* something like this rule for Eighth Amendment claims.[27] Unlike my colleagues, I am not persuaded that an Eighth Amendment rule—let alone an antitrust rule—should be construed as a necessary element for a Fourth Amendment claim.[28] Certainly, the same pleading standard applies to all substantive claims. [29] But what is necessary to satisfy that standard depends on the nature of the substantive claim.

Nor am I persuaded that engrafting this extraneous element onto Fourth Amendment claims is the *only*

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alternatives). Even in the Ninth Circuit, where alternatives are explicitly considered as a factor in some cases, it's only one factor among the totality of circumstances, it's not an element of the claim: "In *some* cases, for example, the availability of alternative methods of capturing or subduing a suspect *may* be a factor to consider." *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (emphases added); *accord id.* at 703. *See also Scott*, 39 F.3d at 915 (declining to focus on alternatives).

[27] *Compare* PATTERN JURY INSTRUCTIONS 10.7 (U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT 2020) (permitting juries to consider whether an Eighth Amendment prisoner plaintiff has proven that officers tried to "temper the severity of a forceful response").

[28] *Contra ante*, at 512 (Oldham, J., concurring) (citing *Baze v. Rees*, 553 U.S. 35, 47–52, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008)); *see also id.* at 507-09 (discussing *Twombly*). *See Graham v. Connor*, 490 U.S. 386, 397–99, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (disagreeing that courts must consider Eighth Amendment standards in Fourth Amendment claims, given the differences in the amendments, "[w]hatever the empirical correlations between 'malicious and sadistic' behavior and objective unreasonableness may be").

[29] *See ante*, at 513-15 (Oldham, J., concurring).

way to protect government actors' judgment.[30] The Constitution is certainly not a font for excessive-force tort law; neither is qualified immunity an impenetrable shield against every manner of wrongdoing, however ghastly. Respectfully, my colleagues risk the latter pole, but the Fourth Amendment demands no such choice. On the contrary, the Fourth Amendment requires nuanced, fact-specific consideration, perhaps more than any other constitutional provision.[31]

These officers faced a harrowing, fast-moving situation, no question. But we cannot dispense with discovery as to the reasonableness of officers' actions whenever circumstances are difficult. This is not second-guessing what the officers did. It's simply, and unremarkably, recognizing that facts matter—in fact, facts are *all* that matter—and we must actually gather some in order to determine if these officers acted unreasonably.

III

Finally, the panel opinion collides with recent warnings from the Supreme Court summarily negating grants of qualified immunity for obvious

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[30] *Contra ante*, at 513-14 (Ho, J., concurring) ("I fear that officers will choose to stand by and watch, rather than to protect and to serve, if the rules of engagement are unclear and unknowable at the time of the incident—determinable only after discovery is completed.").

[31] *See, e.g.*, *City of Escondido v. Emmons*, — U.S. ——, 139 S. Ct. 500, 503, 202 L.Ed.2d 455 (2019) ("Use of excessive force is an area of the law in which the result depends very much on the facts of each case ….").

constitutional violations.[32] Twice in recent months, the Supreme Court has vacated immunity grants. Both cases were from this circuit. And while these quiet, "shadow docket" actions may not portend a fundamental rethinking of qualified immunity, the Court seems determined to dial back the doctrine's harshest excesses. If not reconsidering, the Court is certainly recalibrating. Most importantly here, the Court is warning us to tread more carefully when reviewing obviously violative conduct.

First came *Taylor v. Riojas* last November.[33] The Court summarily reversed our decision granting qualified immunity to prison officials who confined a prisoner for several days in a pair of "shockingly unsanitary cells"—the first cell "covered, nearly floor to ceiling, in massive amounts of feces"[34] (with one officer telling another that Taylor would "have a long weekend"), and the second cell "frigidly cold" and flooded with raw sewage, in which Taylor "was left to sleep naked" (with another officer expressing hope that Taylor would "f***ing freeze").[35] The Supreme Court held that the prison officials had fair warning, without a factually similar case, that these conditions were plainly unconstitutional.[36] The Court stressed that the conditions were deplorable, obviously cruel,

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[32] "Apparently SUMREVs mean nothing." *Cole v. Carson*, 935 F.3d 444, 473 (5th Cir. 2019) (en banc) (Ho & Oldham, JJ., dissenting), *cert. denied sub nom. Hunter v. Cole*, — U.S. ——, 141 S. Ct. 111, 207 L.Ed.2d 1051 (2020).

[33] — U.S. ——, 141 S. Ct. 52, 208 L.Ed.2d 164 (2020), *summarily reversing* 946 F.3d 211 (5th Cir. 2019).

[34] *Id.* at 53 (cleaned up).

[35] *Id.* at 54.

[36] *Id.*

degrading, and dangerous, and not outweighed by necessity, exigency, or efforts to mitigate. The Court's per curiam was terse and forceful: "Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution."[37]

Indeed, *Taylor* was the first time in 16 years (and just the third time *ever*) that the Supreme Court expressly found official misconduct to violate "clearly established" law.[38] In *Taylor*, the Court harkened back nearly 20 years to *Hope v. Pelzer*,[39] which held that, when a constitutional violation is sufficiently obvious, qualified immunity can be denied even absent a previous case declaring virtually identical conduct unconstitutional.[40] *Hope* promptly went into hibernation, though. And the Court's intervening cases have sent the opposite message: Officers cannot be sued for violating someone's constitutional rights unless the specific actions at issue have previously

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[37] *Id.* at 54.

[38] *See Erwin Chemerinsky: SCOTUS hands down a rare civil rights victory on qualified immunity*, ABA J. (Feb. 1, 2021), https://www.abajournal.com/columns/article/chemerinsky-scotus-hands-down-a-rare-civil-rights-victory-on-qualified-immunity.

[39] 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

[40] In *Hope v. Pelzer*, the Supreme Court held that shackling a shirtless inmate to a hitching post in a painful position for seven hours beneath the scorching Alabama sun, with little water, no bathroom breaks, and a taunting guard, was "antithetical to human dignity" and obviously unconstitutional. 536 U.S. at 745, 122 S.Ct. 2508.

been held unlawful.[41] *Taylor*, however, declares that the obviousness principle has vitality and that egregiousness matters. In summarily reversing us without full briefing or argument,[42] the Court sent the message that not only were we wrong, we were *obviously* wrong—more specifically, we were obviously wrong about an obvious wrong.

And though a rarity, *Taylor* was not a one-off. Just a few months ago, the Supreme Court doubled down in another case from our circuit, *McCoy v. Alamu*, involving an inmate gratuitously assaulted with pepper spray "for no reason at all" by a prison guard who was angry with another inmate.[43] The Court issued a "grant, vacate, and remand" order directing us to reconsider in light of *Taylor*. The Supreme Court's reliance on *Taylor* confirms that the Court does not consider that case an anomaly, but instead a course correction signaling lower courts to deny immunity for clear misconduct, even in cases with unique facts.

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[41] *See, e.g.*, *Wesby v. District of Columbia*, 816 F.3d 96, 102 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) ("[I]n just the past five years, the Supreme Court has issued 11 decisions reversing federal courts of appeals in qualified immunity cases ….").

[42] *See Kisela v. Hughes*, — U.S. ——, 138 S. Ct. 1148, 1162, 200 L.Ed.2d 449 (2018) (Sotomayor, J., dissenting) ("A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.") (citation omitted); *accord Wearry v. Cain*, 577 U.S. 385, 397, 136 S.Ct. 1002, 194 L.Ed.2d 78 (2016) (Alito, J., dissenting) ("[W]e generally do not decide cases without allowing the parties to file briefs and present argument.").

[43] *McCoy v. Alamu*, — U.S. ——, 141 S. Ct. 1364, 209 L.Ed.2d 114 (2021), *GVR-ing* 950 F.3d 226 (5th Cir. 2020).

As in *Taylor*, we granted qualified immunity in *McCoy* because there was no case with materially similar facts. And as in *Taylor*, the Court instructed us to try again. The message is low-key but loaded. These two orders make clear that the Court is earnest about reining in qualified immunity's severest applications. This doctrinal clarification may not amount to sweeping reexamination, but the upshot is plain: In cases with "particularly egregious facts," courts must not strain to absolve constitutional violations. Even if the precise fact pattern is novel, there is no need for a prior case exactly on point where the violation is obvious.[44] And a conclusion of obviousness at step two necessarily means that step one has been satisfied; an obvious violation of a "clearly established" right inescapably means that a right has been violated.

The principle uniting these recent rebukes is that the qualified-immunity doctrine does not require judicial blindness. Courts need not be oblivious to the obvious.

One can only speculate how the Supreme Court, having upended us in *Taylor* and *McCoy*, would evaluate today's case. For my part, this case is even clearer, and its holding more jolting, for two reasons: (1) *Taylor* and *McCoy* were appeals following summary judgment, after the cases had been factually developed, whereas this is a motion-to-dismiss case that requires us to take Plaintiffs' allegations as true; and (2) in *Taylor* and *McCoy*, we at least

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[44] *Compare Taylor*, 141 S. Ct. at 52–54; *McCoy*, 141 S. Ct. at 1364, *with Hunter*, — U.S. ——, 141 S. Ct. 111, *denying cert. for Cole*, 935 F.3d at 453 (finding a constitutional violation "without dependence on the facts of other cases").

acknowledged there was a constitutional violation, whereas here we held there was no violation at all—not even a plausible one.

Where is the bottom? In my judgment, nothing better captures the yawning rights-remedies gap of the modern immunity regime[45] than giving a pass to alleged conscience-shocking abuse at the motion-to-dismiss stage and step one of the immunity inquiry.

* * *

This year America commemorates the sesquicentennial of our preeminent civil rights statute, 42 U.S.C. § 1983, the text of which promises a federal remedy for the violation of "any" right—not just "clearly established" ones. Nonetheless, the atextual, judge-created doctrine of qualified immunity shields lawbreaking officials from accountability, even for patently unconstitutional abuses, thus largely nullifying § 1983. The pages of F.3d abound with head-scratching examples:

- stealing $225,000 while executing a search warrant[46]
- shooting a 10-year-old boy in the leg while repeatedly trying to shoot the nonthreatening family dog[47]

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[45] *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part) ("[Q]ualified immunity often smacks of unqualified impunity.").

[46] *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019), *cert. denied*, — U.S. —, 140 S. Ct. 2793, 206 L.Ed.2d 956 (2020).

[47] *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019), *cert. denied*, — U.S. —, 141 S. Ct. 110, 207 L.Ed.2d 1051 (2020).

- releasing a police dog on a surrendered suspect (since the suspect was *sitting* on the ground while in a prior case the suspect was *lying* on the ground)[48]

But transformation is often born of tragedy.

Samuel Morse's invention of the telegraph was spurred by heartbreak, the death of his wife, news of which arrived by letter, far too late for him to attend her burial. Morse set his mind to developing a way to deliver messages in minutes rather than days or weeks. And years later, in a hushed Supreme Court chamber, Morse transmitted his revolutionary message.

The horrific death of Gabriel Olivas is also suffused in sorrow. And while qualified immunity has enjoyed special solicitude at the Supreme Court, perhaps these "particularly egregious facts"[49] will prompt another meaningful message from the Court, one that marries law with justice (and common sense) and makes clear that those who enforce our laws are not above them.

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[48] *Baxter v. Bracey*, 751 F. App'x 869 (6th Cir. 2018), *cert. denied*, — U.S. ——, 140 S. Ct. 1862, 207 L.Ed.2d 1069 (2020).

[49] *Taylor*, 141 S. Ct. at 54.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DISTRICT

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,

Plaintiffs,

v.

CITY OF ARLINGTON, TEXAS; JEREMIAS GUADARRAMA; and EBONY N. JEFFERSON,

Defendants.

