No. 21-778

IN THE

Supreme Court of the United States

SELINA MARIE RAMIREZ, INDIVIDUALLY AND AS INDEPENDENT ADMINISTRATOR OF, AND ON BEHALF OF, THE ESTATE OF GABRIEL EDUARDO OLIVAS AND 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,

Petitioners,

v.

JEREMIAS GUADARRAMA; EBONY N. JEFFERSON,

Respondents.

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

RESPONDENT JEREMIAS GUADARRAMA'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a case where surviving family members brought a Fourth Amendment excessive force claim against a police officer who used his taser in a unique and rapidly evolving circumstance that tragically resulted in the death of Petitioners' Decedent, did the Fifth Circuit Court of Appeals correctly apply the doctrine of qualified immunity to preclude liability and suit when the Petitioners did not sufficiently plead that the officer's actions caused the deprivation of a constitutional right, were objectively unreasonable, or violated clearly established law, under the analysis required by *Graham v. Connor*, 490 U.S. 386 (1989), where the Court of Appeals concluded 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"?

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RESPONDENT JEREMIAS GUADARRAMA'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondent Jeremias Guadarrama ("Respondent" or "Guadarrama") files this Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Petition"), and in response to the Brief of the Cato Institute, Law Enforcement Action Partnership, and Roderick & Solange MacArthur Justice Center as *Amici Curiae* in Support of Petitioners ("Brief of Amici"), and respectfully requests that the Court deny the Petition.

OPINIONS BELOW

Although the Petition, at p. 1, accurately cites the reported opinions, it omits reference to the initial citation of the Fifth Circuit's February 8, 2021, opinion as an unreported decision, available at 844 Fed. App'x 710 (5th Cir. 2021).

COUNTER-STATEMENT OF THE CASE

1. Respondent is dissatisfied with the presentation of the statement of the case by Petitioners. Sup.Ct.R. 24.2. Petitioners alleged excessive force against police officers who were faced with a volatile, dangerous situation and shot their tasers in an attempt to bring the situation under control, and thereafter Petitioners' Decedent ignited because he had doused himself in gasoline. Pet. App. 74a-78a, 118a-119a. Respondent sought dismissal based upon his entitlement to qualified immunity, which was denied. Pet. App. 15a-17a. The Fifth Circuit Court of Appeals determined that Respondent was entitled to qualified immunity. Pet. App. 1a-14a.

2. The only "facts" under consideration in an appeal from denial of a dismissal motion under Rule 12 for failure to state a claim are those presented in Petitioners' pleadings. Petitioners' factual allegations are set forth in the lengthy First Amended Plaintiffs' Original Complaint. Pet. App. 61a-128a. As alleged by Petitioners, the following facts are presented.

On July 10, 2017, Petitioners' husband and father, Mr. Gabriel Eduardo Olivas ("Mr. Olivas") had doused himself with gasoline and was threatening to kill himself by lighting himself on fire. Pet. App. 69a-70a. A call was made to the Arlington Police Department that Mr. Olivas was threatening to burn down the house and was pouring gasoline in the house. Pet. App. 71a. The information provided on the call to police stated that Mr. Olivas was high on methamphetamines. Pet. App. 73a.

Respondent responded to the call made to the Arlington Police Department concerning the suicidal person at Mr. Olivas' residence. Pet. App. 74a. Upon arrival, Respondent, Sergeant Ebony Jefferson ("Sgt. Jefferson")[1], and another officer ("Officer Elliott") arrived at the residence. Pet. App. 74a. Respondent detected a strong odor of gasoline inside the house. Pet. App. 74a. Respondent and the other officers were directed by a female family member to a bedroom down the hall. Pet. App. 74a.[2] There, Mr. Olivas was inside the bedroom. Pet. App. 74a-75a. Respondent

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[1] Sgt. Jefferson was also sued in this case, is also a Respondent, and is filing a separate Brief in Opposition. *See* Court's Docket.

[2] The Petition asserts that the officers "cornered Olivas in a bedroom." Pet. 3. Such a somewhat perjorative contention is not accurate where the officers are alleged to have been directed to the bedroom by a family member. Pet. App. 74a.

was concerned that the suicidal male, later identified to be Mr. Olivas, would ignite the bedroom on fire, igniting himself and innocent victims, because Respondent could smell the very strong odor of gasoline inside the bedroom. Pet. App. 75a.