Civil Action No. 3:19-cv-01529-L

JURY DEMANDED

August 7, 2019

FIRST AMENDED PLAINTIFFS' ORIGINAL COMPLAINT

City of Arlington custom, policy, and/or practice, and two Arlington police officers, caused Gabriel Olivas' horrific death. Defendant officers Tased him while he was covered with gasoline. As expected, Mr. Olivas caught fire, suffered burns over approximately 85% of his body, and died within a few days.

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TO THE HONORABLE UNITED STATES DISTRICT COURT:

Plaintiffs file this amended complaint and for cause of action will show the following.

I. Introductory Allegations

A. Parties

1. Plaintiff Selina Marie Ramirez ("Ms. Ramirez" or "Selina") is a natural person who resides and did reside and was domiciled in Texas at all relevant times. Ms. Ramirez was Gabriel Eduardo Olivas' wife at the time of Mr. Olivas' death. Gabriel Eduardo Olivas is referred in this pleading as "Gabriel" and/or "Mr. Olivas." Ms. Ramirez brings claims in this lawsuit individually and as the Independent Administrator of the Estate of Gabriel Eduardo Olivas. Ms. Ramirez also brings claim by and on behalf of female minor S.M.O. as S.M.O.'s mother, guardian, and next friend. S.M.O. was Gabriel's daughter at the time of Gabriel's death. Ms. Ramirez asserts any and all claims available in her capacity as the Independent Administrator regarding Gabriel's death, both survival claims and wrongful death claims, including all claims on behalf of the Estate and all of Gabriel's heirs-at-law including but not necessarily limited to Ms. Ramirez and Gabriel's children – Gabriel Anthony Olivas and female minor S.M.O. Letters of independent administration were issued to Ms. Ramirez on or about August 22, 2018, in Cause Number 2018-PR00844-2, in the Probate Court No. 2 of Tarrant County, Texas, in a case styled *In the Estate of Gabriel Eduardo Olivas, Deceased*.

2. Plaintiff Gabriel Anthony Olivas is a natural person who resides and did reside and was in

domiciled in Texas all relevant times. Gabriel Anthony Olivas was Mr. Olivas' son at the time of Gabriel's death. Gabriel Anthony Olivas brings claims in this lawsuit individually.

3. Defendant City of Arlington, Texas ("Arlington" or "City of Arlington") is a Texas incorporated municipality/city. Arlington has been served with process and has made an appearance in this case. Arlington acted or failed to act at all relevant times, in accordance with its customs, practices, and/or policies, through its policymakers, chief policymakers, employees, agents, representatives, and/or police officers and is liable for such actions and/or failure to act to the extent allowed by law (including but not necessarily limited to law applicable to claims pursuant to 42 U.S.C. § 1983).

4. Defendant Jeremias Guadarrama ("Officer Guadarrama" or "Mr. Guadarrama") is a natural person who resides and is domiciled in Fort Worth, Texas. Mr. Guadarrama has been served with process and has made an appearance in this case. Mr. Guadarrama is being sued in his individual capacity and acted at all relevant times under color of State law. Mr. Guadarrama was employed by and/or was the agent and/or designee and/or contractor of and for City of Arlington at all such times and acted or failed to act in the course and scope of his duties for City of Arlington.

5. Defendant Ebony N. Jefferson ("Officer Jefferson," "Mr. Jefferson," or "Sergeant Jefferson") is a natural person who resides and is domiciled in Dallas, Texas. Mr. Jefferson has been served with process and has made an appearance in this case. Mr. Jefferson is being sued in his individual capacity and

acted at all relevant times under color of State law. Mr. Jefferson was employed by and/or was the agent and/or designee and/or contractor of and for City of Arlington at all such times and acted or failed to act in the course and scope of his duties for City of Arlington.

B. Jurisdiction and Venue

6. The court has original subject matter jurisdiction over this lawsuit according to 28 U.S.C. §§ 1331 and 1343(4), because this suit presents a federal question and seeks relief pursuant to federal statutes providing for the protection of civil rights. This suit arises under the United States Constitution and a federal statute - 42 U.S.C. § 1983.

7. The court has personal jurisdiction over City of Arlington because it is a Texas City. The court has personal jurisdiction over the natural person Defendants because they reside in, are domiciled in, and are citizens of Texas.

8. Venue is proper in the Dallas Division of the United States District Court for the Northern District of Texas, pursuant to 28 U.S.C. § 1391(b)(1). It is the division in the district in which Defendant Mr. Jefferson resides, and all Defendants are Texas residents.

II. Factual Allegations

A. Introduction

9. Plaintiffs provide in the factual allegations sections below the general substance of certain factual allegations. Plaintiffs do not intend that those sections provide in detail, or necessarily in chronological order, any or all allegations. Rather, Plaintiffs intend that those sections provide

Defendants sufficient fair notice of the general nature and substance of Plaintiffs' allegations, and further demonstrate that Plaintiffs' claim(s) have facial plausibility. Whenever Plaintiffs plead factual allegations "upon information and belief," Plaintiffs are pleading, in accordance with Federal Rule of Civil Procedure 11(b)(3), that the specified factual contentions have evidentiary support or in the alternative will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

B. Gabriel Eduardo Olivas

10. Gabriel grew up in Sylmar, California. Gabriel and Selina met when they were teenagers, and had been together as a couple since not long after meeting. They had been common-law married for years prior to Gabriel's death. Gabriel and Selina moved to Arlington, Texas when Gabriel was approximately 22 years old, where they resided until Gabriel's death.

11. Gabriel worked doing creative effects for movies when he and Selina lived in California. This included things such as using fans for actors, to make it appear as if actors were in a windy situation, and using road cages for cars. When Gabriel and Selina moved to Texas, Gabriel worked in t-shirt printing.

C. Officer Guadarrama and Officer Jefferson Unreasonably Tase Mr. Olivas, Causing Him to Catch Fire, Suffer Horrific Burns, Linger, and Die

12. On July 10, 2017, Mr. Olivas was at home, telling family members that he would kill himself, by lighting himself on fire after dousing himself with gasoline. He did not threaten to harm his wife, his son,

or anyone else in his home. In fact, he never harmed his wife, his son, or anyone else on that day. Rather, Mr. Olivas was distraught and seeking attention. Mr. Olivas did not intend to commit suicide, and he would not have committed suicide. Mr. Olivas never ignited a lighter or any other device to catch himself on fire. Instead, Defendant police officers arrived at his home, Tased Mr. Olivas (knowing that he was drenched with gasoline), and caused Mr. Olivas to catch fire and die after lingering in excruciating pain for days.

13. There is no doubt that all police officers at the scene of the incident leading to Mr. Olivas' death, at which he was Tased, were aware that Mr. Olivas was threatening to commit suicide. Upon information and belief, they learned this information through communications with the Arlington Police Department before arriving at Mr. Olivas' home. Further, even after Mr. Olivas was Tased and caught fire, as described below, Arlington Police Officer C. Pierce (#2827) signed a notification of emergency detention. Officer Pierce wrote in part that Mr. Olivas had made several statements to family members about killing himself. Officer Pierce also noted that Mr. Olivas poured gasoline at certain spots inside the home as well as all over himself, saying he was going to kill himself. Therefore, Officer Pierce sought temporary admission of Mr. Olivas to the Medical City Plano inpatient mental health facility on an emergency basis. This request is authorized under Texas law. Thus, all such officers knew that Mr. Olivas had not threatened to harm anyone other than himself, and he had not harmed anyone.

1. Statements

14. Arlington Police Officers provided statements about what occurred after Mr. Olivas was improperly and unreasonably Tased. Relevant portions of relevant statements are provided below.

a. Officer Scott (#2835)

15. Officer Scott provided a statement, entitled "supplemental narrative," regarding the incident. Officer Scott wrote that, on July 10, 2017, at approximately 11:57 a.m., he, Corporal Ray, Officer Guadarrama, and Sergeant Jefferson were dispatched to Mr. Olivas' home. The call text stated that the caller's father was threatening suicide. The caller was Gabriel Anthony Olivas, and his father was Mr. Olivas. The call text allegedly further indicated that Mr. Olivas was threatening to burn down the house and was pouring gasoline in the house. However, there was no indication that Mr. Olivas was threatening to harm his wife, his son, or anyone else in the home, or that he had trapped and/or otherwise put any such persons in a position that they would be harmed if Mr. Olivas chose to kill himself. Mr. Olivas did not threaten to harm his wife, son, or anyone else at the home, and he had not trapped, injured, harmed, or put anyone in his home in a position that such persons would be harmed or injured if Mr. Olivas actually chose to commit suicide. However, Mr. Olivas would never have committed suicide. Mr. Olivas did not commit suicide, and he did not light a lighter he was holding. He caught fire solely as a result of officers Tasing him when they should not have done so.

16. While driving to Mr. Olivas' home, police officers informed police dispatch to have Mr. Olivas'

son and whoever else was in the house with Mr. Olivas to exit the house. When officers arrived at the scene, it would have been reasonable for them to follow their own advice, and remove people other than Mr. Olivas from the home. They should have removed everyone other than Mr. Olivas from the home rather than ultimately confronting and Tasing Mr. Olivas with family members in the house. Officer Scott heard Officer Elliott (#3007) place himself onto the call for service. Before Officer Scott's arrival, he asked dispatch where Mr. Olivas was located. Officer Scott was told that he was inside one of the bedrooms.

17. Officer Scott indicates that he arrived at approximately 12:02 p.m., along with Corporal Ray. Officer Scott noticed that there were already three police vehicles at Mr. Olivas' house. Police officers from those vehicles were already presumably in Mr. Olivas' home. As Officer Scott was pulling up to Mr. Olivas' residence, he heard officers "call for the channel." After parking, Officer Scott and Corporal Ray began to run toward the home. Officer Scott saw an Hispanic female in the front yard waving at officers, and yelling, "Hurry up." Officer Scott asked the female which way, and she said down the hallway to the first bedroom on the right. This description of where Mr. Olivas was located shows how easy it would have been for officers inside to quickly remove family members from the house through the front door, before having to have any physical interaction with Mr. Olivas. Ms. Ramirez is approximately 5 feet, 1 inch tall, and Gabriel Anthony Olivas is approximately 5 feet, 8 inches tall.

18. Officer Scott and Corporal Ray entered the home and ran towards the bedroom. Corporal Ray

then abruptly stopped, and Officer Scott bumped into him as a result. Officer Scott never made it to the bedroom and was not able to see who was inside of the bedroom. Corporal Ray then informed Officer Scott that a man was on fire. Officer Scott could then see smoke coming from the bedroom in which Mr. Olivas has been Tased.

b. Corporal Ray (#2573)

19. Corporal Ray wrote a report, entitled "Supplemental Narrative." He wrote that, on Monday, July 10, 2017, at 11:57 a.m., he was dispatched to Mr. Olivas' home regarding an alleged suicidal subject, high on methamphetamines, and who was pouring gasoline inside the home. Corporal Ray indicated that, when he arrived, he was met by "frantic family members yelling for officers to hurry and help their father." Mr. Olivas' son, Gabriel Anthony Olivas, yelled to Corporal Ray that, as soon as he entered the home, he should turn right, and he would find Mr. Olivas in the first room. Once again, this description as to how to access the bedroom in which Mr. Olivas was located, and which was now on fire, showed how easy it would have been for Defendant police officers to have removed family members from the residence using the open front door (thereby avoided Tasing Mr. Olivas). They could have then examined the situation from a better vantage point. Corporal Ray entered the home and turned right. As soon as he turned the corner, he observed Mr. Olivas, on fire, yelling. The room was very dark by that point, and smoke was beginning to fill the room.

c. Officer Jeremias Guadarrama (#2514)

20. Officer Guadarrama signed a typed statement after the incident involving Mr. Olivas. He wrote that, on Monday, July 10, 2017, at approximately 12:00 p.m., he was dispatched to Mr. Olivas' residence in reference to a suicidal individual who had been believed to have doused his residence with gas. However, after arriving at the residence, Officer Guadarrama learned that the residence had not been doused with gas. He was the first officer arriving at the scene, and he staged while awaiting back-up.

21. Officer Guadarrama wrote that Sergeant Jefferson and Officer Elliott were the next officers to arrive at Mr. Olivas' home on July 10, 2017. He wrote, "Sergeant Jefferson reminded us to use non-lethal on the suicidal person." Officer Guadarrama noted that, as they walked toward Mr. Olivas' home, the front door was wide open. Thus, there was no obstruction keeping officers from removing people other than Mr. Olivas from the home, through the front door. They entered the residence, and Officer Guadarrama "very quickly detected the strong odor of gasoline inside the residence." Thus, he, and every other officer arriving at the home prior to interaction with Mr. Olivas knew that using a Taser in such a situation, in an area in which gas and/or gas fumes was present, would probably start a fire. After he walked further into Mr. Olivas' home, he heard loud discussion between a male and female in an east corner of Mr. Olivas' home. When they walked further into the house, a female family member pointed officers into the east corner bedroom. This was roughly the southeast corner of the home, or the front right corner.

22. As the officers entered into that bedroom, Officer Guadarrama "knew that the suicidal male [Mr. Olivas] was inside the bedroom." Further, "I was concerned that the suicidal male would ignite the bedroom on fire igniting himself and innocent victims, because I could smell the very strong odor of gasoline inside the bedroom." Regardless, Officer Guadarrama did nothing to remove people from the home and extract them from what he perceived to be a dangerous situation. Instead, as described below, he chose to leave such persons in the home, Tase Mr. Olivas, and catch Mr. Olivas and the home on fire as a result.

23. Officer Guadarrama's statement omits important occurrences. His statement indicates that Mr. Olivas immediately began pouring a red container full of liquid on top of his heard with his left hand while holding in his right hand "some sort of lighting mechanism." He also wrote that "the female was in-between the suicidal individual and officers within arm's reach of both . . . ." However, he alleged, "[S]he would not leave the room after several commands." Officer Guadarrama should have grabbed the woman and removed her from the room. Instead, his allowing her to remain, and the ultimate Tasing of Mr. Olivas, was unreasonable.

24. Officer Guadarrama, confusing the chronology of what occurred, writes that Officer Elliott then sprayed Mr. Olivas with OC spray. Officer Guadarrama saw Sergeant Jefferson remove his Taser and point it at Mr. Olivas. After Officer saw the red dot from Sergeant Jefferson's Taser on Mr. Olivas' chest, Officer Guadarrama also pulled his Taser and pointed it at Mr. Olivas. Sergeant Jefferson was the

ranking officer, and Officer Guadarrama followed the lead of his ranking officer.

25. Officer Guadarrama makes no mention in his statement about Officer Elliott clearly telling Officer Guadarrama and Sergeant Jefferson that, if they shot Mr. Olivas with the Taser, he would catch on fire. Regardless, Officer Guadarrama knew that, if he shot Mr. Olivas with a Taser, Mr. Olivas, and potentially the entire room (due to gas fumes), would catch fire. Officer Guadarrama admitted in his statement that Mr. Olivas was in close proximity at the time, and was further a "safe distance away from his family members." Officer Guadarrama further wrote something in the statement which was a blatant inconsistency, and which was not true. He wrote, "The female family member was right next to the suicidal male . . . ." He further falsely wrote, "I was afraid that if I fired my firearm a bullet from my service weapon could possibly strike the female family member due to the close proximity that she had next to the suicidal male." Mr. Olivas could not be a "safe distance away from his family members" and at the same time be right next to a female family member. In fact, the truth was that Mr. Olivas was not right next to either his son or his wife – the only two family members in the room. Instead, the three police officers, Mr. Olivas's wife, and Mr. Olivas's son were generally in line facing Mr. Olivas at the time police officers chose to Tase Mr. Olivas. Neither Mr. Olivas's wife or son was in such proximity to Mr. Olivas, such that there would have been any risk of either being shot had Officer Guadarrama chosen to shoot at Mr. Olivas with his firearm.

26. Officer Guadarrama wrote, "I instinctively fired my duty issued Taser striking the male in the torso area." He also wrote that "moments later the individual was engulfed in flames." He noted that Mr. Olivas "then began to run around the room engulfing the room in flames." None of this was a surprise to Officer Guadarrama. Officer Guadarrama fired his Taser at Mr. Olivas even though Mr. Olivas never made any gesture toward family members or police officers that day. Thus, he had visibly done nothing to threaten his family members or police officers.

27. Further, Officer Guadarrama fails to mention that it appeared to everyone in the room that Mr. Olivas could not see as a result of being sprayed in his eyes with OC spray. This had been made clear to people in the room, because Mr. Olivas had rubbed his hands over his eyes after being sprayed.

28. The fact that Officer Guadarrama alleges that he "instinctively" fired his Taser at Mr. Olivas showed that he was not acting in a reasonable manner based upon his knowledge of what would occur after firing the Taser. Upon information and belief, Officer Guadarrama had attended training during which he learned that the firing of a Taser in such situation was likely to cause Mr. Olivas, and potentially other areas in the room with gasoline fumes, to catch fire. Officer Elliott had also told Officer Guadarrama prior to Taser deployment that Mr. Olivas would catch fire. The result was Mr. Olivas' death.

29. Officers, by shooting their Tasers at Mr. Olivas, also further endangered Mr. Olivas's wife and son. Officers were unaware as to whether Mr. Olivas's wife and/or son had gas on them (thus increasing the likelihood that they would catch fire). Further,

neither Mr. Olivas's wife or son were injured or burned as a result of the Tasing and resulting fire. This demonstrated that neither of them were close enough to Mr. Olivas to be in danger if Mr. Olivas had chosen to light himself on fire. After the police officers started the fire, an officer fleeing the room in panic collided with Ms. Ramirez with such force so as to injure her knee.

d. Sergeant Ebony N. Jefferson (#2116)

30. Sergeant Jefferson signed a written statement regarding the incident, on July 14, 2017, after having plenty of time to meet with his attorney. Sergeant Jefferson wrote that he was on duty working as Operational Sergeant in the East District. He then heard dispatch send officers to Mr. Olivas' home in reference to a suicidal person. He also heard that the person had poured gasoline on himself and in a room. Thus, he had not heard that anyone had poured gasoline throughout the house. In fact, Mr. Olivas had not poured gasoline throughout the house. Sergeant Jefferson was not far from the location, so he asked dispatch to show that he would be in route to the call.

31. When Sergeant Jefferson arrived, he saw two other patrol vehicles staged near Mr. Olivas' home. He then informed dispatch that he was on-scene. Those officers were Officer Elliott and Officer Guadarrama.

32. Sergeant Jefferson saw Officer Elliott and Officer Guadarrama run toward the open front door of Mr. Olivas' home. Sergeant Jefferson exited his vehicle and ran to and joined the other officers at the door.

33. Sergeant Jefferson noticed that Officer Guadarrama had his duty firearm drawn. Therefore, Sergeant Jefferson told Officer Elliott to draw "less lethal." This was an instruction to Officer Elliott to draw his Taser. After Officer Elliott pulled his Taser, Sergeant Jefferson pulled his Taser "as a second less lethal option."

34. Sergeant Jefferson admitted that, "[a]s the Sergeant, [, he] wanted to be able immediately address whatever threat [he and other officers] were about to encounter." Officer Guadarrama entered the residence, followed by Officer Elliot, followed by Sergeant Jefferson. Sergeant Jefferson determined that the noise was coming from a room down the hallway on the east side of the house from the front door. When they entered the room with Mr. Olivas, Sergeant Jefferson smelled gas. He noted that Officer Elliott had his Taser pointed in the direction of people in the room. After making observations of several people in the room and hearing the commotion, Sergeant Jefferson alleges that he re-holstered his Taser and began to pull people away from Mr. Olivas and pushed them into the hallway. He was allegedly unsuccessful. Upon information and belief, Sergeant Jefferson would have been able to remove those people from the property, out the front door, if that were his goal. Further, upon information and belief, this did not occur as Sergeant Jefferson alleged.

35. Sergeant Jefferson would ultimately give a statement to Detective Gildon, who would investigate Mr. Olivas' death on behalf of the City of Arlington. Sergeant Jefferson, in an assertion completely opposite of what he told Detective Gildon, wrote, "I unholstered my [T]aser, turned it on and pointed it at

the suspect." It appears that Sergeant Jefferson, after realizing he did not tell the truth to a fellow law enforcement officer, and after having time to meet with his attorney, decided to change his story. Sergeant Jefferson wrote that he then heard a Taser discharge from where Officer Guadarrama was standing. Further, upon hearing that discharge, "The suicidal suspect immediately catches on fire and I became startled by the flames and moved away from them." Sergeant Jefferson then, upon information and belief, falsely asserts that he unintentionally discharged his Taser. Upon information and belief, Sergeant Jefferson pointed his Taser at Mr. Olivas and intentionally shot Mr. Olivas. This was patently unreasonable. Unreasonable force is unconstitutional force.

e. Officer Caleb Elliott (#3007)

36. Officer Caleb Elliott signed a statement related to the incident leading to Mr. Olivas' death. In his statement, he indicated that, on July 10, 2017, at approximately 12:30 p.m., he was driving a marked patrol vehicle in full uniform. He wrote that he overhead a suicide in progress call at Mr. Olivas' home, and that the call was announced on the radio. He said the call text indicated that the caller's father was wanting to harm himself. Upon information and belief, there was no call text indicating that Mr. Olivas wanted to harm anyone else. Officer Elliott indicated that, since he was coming back to the East District from administrative markout at the main station, he waited until he was inside East District lines before sending the dispatcher a message informing her that he would be in route to the call. He then received information over the radio that Mr. Olivas was

pouring gasoline on himself. Officer Elliott activated his overhead lights and siren and began to drive to Mr. Olivas' home.

37. As Officer Elliott got close to Mr. Olivas' home, he heard Officer Guadarrama call out on the radio that he was staged near Mr. Olivas' home. Officer Elliott turned off his siren when he was approximately 200 yards north of Carla Avenue on Allen Avenue. He then saw Officer Guadarrama, who had parked on Mr. Olivas' street just off of Allen Avenue, begin to drive to Mr. Olivas' home. Officer Elliott followed Officer Guadarrama and parked directly behind him (just west of Mr. Olivas' home).

38. As Officer Elliott and Officer Guadarrama walked toward Mr. Olivas' home, Officer Elliott put on latex gloves due to information regarding gasoline having been poured onto Mr. Olivas. Officer Guadarrama told Officer Elliott that, some time back, he and other officers had responded to the home and discovered a man who possibly could be the same subject in the current call and who Officer Guadarrama said was wanting suicide by cop at the time. The assertion that Mr. Olivas wanted "suicide by cop" was false. Mr. Olivas never wanted "suicide by cop" and/or to be killed by any police officer. In fact, Mr. Olivas did not want to commit suicide, and he would not have committed suicide that day. Upon information and belief, Officer Guadarrama made the statement to create in advance a defense for himself if anything were to go wrong inside the home. Mr. Olivas needed help. He did not need to be Tased and killed by police.