Mr. Olivas then poured gasoline on himself, and threatened to ignite himself and start a fire with a lighter he was holding in his hand. Pet. App. 75a. Sgt. Jefferson and Officer Elliott, and the female family member, were in the room. Pet. App. 75a. The female did not leave the room after several commands to do so by the officers. Pet. App. 75a. Officer Elliott sprayed Mr. Olivas with OC spray, but that did not stop Mr. Olivas' actions. Pet. App. 75a. Sgt Jefferson unholstered his taser and pointed it at Mr. Olivas. Pet. App. 75a. Respondent also unholstered his taser and pointed it at Mr. Olivas. Pet. App. 75a.

Respondent considered using his firearm to address the situation, but decided not to do so for fear that the bullet would strike the nearby female family member. Pet. App. 76a. Fearing for the safety of himself, the other persons in the bedroom, and the other police officers with him, Respondent fired his taser at Mr. Olivas in order to reduce the threat of harm by incapacitating Mr. Olivas. Pet. App. 76a. Mr. Olivas moments later became engulfed in flames, the residence caught fire, and Mr. Olivas later died from his injuries. Pet. App. 76a.

In Petitioners' "Factual Background" section of the Petition, Petitioners assert that the pleadings allege that, "[a]fter being pepper-sprayed, Olivas poured gas on himself and began screaming something unintelligible." Pet. 6. The referenced allegation actually states, "Olivas began screaming 'non-sense' and yelling that he was going to burn the place to the ground."

Pet. App. 86a. Respondent objects to Petitioners' re-characterization of the pleadings because it omits the allegation that Mr. Olivas suddenly and clearly expressed that he was going to burn the house down—as he stood up and raised a lighter in a bedroom full of gas vapors—which indicated to the officers that Mr. Olivas intended to commit felonious arson in a manner that placed his family and the officers in a life-threatening situation. Any assertion by Petitioners that this case does not involve an exigency or threat to the officers, therefore, is belied by Mr. Olivas' expressed and deadly threats set forth in the pleadings.

As part of Petitioners' presentation that the situation facing Respondent was less dangerous and life-threatening, the suggestion is made that Mr. Olivas was "a safe distance away from his family members." Pet. 6. This partial quote from the Amended Complaint, taken out of context, does not accurately portray the situation facing Respondent and the other officers as alleged. The officers and family members are alleged to have been in the room approximately six feet from Mr. Olivas. Pet. App. 87a. The Amended Complaint nonetheless contains a tacit admission by Petitioners that Mr. Olivas presented an immediate and deadly threat to the officers and family members. Pet. App. 77a ("Officers, by shooting their tasers at Mr. Olivas, also further endangered Mr. Olivas's wife and son."). Petitioners' assertion that this case does not involve an exigent threat to Respondent, therefore, is belied by Mr. Olivas' expressed and deadly threat presented in the pleadings.

3. Petitioners brought this action pursuant to 42 U.S.C. § 1983 asserting a violation of Mr. Olivas' rights under the Fourth Amendment to the United States Constitution when the officers tased Mr. Olivas. Pet.

App. 61a-128a. The district court denied Respondent's, and Sgt. Jefferson's, motion to dismiss asserted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure based on qualified immunity. Pet. App. 15a-17a.

4. Respondent, and Sgt. Jefferson, appealed to the Fifth Circuit Court of Appeals, which reversed the district court's decision based upon Respondent's, and Sgt. Jefferson's, qualified immunity, and remanded the case to the district court for entry of an order dismissing Petitioners' claims against Respondent and Sgt. Jefferson. Pet. App. 1a-14a.

a. The Fifth Circuit began its analysis by restating the Court's qualified immunity jurisprudence, beginning with references and citations to *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), and *Pearson v. Callahan*, 555 U.S. 223, 232 (2009), and concluded its summary of the elements of qualified immunity with identifying the standards from *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Pet. App. 5a-6a. The Fifth Circuit correctly summarized the elements of qualified immunity, noting that qualified immunity has two components: (1) whether a plaintiff alleges or shows 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. Pet. App. 6a.

b. Next, the Fifth Circuit began its analysis by determining the first prong of the qualified immunity defense. Pet. App. 6a. The Fifth Circuit noted that Petitioners alleged that Respondent and Sgt. Jefferson violated Mr. Olivas' Fourth Amendment rights by use of excessive force when they fired their tasers at him. Pet. App. 6-7a. The Fifth Circuit's phrasing of the

question was "whether Olivas had a constitutional right not to be tased, not as a general proposition but under the particular circumstances present in this case." Pet. App. 7a. The Fifth Circuit then analyzed the excessive force issue by reviewing the elements from *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). Pet. App. 7a-13a. In a unanimous opinion, the Fifth Circuit concluded 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 found Respondent and Sgt. Jefferson entitled to qualified immunity. Pet. App. 13a.

c. Petitioners sought rehearing *en banc*, which was denied by a vote of 13-4. Pet. App. 18a-19a. The *en banc* process resulted in 3 concurrences and 2 dissents. Pet. App. 20a-60a.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's Decision Did Not Create a New Heightened Pleading Standard.