39. At this point, Sergeant Jefferson arrived at the scene. Sergeant Jefferson approached Officer

Guadarrama and Officer Elliott in the front yard. Sergeant Jefferson, being in charge of the scene, said to Officer Elliott, "Elliott, you take less lethal." Officer Elliot understood the instruction, and un-holstered his Taser and held it by his side in his right hand. However, shortly after unholstering his Taser, Officer Elliott realized what everyone at the scene realized as well – if Mr. Olivas "had actually poured gasoline on himself, applying a Taser was likely to ignite a fire." Thus, consistent with Officer Elliott's Taser-use knowledge, he knew that Mr. Olivas would probably catch fire if someone used a Taser on him. Sergeant Jefferson, who was in charge, and Officer Guadarrama, possessed the same knowledge. They knew that, if they Tased Mr. Olivas after he had poured gasoline on himself, he would probably catch fire. Thus, while Sergeant Jefferson referred to Officer Elliott's potential use of a Taser as "less lethal," he knew that it would likely be lethal if Mr. Olivas had poured gasoline on himself.

40. Officer Elliott kept his Taser out and by his side as they entered Mr. Olivas' home, due to, at that moment, Officer Elliott not knowing for sure whether Mr. Olivas had actually poured gasoline onto himself or if, instead, Mr. Olivas' family had meant only that Mr. Olivas had been grabbing at a gasoline can in an attempt to pour gasoline on himself. Officer Elliott's speculation would soon be remedied, and he, along with every other officer in the room with Mr. Olivas, would know with certainty that Mr. Olivas had in fact poured gasoline on himself.

41. Officer Elliott continued his written statement. He affirmed that he would use the Taser "only if [he] had sufficient reason to believe [Mr. Olivas] had not

actually poured gasoline on himself." Therefore he "kept it in [his] hand in case [he] immediately had cause to use it and knowledge that [Mr. Olivas] had not doused himself in gasoline." Officer Elliott knew that he could not use excessive, unconstitutional force on Mr. Olivas by firing a Taser at him when he was doused with gasoline, even if a ranking officer instructed him to do otherwise.

42. Officer Guadarrama entered the home before Officer Elliott, and Sergeant Jefferson was directly behind Officer Elliott. Officer Elliott saw a female standing inside near the entrance to the home. Thus, the female could have been easily removed from the home by the Defendant officers. After he entered Mr. Olivas' home, Officer Elliott observed a puddle of some liquid on the floor to the right of the front door.

43. Officer Elliott followed Officer Guadarrama into the bedroom in which Mr. Olivas was located. The bedroom was directly east of the front door. As soon as Officer Elliott entered the room, he could smell the odor of gasoline. Upon information and belief, the Defendant officers also could smell the odor of gasoline in the air as they entered the room. Thus, they all knew that Mr. Olivas would probably catch fire if he were Tased and covered with gasoline.

44. Officer Elliott saw Mr. Olivas on the far south wall of the room, leaning against the wall. Mr. Olivas was holding a red plastic gas can against his body, and it appeared to be a 2-gallon or 2.5-gallon can. Officer Elliott said that he observed two or three family members attempting to pull the gas can away from Mr. Olivas. However, there were only two family members in the room. Mr. Olivas and the family members were yelling and screaming, but Officer

Elliott could not make out any words. Officer Guadarrama moved to the left side of the room, in front of a large piece of furniture. Officer Elliott moved to the right side of the room in front of another piece of furniture which separated him from Officer Guadarrama. Sergeant Jefferson then entered the room, standing at the end of the couch between Officer Guadarrama and Officer Elliott.

45. Officer Elliott used his flashlight to illuminate Mr. Olivas. He noted that Mr. Olivas' body appeared dry. Thus, Officer Elliot believed that "Taser deployment may have been possible due to the lack of visible gasoline on his body." Therefore, Officer Elliott activated his Taser and pointed it at Mr. Olivas. At that time, family members moved behind the officers and stood closer to the room's doorway. The Defendant officers should have taken that opportunity to physically remove those family members from the home and avoid what would occur. Officer Elliott turned his head and shouted at the family, "Get out of here, now!" Mr. Olivas's wife and son backed to the doorway, and then moved back into the room. However, they then remained generally in line with the three police officers and not adjacent to Mr. Olivas. Upon information and belief, Defendant officers did nothing to physically remove the family from the situation. It would have been reasonable to do so at that time, and before any interaction with Mr. Olivas had occurred.

46. At this point, Officer Elliott realized that, although Mr. Olivas' skin appeared dry, he could still have gasoline fumes on or around him. Thus, if Tased, Mr. Olivas could be set on fire. Officer Elliott turned his head slightly, so that he could see Sergeant

Jefferson and Officer Guadarrama. He then shouted to Sergeant Jefferson and Officer Guadarrama, "If we Tase him, he is going to light on fire." Upon information and belief, Sergeant Jefferson and Officer Guadarrama heard what Officer Elliott said. Officer Elliott then holstered and turned off his Taser.

47. It was abundantly clear to Officer Elliott that, if any one Tased Mr. Olivas, Mr. Olivas would catch fire. Officer Elliott did not say he would likely catch fire, or would probably catch fire. He said that he would catch fire.

48. Thus, it was clear to all three officers in the room that, if Mr. Olivas was Tased, he would suffer significant burns and injury, and potentially death. Officer Elliott had been with the City of Arlington Police Department for only approximately one year at that time, whereas Sergeant Jefferson had been with the Department over fourteen years, and Officer Guadarrama had been with the Department over nine years. However, Officer Elliott acted at that time in a reasonable manner, stating his knowledge regarding Taser deployment. Sergeant Jefferson and Officer Guadarrama had the same knowledge but chose to ignore it and instead act in an unreasonable, unconstitutional manner.

49. Officer Elliott then unholstered his OC spray and shook it briefly, attempting to mix it thoroughly, before spraying Mr. Olivas in the face from approximately 6 feet away (for approximately 2 seconds). According to Officer Elliot, as Officer Elliott shook his spray, Mr. Olivas stood up and poured gasoline over his head and onto his head. However, Officer Elliott left out the fact that Mr. Olivas, after being sprayed in the face, could not see and was

rubbing his eyes with his hand, and was not making any gestures or aggressive moves toward anyone. Officer Elliott could see the gasoline running all the way down Mr. Olivas's torso and beginning to soak his pants. Upon information and belief, other officers in the room also saw the same thing. At some point, Mr. Olivas began screaming "non-sense" and yelling that he was going to burn the place to the ground. However, by this time, Mr. Olivas had moved to a position near the middle of the far wall to the left corner, near the window. It was at this point he began to turn and face Officer Elliott. Officer Elliott, fearing that he would flood the room with OC spray fumes and begin to incapacitate himself and other officers, shut off the spray. Mr. Olivas was still blinded as a result of OC spray being sprayed into his eyes.

50. The fact that Officer Elliott alleges that he was only 6 feet away from Mr. Olivas shows that Mr. Olivas could have easily been subdued by Officer Elliott, by Officer Elliott rushing and grabbing Mr. Olivas. Upon information and belief, other officers in the room could have done the same. Police officers often use what is referred to as the "21-Foot Rule" when attempting to defend themselves from excessive force allegations. This purported rule holds that, if a subject armed with a knife, club, or similar weapon is within 21 feet of an officer, a reasonable conclusion would be that the officer would be within a danger zone. According to the alleged rule, such a person would be able to close the distance and use the weapon before the officer could unholster and use his or her handgun. The purported rule further holds that the subject could close the 21 feet in about one-and-a-half seconds.

51. Assuming without admitting that the 21-Foot Rule presents a truthful scenerio, then Mr. Olivas being only 6 feet away from Officer Elliott, and only a bit more than that away from other officers in the room, such 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. However, instead of doing so, Defendant officers ultimately chose to Tase, and unfortunately kill, Mr. Olivas. They chose to do this knowing that there were others in the room that they could have physically removed. Thus, Defendant officers acted unreasonably and unconstitutionally.

52. Notably, it was not until after this point that Officer Elliot noticed that Mr. Olivas had an object in the hand other than the hand with which he was holding the gasoline can. Upon information and belief, other officers likewise had not noticed the object until that time. Thus, any and all officers in the room could have and should have quickly physically subdued Mr. Olivas rather than stand at a distance and using OC spray and/or a Taser to attempt to subdue him. It was unreasonable to think that gas alone, without some lighting device, would have been a danger keeping officers from quickly and physically subduing Mr. Olivas.

53. Officer Elliott noticed the object in Mr. Olivas' hand when Mr. Olivas lowered the gasoline can with his left hand but kept his right hand raised. Officer Elliott believed the object to be a lighter of some sort. Officer Elliott realized that officers either had to find a way to incapacitate Mr. Olivas (which, upon information and belief, they could have already physically done quickly), or evacuate the home and

formulate a plan to remove the subject. The home evacuation should have been done immediately when officers arrived at the scene, but they chose to unreasonably engage in extended interaction with Mr. Olivas and ultimately cause his death.

54. Officer Elliott observed Sergeant Jefferson pull his Taser out of its holster and point it at Mr. Olivas. Officer Elliott then saw two red lasers trained on Mr. Olivas' chest. This indicated to Officer Elliott that there were two Tasers pointed at Mr. Olivas. Officer Elliott's Taser was still holstered, and turned off. Shockingly, Officer Elliott then heard a sudden pop, indicating to him that a Taser had been fired. "[T]he subject was suddenly engulfed in flame." The Tasing of Mr. Olivas caused him to catch fire and ultimately die. Both Tasings contributed to, were producing causes of, and were proximate causes of Mr. Olivas catching fire and dying. South and east walls in the room quickly started to catch fire, and Officer Elliott could feel immense heat. The family was still behind Officer Elliott at that time, which once again showed that Defendant officers could have quickly forced family members to exit the home through the relatively close front door. This was, unfortunately, demonstrated after Mr. Olivas caught fire. Officer Elliott "began to push and shove the family out of the room, saying, 'Get out, get out now!'" Sergeant Jefferson and Officer Guadarrama were closer at that point in time to Mr. Olivas than was Officer Elliott. Officer Elliott ultimately ran out of the home to make sure all the family members were outside, and he observed a family member grabbing a water hose to try to put out the fire from the outside of the home. At one point, Officer Elliott went back into the home and

saw Mr. Olivas laying on the ground, kicking and flailing as he laid there, on fire, and in horrific pain.

2. Mr. Olivas' Medical Condition at the Scene

55. American Medical Response ("AMR") responded to the scene to medically assist Mr. Olivas. Records indicate that AMR received a call at 11:55 a.m. and arrived at Mr. Olivas' side at 12:13 p.m. Mr. Olivas' pain was listed in records as being 10 on a scale of 10 at 12:15 p.m. The listed chief complaint was "burn."

56. Records indicate that Mr. Olivas was found with what appeared to be a full-body burn, having mostly second and third degree burns with some first degree burns. Mr. Olivas could not open his eyes, and his clothes were burned off with the exception of a portion of his pants and socks. Mr. Olivas was yelling for help. His skin was ashen, black, and red. Mr. Olivas appeared to have Taser barbs in his chest. The barbs were removed.

57. Mr. Olivas was transferred to the hospital by ambulance. He did not say anything during transport about what occurred, or how he became engulfed in flames. Mr. Olivas was crying in pain and demanding morphine. Morphine was administered to Mr. Olivas on the way to the hospital, in three doses of 5 milligrams each. Even after administration of that medication, Mr. Olivas was described as fully alert and screaming. Mr. Olivas was unable to sign medical records due to his injuries. Records indicate that an EMT was told at the hospital, by someone with the Arlington Police Department, that Mr. Olivas poured gasoline all over himself and lit himself on file to attempt suicide. The allegation that Mr. Olivas lit

himself on fire is false, and it was made to deflect liability from Defendants.

3. Autopsy

58. Stephanie S. Burt, M.D., Assistant County Medical Examiner with Collin County Office of the Medical Examiner, conducted an autopsy of Mr. Olivas. The report indicates that Mr. Olivas was 5 feet, 8 inches tall and weighed 200 pounds. Dr. Burt found that Mr. Olivas had suffered thermal burns and smoke inhalation. She further found extensive partial to full-thickness burns with debridement and skin grafts over eighty-five percent (85%) of Mr. Olivas' body. She noted a history of inhalation injury with soot in his airway. Based upon the autopsy and history available to Dr. Burt, it was her opinion that Mr. Olivas died as the result of thermal burns and smoke inhalation. Dr. Burt did not reach any opinion as to what caused the fire which ultimately caused Mr. Olivas' death. However, the fire was caused by Taser deployment described in this pleading.

D. Death Investigation

1. Taser Analysis by Axon Enterprise, Inc. (f/k/a Taser International, Inc.)

59. Axon Enterprise, Inc., formally known as Taser International, Inc. ("Axon"), was asked to analyze Taser evidence distroyed in the fire to determine if the cartridge in each relevant Taser had deployed on July 10, 2017. Axon received, on July 26, 2017, two boxes. One box was labeled "RHA 9," and the other box was labeled "RHA 10." Axon provided a report, dated September 7, 2017, regarding its analysis. Axon noted that the X26 Taser was first produced in 2004 and ultimately retired from production in December 2015.

The X26 is activated by pulling the trigger when the device is armed. If the trigger is pulled and released, the X26 will be active for 5 seconds.

60. The report also indicated that the Taser X26P device is a single-cartridge device in the Axon Smart CEW line which was first available in January 2013. It was designed significantly on the X26 platform first available in April 2012, which was in turn was significantly designed on the Taser X3 platform first avaialable in July 2009. The X26P device also had an ambidextrous safety switch. When the switch is in the up position, the weapon is armed and ready to activate. The X26P is in safe mode when the safety switch is in the down position.

61. The X26 and X26P deploy Taser-brand standard cartridges. Cartridges are offered in distances of 15 feet, 21 feet, and 25 feet. A 35-foot cartridge was offered until April 2012. When a Taser cartridge is deployed, 20-to-30 AFID tags are disbursed. The AFIDs are printed with the serial number of the cartridge from which they are deployed.

62. Axon analyzed evidence it received from Arlington. As to evidence labeled RHA 9 (Item 1), results showed that the cartridge's gas capsule was punctured, and the wire bundle was not present inside the cartridge. This indicated that the cartridge had been deployed. Axon could not determine whether the cartridge was deployed as a result of a trigger pull or as a result of heat (from the fire) exceeding 536 degrees.

63. As to evidence labeled RHA 9 (Item 2) Axon indicated that the cartridge had not been deployed. As to evidence labeled RHA 10, Axon determiend that the cartridge had been deployed. Axon was uncertain as

to whether the cartridge was deployed as a result of a trigger pull or due to heat exceeding 536 degrees.

2. Scene Investigators

64. On Monday, July 10, 2017, at approximately 1:20 p.m., Arlington Police Department Crime Scene Investigator S. Ozuna (#2366) was notified by a crime scene sergeant of the incident involving Mr. Olivas. His report begins with the incorrect statement that Crime Scene Investigator Ozuna ("CSI Ozuna") was notified of the incident on "Monday, July 7, 2017 at approximately 13:20 hours." Upon information and belief, that was a typographical error. Instead, upon information and belief, CSI Ozuna arrived at Mr. Olivas' home on July 10, 2017 at approximately 1:49 p.m.

65. CSI Ozuna noted that the weather was clear and hot. He observed multiple fire trucks and police vehicles arround Mr. Olivas' home. He also noted that Mr. Olivas' home was a two-story house, with the front door oriented to the south. He indicated that the front yard was on the east side of the home. CSI Ozuna saw fire damage from the outside of the home involving the downstairs southeast bedroom. CSI Ozuna was led to that bedroom from the front door by, upon information and belief, fire investigators. Electricity to the home had been terminated. CSI Ozuna provided in his report a detailed description of what he observed at the scene, including significant fire damage to Mr. Olivas' home.

66. Fire Investigator R. Alcantar (#689) also responded to the house fire on July 10, 2017. He noted that the most severe fire damage was located on the southeast corner of the house. There was heavy fire, smoke, and heat damage visible in the bedroom in

which Mr. Olivas was Tased and caught fire. The mattress in the room had fire damage, such that mattress springs were visible. There was also a section on the top of a dresser that had been burned away. According to his report, "All windows in the bedroom were broken."

3. Arlington Police Department Homicide Unit

67. Detective Grant Gildon (#2261) conducted an investigation regarding Mr. Olivas' death, and he drafted reports including a 137-page report. Information in this section of the pleading was obtained from that 137-page report.

68. On the very day that Mr. Olivas was shot with Tasers and engulfed in flames, Sergeant Jefferson, Officer Guadarrama, and Officer Elliot were already meeting with an attorney representing them from the Combined Law Enforcement Association of Texas ("CLEAT"). "They stated prior to [Detective Gildon's] arrival they were told Officer Guadarrama would not be giving a statement to [Detective Gildon] on [that] date and that it was undetermined if the others would be providing statements." Thus, the Defendant officers were able to meet with an attorney, while Mr. Olivas was receiving emergency medical treatment at the hospital, even before giving statements as to what occurred. While at Medical City of Arlington on that date, which is where Detective Gildon learned information in the preceding sentence, he also learned that four Taser probes were recoverd from Mr. Olivas and his clothing. This indicated that two Taser deployments had occurred.

69. Attorney Terry Daffron, with CLEAT, was the attorney who responded to the hosptial to represent

Sergeant Jefferson, Officer Guadarrama, and Officer Elliott. Detective Gildon informed Ms. Daffron of the status of the case, and further that he wanted to speak to the three officers about what occurred. Ms. Daffron asked if there was anything in particular about which Detective Gildon wanted to ask during interviews. Thus, upon information and belief, Defendant officers' attorney was able to learn a bit about what Detective Gildon would ask – even before he asked it. Further, upon information and belief, she was then able to communicate this information to Defendant officers.

70. On July 10, 2017, Detective Gildon met with Sergeant Jefferson at Medical City of Arlington. Also present were Sergeant Jefferson's attorney, Ms. Daffron, as well as Sergeant Jones, Detective Griesbach, Sergeant Coggeshall, and Lieutenant Harris. Sergeant Jefferson said that he told Officer Elliott before entering Mr. Olivas' house that Officer Elliott would be the designated officer for the less-leathal option. This indicated that Sergeant Jefferson had delegated to Officer Elliott the decision to use a Taser (if needed and reasonable).

71. Sergeant Jefferson "described experiencing the strong odor of gasoline throughout the residence." "He also falsely told the detective that he "Pulled his Taser out but didn't point it at the Decedent." He also falsely represented "he didn't fire his Taser at any point during the incident." However, Sergeant Jefferson was quick to blame Officer Guadarrama for firing his Taser and striking Mr. Olivas. Sergeant Jefferson falsely told the investigator that he dropped his Taser onto the floor. He did admit that Officer Elliott, who had been the designated person to determine whether Taser use was appropriate, did not fire his Taser.

72. Upon information and belief, Arlington did not terminate Sergeant Jefferson as a result of his making false material statements to an investigator. Further, upon information and belief, Arlington did not seek prosecution of Sergeant Jefferson as a result of such false statements made to a law enforcement officer.

73. Sergeant Jefferson admitted that, after Taser deployment, Mr. Olivas and multiple items in the room caught fire. This showed that Taser use can cause gas fumes alone to ignite.

74. Detective Gildon also interviewed Officer Elliott at the hospital. Officer Elliott told Detective Gildon that, when holstering his Taser after entering the residence, as described elsewhere in this pleading, he said out loud that they couldn't Tase Mr. Olivas. Officer Elliot also said that he saw two separate red dots moving around on Mr. Olivas' chest, and that he believed those dots to be dots from Tasers. He also said that, upon hearing the Taser discharge, Mr. Olivas and the room became engulfed in flames. After the interview, Detective Gildon met with Ms. Daffron and scheduled to meet with her and her client-officers two days later to answer questions and provide further details.

75. Detective Gildon noted that Officer Elliott was in possession of both of his Taser cartridges. He also noted that Officer Guadarrama had one Taser cartridge loaded into his Taser. A second Taser cartridge was in his bag inside his patrol vehicle. Detective Gildon seized the cartridge inside the patrol vehicle.

76. Sergeant Jefferson told Detective Gildon that both of his Taser cartridges were attached to his Taser. Upon information and belief, this was a further

false representation made by Sergeant Jefferson to a law enforcement officer. Detective Gildon was told that both Officer Guadarrama and Sergeant Jefferson dropped their Tasers inside of Mr. Olivas' residence when the fire started.

77. Detective Gildon obtained Arlington training records for Officer Elliott and the Defendant officers. Records indicated that they all completed electronic control weapon (Taser) training in 2017, and that they were certified and approved to carry and operate Tasers as of July 10, 2017. Sergeant Jefferson completed his annual Taser training on February 5, 2017, Officer Guadarrama completed his annual training on February 28, 2017, and Officer Elliott completed his annual training on June 3, 2017.

78. On July 12, 2017, Detective Gildon interviewed Sergeant Jefferson again. The interview occurred at the Arlington Police Department. Sergeant Jefferson's attorney, Ms. Daffron, was present. Sergeant Jones and Detective Griesbach were also present.

79. Sergeant Jefferson admitted that he instructed Officer Elliott to be prepared with "less lethal coverage." This meant that Officer Elliott was the designated officer for any Taser use. Sergeant Jefferson also admitted that, as officers entered the residence, he could smell an odor of what appeared to be gasoline.

80. Sergeant Jefferson, still weaving a tale of alleged non-involvment in Tasing Mr. Olivas, said that he pulled his Taser out at one point but then decided to re-holster it. This is clearly untrue, because Sergeant Jefferson shot his Taser at Mr. Olivas. Sergeant Jefferson also admitted that, as he entered the residence, he thought a Taser could possibly be

used to control Mr. Olivas. Sergeant Jefferson admitted that, at the moment he saw Officer Guadarrama pull his Taser, he began pulling his Taser from his holster. Detective Gildon asked Sergeant Jefferson whether he pointed his Taser at Mr. Olivas. "He stated he did not." This was yet another false statement made by Sergeant Jefferson to a law enforcement officer. Detective Gildon continued:

> He said as he was drawing his [T]aser Officer Guadarrama fired his [T]aser, which caused Sgt. Jefferson to flinch. I then observed Sgt. Jefferson demonstrate how he flinched with the [T]aser in his right hand. Sgt. Jefferson stated the Decedent then became engulfed in flames, so he dropped his [T]aser on the ground. He stated he didn't believe he fired his [T]aser.

Thus, Sergeant Jefferson continued in his false narrative, making material misrepresentations to a law enforcement officer investigating Mr. Olivas' death. Upon information and belief, Arlington did not terminate Sergeant Jefferson from his employment as a police officer and did not seek prosecution of him for the making of such false statements. This was some evidence of Arlington's existing policy that the use of a Taser on suicidal subjects covered with gas was appropriate.

81. Detective Gildon pushed Sergeant Jefferson about Sergeant Jefferson's false representation:

> I began asking Sgt. Jefferson if he fired his [T]aser while in the bedroom addressing the Decedent. He stated he did not discharge his [T]aser. I informed Sgt. Jefferson that a total of four [T]aser probes were removed from the

> Decedent, which would indicate two separate [T]aser discharges occurred. Upon hearing this, he immediately stated that if two [T]asers were discharged then he had to of [sic] fired his [T]aser. He stated he knew Officer Elliott didn't fire a [T]aser because his [T]aser was holstered at the time.

Thus, once Detective Gildon convinced Sergeant Jefferson that Detective Gildon could prove with physical evidence that Sergeant Jefferson filed his Taser at Mr. Olivas, Sergeant Jefferson finally told the truth.

82. Detective Gildon also interviewed Officer Elliott again. The interview occurred on July 12, 2017 at the Arlington Police Department. Officer Elliott once again reiterated that, due to the presence of gasoline, he holstered his Taser. Detective Gildon wrote, "He holstered the [T]aser and stated to the other officers, 'If we [T]ase him, he's going to light on fire.'" Thus, Officer Elliott stated information which Defendant police officers already knew – Tasing Mr. Olivas was certain to result in him catching fire. Tasing Mr. Olivas in the situation in which he was Tased was patently unreasonable.

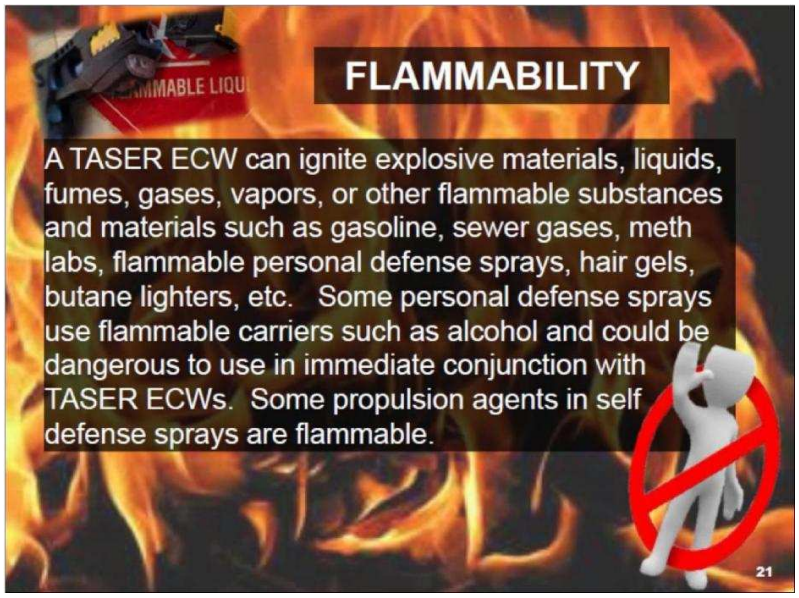
E. Defendant Officers' Experience and Training

1. 2017 Taser Training

83. As indicated elsewhere in this pleading, Sergeant Jefferson, Officer Guadarrama, and Officer Elliott received Taser update training in year 2017 before Mr. Olivas was Tased. Arlington's training did not result in those officers receiving TCOLE credit. They only received in-house Arlington Police Department training credit. Upon information and

belief, this was because Arlington's training did not meet standards high enough for TCOLE credit.

84. These officers were reminded of what they already knew regarding use of a Taser electronic control weapon in a situation in which flammable substances and/or vapors are present. A Taser should not be used. Upon information and belief, each officer reviewed the following page and/or reviewed it as a slide in the 2017 training seminar:



Therefore, when Sergeant Jefferson and Office Guadarrama chose to shoot their Tasers at Mr. Olivas, they knew that he would catch fire. The concept was not new to them but one they had learned years before. They were also reminded of this concept just a few months before Tasing Mr. Olivas in year 2017.

85. Notably, the flammability notice provided by Arlington to its police officers, during annual Taser training, did not prohibit use of a Taser in such a

situation. Therefore, Arlington policy allowed officers, such as Defendant officers, to Tase someone such as Mr. Olivas, even when the person was doused in gasoline. This policy was a moving force behind, caused, and was a proximate cause of Mr. Olivas' injuries, damages, and death.

2. Texas Commission on Law Enforcement Records

86. The Texas Commission on Law Enforcement (TCOLE) keeps records of training completed by, and the work history of, peace officers and jailers in Texas. TCOLE records indicate that Defendant officers, as a result of their experience and law enforcement–related education, knew that what they did with regard with Mr. Olivas violated Mr. Olivas' constitutional rights.

87. TCOLE records indicate the following service history for Officer Elliott:

Appointed As	**Department**	**Award**	**Service Start Date**	**Service End Date**
Peace Officer (Full-time)	Arlington Police Department	Peace Officer License	07/25/16	

88. TCOLE records indicate that Officer Elliott received the following training and/or education, through which he should have obtained sufficient knowledge to know that any failure to act appropriately with regard to Mr. Olivas would have been unreasonable, deliberately indifferent, and a constitutional violation:

Course No.	Course Title	Course Date	Course Hours	Institution
3722	Peace Officer Field Training	12/04/16	160	Arlington Police Academy
2040	Defensive Tactics	08/08/16	8	Arlington Police Academy
101	Addendum Basic Peace Officer	07/29/16	354	Arlington Police Academy
1000643	Basic Peace Officer Course (643)	06/17/16	643	Arlington Police Academy

89. TCOLE records indicate the following service history for Officer Guadarrama:

Appointed As	Department	Award	Service Start Date	Service End Date
Peace Officer	Arlington Police Department	Peace Officer License	02/25/08	01/10/19
Jailer	Parker County Sheriff's Office	Temporary Jailer License	12/26/07	02/14/08

Jailer	Tarrant County Sheriff's Office	Temporary Jailer License	08/22/05	09/08/05

90. TCOLE records indicate that Officer Guadarrama received the following training and/or education, through which he should have obtained sufficient knowledge to know that his failure to act appropriately with regard to Mr. Olivas was unreasonable, deliberately indifferent, and a constitutional violation:

Course No.	**Course Title**	**Course Date**	**Course Hours**	**Institution**
2040	Defensive Tactics	06/07/17	8	Arlington Police Academy
2040	Defensive Tactics	07/09/15	8	Arlington Police Academy
2040	Defensive Tactics	08/18/14	8	Arlington Police Academy
3344	Less Lethal Electronic Control Device Training	01/21/14	4	Arlington Police Academy
2040	Defensive Tactics	08/19/13	8	Arlington Police Academy
2108	Arrest, Search, and Seizure	05/30/13	24	Arlington Police Academy

Course No.	Course Title	Course Date	Course Hours	Institution
	(Intermed-iate)			
3340	Crowd Control	05/22/13	8	Arlington Police Academy
3340	Crowd Control	04/30/13	8	Arlington Police Academy
3344	Less Lethal Electronic Control Device	01/31/13	4	Arlington Police Academy
3344	Less Lethal Electronic Control Device	11/30/12	4	Arlington Police Academy
2040	Defensive Tactics	06/06/12	8	Arlington Police Academy
2053	Baton (all)	12/13/11	8	Arlington Police Academy
2107	Use of Force (Intermed-iate)	11/15/11	16	Arlington Police Academy
2040	Defensive Tactics	08/03/11	8	Arlington Police Academy

Course No.	Course Title	Course Date	Course Hours	Institution
3344	Less Lethal Electronic Control Device	12/08/10	8	Arlington Police Academy
3340	Crowd Control	10/20/10	8	Arlington Police Academy
2040	Defensive Tactics	05/12/10	5	Arlington Police Academy
2040	Defensive Tactics	05/12/10	5	Arlington Police Academy
2040	Defensive Tactics	03/31/09	5	Arlington Police Academy
3722	Peace Officer	12/15/08	160	Arlington Police Academy
101	Addendum Basic Peace Officer	07/14/08	422	Arlington Police Academy
1000	Basic Peace Officer	07/11/08	618	Arlington Police Academy

91. TCOLE records indicate the following service history for Sergeant Jefferson

Appointed As	Department	Award	Service Start Date	Service End Date
Peace Officer	Arlington Police Department	Peace Officer License	03/03/2003	

92. TCOLE records indicate that Sergeant Jefferson received the following training and/or education, through which he should have obtained sufficient knowledge to know that his failure to act appropriately with regard to Mr. Olivas would have been unreasonable, deliberately indifferent, and a constitutional violation:

Course No.	**Course Title**	**Course Date**	**Course Hours**	**Institution**
2040	Defensive Tactics	06/24/15	8	Arlington Police Academy
3009	Supervision (other than TCOLE 3701, 3710, 3711,	03/27/15	8	Arlington Police Academy
3009	Supervision (other than TCOLE 3701, 3710, 3711,	03/26/15	8	Arlington Police Academy
3009	Supervision (other than TCOLE 3701, 3710, 3711,	03/25/15	5	Arlington Police Academy
3009	Supervision (other than TCOLE	03/25/15	3	Arlington Police Academy

Course No.	Course Title	Course Date	Course Hours	Institution
	3701, 3710, 3711,			
3009	Supervision (other than TCOLE 3701, 3710, 3711,	03/24/15	4	Arlington Police Academy
3009	Supervision (other than TCOLE 3701, 3710, 3711,	03/24/15	4	Arlington Police Academy
2096	Arrest, Search & Seizure (Non-Intermed-iate Core Co	11/20/14	16	Arlington Police Academy
2040	Defensive Tactics	09/16/14	8	Arlington Police Academy
2108	Arrest, Search, and Seizure (Intermed-iate)	07/31/14	24	Arlington Police Academy

Course No.	Course Title	Course Date	Course Hours	Institution
3737	New Supervisor's Course	01/31/14	56	Institute for Law Enforcement Administration
3700	Management/ Supervision	01/31/14	64	Institute for Law Enforcement Administration
3344	Less Lethal Electronic Control Device Training	01/28/14	4	Arlington Police Academy
2040	Defensive Tactics	11/07/13	8	Arlington Police Academy
3340	Crowd Control	05/22/13	8	Arlington Police Academy
3340	Crowd Control	04/30/13	8	Arlington Police Academy
3344	Less Lethal Electronic Control	02/28/13	4	Arlington Police Academy

Course No.	Course Title	Course Date	Course Hours	Institution
	Device Training			
3344	Less lethal Electronic Control Device Training	08/31/12	4	Arlington Police Academy
2040	Defensive Tactics	06/06/12	8	Arlington Police Academy
2107	Use of Force (Intermed-iate)	11/15/11	16	Arlington Police Academy
2040	Defensive Tactics	06/28/11	8	Arlington Police Academy
2040	Defensive Tactics	06/21/11	24	Arlington Police Academy
2056	Toxic Chem/ Radioactive Materials	12/15/10	8	Arlington Police Academy
3344	Less Lethal Electronic Control	12/08/10	8	Arlington Police Academy

Course No.	Course Title	Course Date	Course Hours	Institution
	Device Training			
3340	Crowd Control	11/11/10	8	Arlington Police Academy
3340	Crowd Control	11/04/10	24	Arlington Police Academy
3343	Less Lethal Chemical Weapons Training (OC, Mace . . .)	07/20/10	8	Arlington Police Academy
2108	Arrest, Search, and Seizure (Intermed-iate)	07/15/10	24	Arlington Police Academy
2040	Defensive Tactics	05/14/10	5	Arlington Police Academy
3340	Crowd Control	04/28/10	24	Arlington Police Academy
2040	Defensive Tactics	03/03/09	5	Arlington Police Academy

Course No.	Course Title	Course Date	Course Hours	Institution
2040	Defensive Tactics	09/23/08	16	Arlington Police Academy
55037	Field Training Officer	06/18/07	40	Arlington Police Academy
1000	Basic Peace Officer	03/03/03	576	Arlington Police Academy

Officer Elliott, who had much less training and experience than Sergeant Jefferson and Officer Guadarrama, chose the correct course of action regarding use of his Taser – keep it holstered.

F. Defendant Police Officers Acted in an Unreasonable, Unconstitutional Manner

93. As alleged in this pleading, the Defendant police officers acted in a patently unreasonable manner when Tasing, and ultimately killing, Mr. Olivas. Further, as alleged in this pleading, Defendant police officers acted in an unconstitutional, unreasonable manner when choosing not to evacuate other people from the residence but instead Tasing Mr. Olivas with such people present.

94. In the alternative, or in addition, Defendant police 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. A crisis negotiation/intervention team advises patrol officers on psychiatric issues that arise in the course of their law enforcement duties and assists in transportation and processing of individuals deemed to need inpatient psychiatric treatment. If Mr. Olivas barricaded himself in the home and refused to exit, utilization of SWAT would have been a safer alternative. SWAT is equipped with special training, equipment, and tools, such as ballistic shields, chemical agents, Saber Red 16-ounce Stream MK-9 or a similar high-volume Oleoresin Capsicum ("OC") Streamer, less-than-lethal launchers/ projectiles, ballistic/tactical gear, ballistic helmets, and armored rescue/recovery vehicles. Handling barricaded subjects, if such would be the case with Mr. Olivas after evacuation of the home, requires special tools and expertise. This comes from specialized training of officers. The SWAT team would have been equipped and trained to resolve any barricaded subject situation.

95. In addition, or in the alternative, the City of Arlington, through the Arlington Police Department, failed to properly train and certify Sergeant Jefferson according to TCOLE records. TCOLE records indicate that his last documented electronic control device/Taser training was on January 28, 2014. Moreover, TCOLE records indicate that the last certified training of and for Officer Guadarrama, for electronic control device/Taser, was on January 21, 2014. It appears that the City of Arlington only gave internal credit for other purported Taser training for those police officers. Upon information and belief, the City of Arlington did so because the training was not up to standards required for training to be reported to

TCOLE. Thus, Arlington's failure to appropriately train the Defendant police officers was a moving force behind and proximately caused Mr. Olivas' death and all other damages asserted herein.

G. City of Arlington's *Monell* Liability

96. Arlington is liable for all damages referenced and asserted in this pleading pursuant to *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978) and its progeny. Such liability arises due to the action and/or inaction of the chief policymaker for Arlington regarding police duties. The chief policymaker was the police chief at all relevant times, or the chief policymaker for the City had delegated such chief policymaking authority to the police chief. Regardless, Fifth Circuit precedent is clear that Plaintiffs need not identify the specific chief policymaker at this stage of this case. Arlington's action and inaction referenced in this pleading, and its policies, practices, and/or customs, were moving forces behind, resulted in, were producing causes of, and were proximate causes of referenced constitutional violations and damages (including Mr. Olivas' death).

1. City of Arlington's Policy Regarding Escalation in Force was a Moving Force Behind and Proximately Caused Mr. Olivas' Death

97. The Arlington Police Department had in place, on July 10, 2017, an escalation of force policy. Upon information and belief, that policy read:

> **Escalation.** Under normal circumstances, only the methods or instrumentalities listed below may be used to apply force. These methods are

listed in ascending order from the least severe to the most extreme:

- Employee/employee **presence**: uniform, badge, patrol car, physical bearing;
- Verbal **direction**: verbal communication, negotiation skills;
- Passive **guidance/control**: hands-on escorting, picking up body weight, pushing-pulling gently;
- **Oleoresin-Capsicum** spray;
- **Electronic Control Device**;
- **Empty hand control**: soft (fingertip pressure applied to pressure points) or hard (striking motorpoints with hands/feet);
- **Intermediate weapons**: soft/(wrist locks using impact weapon) or hard (striking motorpoints with impact weapon);
- **Vascular Neck Restraint** and;
- Approved **firearm** and ammunition.

(Emphasis in original).

98. Arlington decided that the least severe use of force was police officer presence, while the greatest use of force was use of a firearm. Arlington described the use of force continuum being listed "from the least severe to the most extreme." Thus, Arlington educated its police officers that they should apply that continuum when dealing with people such as Mr. Olivas.

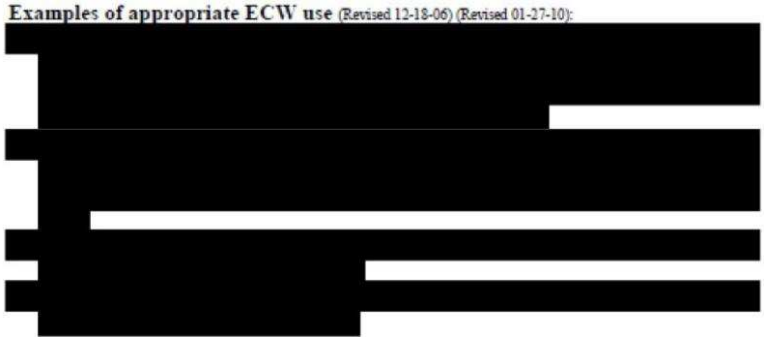
99. There are at least two issues with the use-of-force continuum, and its application, which were moving forces behind and proximately caused Mr. Olivas' death. First, the use-of-force continuum indicates that Arlington police officers should use

their electronic control devices (Tasers) before they should attempt to use soft hand techniques, which could simply be fingertip pressure applied to pressure points, or in the alternative hard-hand techniques. The continuum also indicates that an officer should use his or her Taser before using intermediate weapons, such as hard impact weapons. However, it is undisputed that a Taser can cause death in more situations than would use of soft hand techniques or impact weapons applied to certain portions of a person's body. Thus, Arlington educated Defendant police officers to use their Tasers before using physical force with Mr. Olivas. As shown elsewhere in this pleading, physical force is what should have been used with Mr. Olivas, if even necessary, after removal of other people from the house.

100. Second, the use-of-force continuum contains no adjustment for and/or mention of a situation like that involving Mr. Olivas. The continuum does not address the presence of gas and/or flammable fumes. Thus, when Defendant officers chose to apply Arlington use-of-force policy, they would be required to apply it as written and not take into account the fact that Mr. Olivas would catch fire if a Taser were used against him. This likewise was a moving force behind, caused, and proximately caused Mr. Olivas' injuries and death.

101. Interestingly, when Arlington police policies were obtained pursuant to a Public Information Act request before suit was filed, Arlington chose to redact, and thus hide, what it considered to be examples of appropriate Taser use:

b. **Examples of appropriate ECW use** (Revised 12-18-06) (Revised 01-27-10):



(Redactions in original).

Upon information and belief, Arlington chose to redact these examples because they would show that its use of force policy, as ultimately applied to Mr. Olivas' situation, was unreasonable.

2. City of Arlington's Policy, Practice, and/or Custom of Allowing Officers to Use a Taser Against a Person Doused with Gasoline was a Moving Force Behind and Proximately Caused Mr. Olivas' Death

102. As noted above, City of Arlington did not prohibit a police officer from using a Taser on a person who had been doused with gasoline. Instead, the City left the decision to the discretion of a police officer. This is an unreasonably policy, and it was implemented, upon information and belief, knowing the certain effects it would have once a police officer Tased a person doused with gasoline. The policy, practice, and/or custom was a moving force behind and proximately caused Mr. Olivas' death.

3. City of Arlington's Policy, Practice, and/or Custom of Continuing to Employ Officer Guadarrama After Numerous Reprimands was a Moving Force Behind and Proximately Caused Mr. Olivas' Death

103. City of Arlington's policy, practice, and/or custom of continuing to employ Officer Guadarrama, after he had received numerous reprimands and counseling regarding his official duties, was a moving force behind and caused Mr. Olivas' death. Before Officer Guadarrama's unfortunate interaction with Mr. Olivas, on July 10, 2017, he had received numerous counseling reports and written reprimands from the Arlington Police Department. As a result, he should have been terminated long before being in the bedroom with Mr. Olivas, armed with a Taser and other weapons. The following table lists such reprimands and counseling reports occurring before July 10, 2017:

Date	**Result**	**Rule/ Regulation**	**Description**
04/08/2010	Counseling Report	APDGO 402.02.A	Obedience to Laws and Regulations 2010-SD-0025
09/12/2010	Written Reprimand	COAPP 201.07.A	Unauthorized Absence 2010-SWRI-0004

10/31/2010	Counseling Report	COAPP 201.00./C	Courtesy 2010-SD-0085
10/10/2013	Written Reprimand	APDGO 403.02.A.1	Probable Cause Arrest 2013-SWRI-0005
01/12/2015	Counseling Report	COAPP 202.02.B	Outside Employment 2015-SD-0003
01/20/2015	Counseling report	APDGO 410.02.B.2	Offense Report 2015-SD-
07/07/2015	Written Reprimand	APDGO 502.02.A	Outside Employment 2015-SWRI-0006
08/22/2016	Written Reprimand	APDGO 410.02.B.2(d)	Offense Report 2016-SWRI-0007
11/04/2016	Written Reprimand	COAPP 201.04.B	Judgment 2016-SWRI-009

Thus, before Officer Guadarrama shot his Taser at Mr. Olivas, he had received five written reprimands and four counseling reports regarding his duty as an Arlington Police Officer. Nine such incidents over the course of approximately seven years shows that he was not qualified to continue in his duties. Most troubling is that the last five incidents occurred over a period of less than two years.

4. City of Arlington's Failure to Discipline Sergeant Jefferson and/or Officer Guadarrama is Evidence of Arlington's Pre-Existing Unconstitutional Policy, Practice, and/or Custom

105. Upon information and belief, Arlington failed to discipline or otherwise take any material adverse employment action against Sergeant Jefferson and/or Officer Guadarrama as a result of the incident involving Mr. Olivas. Upon information and belief, the City's failure to do so was some evidence of pre-existing policy, practice, and/or custom at the time of the incident. Further, upon information and belief, this policy, practice, and/or custom was a moving force behind and proximately caused Mr. Olivas' death.

III. Causes of Action

A. Cause of Action Against Defendants Sergeant Jefferson and Officer Guadarrama and Under 42 U.S.C. § 1983 for Violation of 4th Amendment Rights

105. In the alternative, without waiving any of the other causes of action pled herein, without waiving any procedural, contractual, statutory, or common-law right, and incorporating all other allegations herein (including all factual allegations above) to the extent they are not inconsistent with the cause of action pled here, Defendants Jefferson and Guadarrama are liable to Plaintiffs (including Ms. Ramirez, Gabriel Anthony Olivas, the heirs-at-law of Mr. Olivas, and female minor S.M.O. through Ms. Ramirez acting as her parent, guardian, and next friend), pursuant to 42 U.S.C. § 1983, for violating Mr. Olivas's rights guaranteed by the Fourth Amendment to the United States Constitution, as the Fourth

Amendment has been incorporated to be applied to the States pursuant to the Fourteenth Amendment or otherwise. Defendants Jefferson and Guadarrama acted under color of state law at all times referenced in this pleading. Defendants Jefferson and Guadarrama were deliberately indifferent to Mr. Olivas's constitutional rights, and they acted in an objectively unreasonable manner when seizing and using force with Mr. Olivas, as well as performing all other actions, and further failing to act, as referenced in this pleading. They exercised constitutionally-impermissible excessive force and seizure. Defendants Jefferson and Guadarrama violated clearly established constitutional rights, and their conduct was objectively unreasonable in light of clearly established law at the time of the relevant incident. Defendants Jefferson and Guadarrama were not constitutionally permitted to use the force they chose to use, and they are not entitled to qualified immunity.[1]

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[1] The defense of qualified immunity is, and should be held to be, a legally impermissible defense except as applied to state actors protected by immunity in 1871 when 42 U.S.C. § 1983 was enacted. Congress makes laws. Courts do not. However, the defense of qualified immunity is a court-created defense found nowhere in the statute under which Plaintiffs bring claims in this case. Plaintiffs respectfully make a good faith argument for the modification of existing law, such that the court–created doctrine of qualified immunity be abrogated or limited. The natural person Defendants cannot show that they would fall within the category of persons referenced in the first sentence of this footnote. This would be Defendants' burden, if they choose to assert the alleged defense. Qualified immunity, as applied to persons not immunized under common or statutory law in 1871, is untethered to any cognizable legal mandate and is flatly in derogation of the plain meaning and language of Section 1983.

106. The United States Court of Appeals for the Fifth Circuit has held that using a state's wrongful death and survival statutes creates an effective remedy for civil rights claims pursuant to 42 U.S.C. § 1983. Therefore, Plaintiffs (including Ms. Ramirez, Gabriel Anthony Olivas, the heirs-at-law of Mr. Olivas, and female minor S.M.O. through Ms. Ramirez acting as her parent, guardian, and next friend) seek all remedies and damages available under Texas and federal law including but not necessarily limited to pursuant to the Texas wrongful death statute (Tex. Civ. Prac. & Rem. Code § 71.002 *et seq.*), the Texas survival statute (Tex. Civ. Prac. & Rem. Code § 71.021), the Texas Constitution, common law, and all related and/or supporting case law. Therefore, Mr. Olivas' estate, and/or his heirs-at-law,

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See Ziglar v. Abassi, 137 S. Ct. 1843, 1870-72 (2017) (Thomas, J., concurring). Qualified immunity should have never been instituted as a defense, without any statutory, constitutional, or long-held common law foundation, and it is unworkable, unreasonable, and places too high a burden on Plaintiffs who suffer violation of their constitutional rights. Joanna C. Schwartz, *The Case Against Qualified Immunity,* 93 Notre Dame L. Rev. 1797 (2018) (observing that qualified immunity has no basis in the common law, does not achieve intended policy goals, can render the Constitution "hollow," and cannot be justified as protection for governmental budgets); and William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 82 (2018) (noting that, as of the time of the article, the United States Supreme Court decided 30 qualified immunity cases since 1982 and found that Defendants violated clearly established law in only 2 such cases). Justices including Justice Thomas, Justice Breyer, Justice Kennedy, and Justice Sotomayor have criticized qualified immunity. *Schwartz*, *supra* at 1798–99. Plaintiffs include allegations in this footnote to assure that, if necessary, the qualified immunity abrogation or limitation issue has been preserved.

whose claims are asserted through Ms. Ramirez as the independent administrator of Mr. Olivas' estate, suffered the following damages, for which they seek recovery from these natural person Defendants:

- Mr. Olivas's conscious physical pain, suffering, and mental anguish;
- Mr. Olivas's medical expenses;
- Mr. Olivas's funeral expenses; and
- exemplary/punitive damages.

All such damages were caused and/or proximately caused by the natural person Defendants. If Mr. Olivas had lived, he would have been entitled to bring a 42 U.S.C. § 1983 action and obtain remedies and damages provided by Texas and federal law.

107. Ms. Ramirez, Gabriel Anthony Olivas, and female minor S.M.O. (such claims being asserted through Ms. Ramirez as S.M.O.'s parent, guardian, and next friend) also seek all damages available to them individually as a result of Mr. Olivas's wrongful death. Like all other damages alleged in this section of this pleading, damages suffered by these people were caused and/or proximately caused by the natural person Defendants. Therefore, these people seek and are entitled to obtain all remedies and damages available to them for the 42 U.S.C. § 1983 claims. The natural person Defendants' actions caused, were proximate causes of, and/or were producing causes of the following damages suffered by these people, for which they individually seek compensation:

- loss of services that Ms. Ramirez would have received from Mr. Olivas;
- Mr. Olivas' funeral expenses;

- past mental anguish and emotional distress suffered by them resulting from and caused by Mr. Olivas' death;
- future mental anguish and emotional distress suffered by them resulting from and caused Mr. Olivas' death;
- loss of companionship and society that they would have received from Mr. Olivas; and
- exemplary/punitive damages.

108. Exemplary/punitive damages are appropriate in this case to deter and punish clear and unabashed violation of Mr. Olivas' constitutional rights. The natural person Defendants' actions and/or inaction showed a reckless or callous disregard of, or indifference to, Mr. Olivas' rights and safety. In addition, all such damages resulted from the natural person Defendants choosing to proceed with conscious indifference to and disregard of Mr. Olivas' rights, safety, or welfare after having an actual subjective awareness of the risk involved but nevertheless proceeding with actions resulting in his injuries and death. The natural person Defendants' actions, when viewed objectively from their standpoint at the time of the acts and/or omissions involved, resulted in an extreme degree of risk, considering the probability and magnitude of potential harm to Mr. Olivas. Moreover, Plaintiffs (including Ms. Ramirez, Gabriel Anthony Olivas, the heirs-at-law of Mr. Olivas, and female minor S.M.O. through Ms. Ramirez acting as her parent, guardian, and next friend) seek from the natural person Defendant reasonable and necessary attorneys' fees available pursuant to 42 U.S.C. §§ 1983 and 1988.

B. Cause of Action Against City of Arlington Under 42 U.S.C. § 1983 for Violation of 4th Amendment Rights

109. In the alternative, without waiving any of the other causes of action pled herein, without waiving any procedural, contractual, statutory, or common-law right, and incorporating all other allegations herein (including all factual allegations above) to the extent they are not inconsistent with the cause of action pled here, Defendant City of Arlington is liable to Plaintiffs (including Ms. Ramirez, Gabriel Anthony Olivas, the heirs-at-law of Mr. Olivas, and female minor S.M.O. through Ms. Ramirez acting as her parent, guardian, and next friend), pursuant to 42 U.S.C. § 1983, for violating Mr. Olivas' rights guaranteed by the Fourth Amendment to the United States Constitution, as the Fourth Amendment has been incorporated to apply to the States pursuant to the Fourteenth Amendment or otherwise. Defendants Jefferson and Guadarrama were at all times referenced in this pleading acting in the course and scope of their duties of and for City of Arlington, and they were acting under color of state law. The City acted or failed to act under color of state law at all relevant times.

110. City of Arlington's customs, practices, and/or policies caused, were proximate causes of, and/or were producing causes of all constitutional violations and damages referenced herein. The Arlington Police Department chief of police was the chief policymaker at all times relevant to this pleading. In the alternative, some other person was the relevant chief policymaker. Regardless, the Fifth Circuit has made

it clear that Plaintiffs need not identify the specific policymaker at this stage of the case.

111. Plaintiffs incorporate all factual and *Monell* allegations above regarding the basis for City of Arlington's liability in this case. The City was deliberately indifferent to, and acted in an objectively unreasonably manner regarding, Mr. Olivas' constitutional rights. The City's customs, practices, and/or policies were moving forces behind and caused violations of Mr. Olivas's constitutional rights and showed deliberate indifference to the known or obvious consequences of such customs, practices, and/or policies: constitutional violations. They also caused, were proximate causes of, and were producing causes of all damages (and death) resulting from unconstitutional excessive force against and seizure of Mr. Olivas.

112. The United States Court of Appeals for the Fifth Circuit has held that using a State's wrongful death and survival statutes creates an effective remedy for civil rights claims pursuant to 42 U.S.C. § 1983. Therefore, Plaintiffs (including Ms. Ramirez, Gabriel Anthony Olivas, the heirs-at-law of Mr. Olivas, and female minor S.M.O. through Ms. Ramirez acting as her parent, guardian, and next friend), seek all remedies and damages available under Texas and federal law including but not necessarily limited to the Texas wrongful death statute (Tex. Civ. Prac. & Rem. Code § 71.002 *et seq.*), the Texas survival statute (Tex. Civ. Prac. & Rem. Code § 71.021), the Texas Constitution, common law, and all related and/or supporting case law. Therefore, Mr. Olivas' estate, and/or his heirs-at-law, whose claims are asserted through Ms. Ramirez as the

independent administrator of Mr. Olivas' estate, suffered the following damages, for which they seek recovery from the City:

- Mr. Olivas's conscious physical pain, suffering, and mental anguish;
- Mr. Olivas's medical expenses; and
- Mr. Olivas's funeral expenses.

All such damages were caused and/or proximately caused by the City. If Mr. Olivas had lived, he would have been entitled to bring a 42 U.S.C. § 1983 action and obtain remedies and damages provided by Texas and federal law.

113. Ms. Ramirez, Gabriel Anthony Olivas, and female minor S.M.O. (such claims being asserted through Ms. Ramirez as S.M.O.'s parent, guardian, and next friend) also seek all damages available to them individually as a result of Mr. Olivas' wrongful death. Like all other damages alleged in this section of this pleading, damages suffered by these people were caused and/or proximately caused by the City and the City's policies, practices, and/or customs were moving forces behind and caused such damages. Therefore, the City's actions, policies, practices, and customs caused, were proximate causes of, were producing causes of, and were moving forces behind the following damages suffered by these people, for which they individually seek compensation:

- loss of services that Ms. Ramirez would have received from Mr. Olivas;
- Mr. Olivas' funeral expenses;
- past mental anguish and emotional distress suffered by them resulting from and caused by Mr. Olivas' death;

- future mental anguish and emotional distress suffered by them resulting from and caused by Mr. Olivas' death; and
- loss of companionship and society that they would have received from Mr. Olivas.

Moreover, Plaintiffs (including Ms. Ramirez, Gabriel Anthony Olivas, the heirs-at-law of Mr. Olivas, and female minor S.M.O. through Ms. Ramirez acting as her parent, guardian, and next friend) seek from the City reasonable and necessary attorneys' fees pursuant to 42 U.S.C. §§ 1983 and 1988.

IV. Concluding Allegations

A. Conditions Precedent

114. All conditions precedent to assertion of Plaintiffs' claims have occurred.

B. Use of Documents

115. Plaintiffs intend to use at one or more pretrial proceedings, in motion practice, and/or at trial all documents produced by Defendants.

C. Jury Demand

116. Plaintiffs demand a jury trial on all issues which may be tried to a jury.

D. Prayer

117. For these reasons, Plaintiffs ask that Defendants be cited to appear and answer, and that Plaintiffs (including Ms. Ramirez, Gabriel Anthony Olivas, the heirs-at-law of Mr. Olivas, and female minor S.M.O. through Ms. Ramirez acting as her parent, guardian, and next friend) have judgment for damages within the jurisdictional limits of the court and against all Defendants, jointly and severally, as legally applicable, for damages referenced and/or

mentioned elsewhere in this pleading, and for including but not necessarily limited to:

a) actual damages of and for Ms. Ramirez, Gabriel Anthony Olivas, and female minor S.M.O., individually, including but not necessarily limited to;

- loss of services that Ms. Ramirez would have received from Mr. Olivas;
- Mr. Olivas' funeral expenses;
- past mental anguish and emotional distress resulting from and caused by Mr. Olivas' death;
- future mental anguish and emotional distress resulting from and caused by Mr. Olivas' death; and
- loss of companionship and society that they would have received from Mr. Olivas;

b) actual damages of and for the heirs of Mr. Olivas through the Independent Administrator of his estate, Ms. Ramirez, including but not necessarily limited to:

- Mr. Olivas' conscious physical pain, suffering, and mental anguish;
- Mr. Olivas' medical expenses; and
- Mr. Olivas' funeral expenses;

c) exemplary/punitive damages for all Plaintiffs (including Ms. Ramirez, Gabriel Anthony Olivas, the heirs-at-law of Mr. Olivas, and female minor S.M.O. through Ms. Ramirez acting as her

parent, guardian, and next friend) from the natural person Defendants;

d) reasonable and necessary attorneys' fees for all Plaintiffs (including all heirs at law of Mr. Olivas, Ms. Ramirez, Gabriel Anthony Olivas, and female minor S.M.O. [through Ms. Ramirez acting as her parent, guardian, and next friend]) through trial and any appeals and other appellate proceedings, pursuant to 42 U.S.C. §§ 1983 and 1988;

e) court costs and all other recoverable costs;

f) prejudgment and postjudgment interest at the highest allowable rates; and

g) all other relief, legal and equitable, general and special, to which Plaintiffs (including Ms. Ramirez, Gabriel Anthony Olivas, the heirs-at-law of Mr. Olivas, and female minor S.M.O. through Ms. Ramirez acting as her parent, guardian, and next friend) are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2019 I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court, and the electronic case filing system sent a notice of electronic filing to the following attorneys:

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