Petitioners assault the Fifth Circuit's opinion by declaring that it created a "new pleading standard" in claims against police officers in cases alleging excessive use of force. Pet. 12. Characterizing the Fifth Circuit's analysis of Petitioners' claims in light of Respondent's and Sgt. Jefferson's qualified immunity defense as a "new frontier," Petitioners assert that the Fifth Circuit's decision insulates the officers from liability for "clear wrongdoing." Pet. 12. Petitioners' characterizations are without merit.

Petitioners' Amended Complaint asserted a claim against Respondent for excessive force in violation of the Fourth Amendment to the United States Constitution, pursuant to 42 U.S.C. § 1983. Pet. App.

118a-120a. A plaintiff must allege and establish that the alleged constitutional deprivation was intentional or due to deliberate indifference—not the result of mere negligence. *See Farmer v. Brennan*, 511 U.S. 825, 833-35 (1994); *Davidson v. Cannon*, 474 U.S. 344, 348 (1986); *Daniels v. Williams*, 474 U.S. 327, 330 (1986). The use of force is subject to the Fourth Amendment's reasonableness requirement. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397. "The 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." *Graham*, 490 U.S. at 396-97. The Fifth Circuit's opinion specifically based its analysis of Petitioners' claims using *Graham* as the correct legal barometer. Pet. App. 7a-9a. In using this analysis, the Fifth Circuit was not wrong.

The Fifth Circuit's opinion next correctly focused on the alleged facts, viewing them in the light most favorable to Petitioners. Pet. App. 7a-8a. In analyzing Petitioners' excessive force claim, the Fifth Circuit gave careful attention to the facts and circumstances of this particular case in its reasonableness inquiry, using the requirements of *Graham*, by reviewing "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." Pet. App. 8a (quoting *Graham*, 490 U.S. at 396). Thus, the Fifth Circuit used the Court's correct legal standards by which to analyze Petitioners' excessive force claim.

The Fifth Circuit then analyzed the alleged facts using the *Graham* factors. Pet. App. 7a-12a. The court concluded:

> Accepting the pleaded facts as true and construing them in the light most favorable to Plaintiffs, neither officers' 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.

Pet. App. 13a. Contrary to Petitioners' assertion that the Fifth Circuit did not view the facts in the light most favorable to Petitioners (Pet. 21), the opinion both states that the court did so, and it did so. Pet. App. 7a, 13a.

Petitioners nonetheless complain that the Fifth Circuit has "created" a new pleading element in excessive force cases. Pet. 15-22. This appears to be based on the following portion of the Fifth Circuit's opinion:

> 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. 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.

Pet. App. 11a–12a. Petitioners' concerns are without merit. The Fifth Circuit's analysis was focused on the *Graham* reasonableness inquiry, and expressed some concern that even using something akin to 20/20 hindsight, and considering alternatives that may have been available to the officers, there was not a more reasonable option presented to the officers as a possible course of action under this highly unusual and tragic set of facts. The opinion's conclusion was that the officers' actions were not objectively unreasonable, and was NOT an effort to create an ersatz heightened pleading requirement, as Petitioners suggest.

In other words, the Fifth Circuit's decision did not turn on Petitioners' failure to plead a safer alternative course of action, but was instead based upon the review of the factual circumstances which were affirmatively pled to have confronted the officers at the moment the force was used, in accordance with the Court's repeated emphasis that the issue must be examined from the perspective of the officer on the scene at the moment the force is used. *Cty. of Los*

Angeles v. Mendez, 137 S. Ct. 1539, 1547-8 (2017) ("Excessive force claims . . . are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred.") (quoting *Saucier v. Katz*, 533 U.S. 194, 207 (2001)). The Fifth Circuit concluded that the officers were faced with the immediate potential for the destruction of lives and property, and acted in a manner that was not objectively unreasonable.

Petitioners assert that Respondent's dismissal motion should have been denied because the question of the viability of alleged alternative courses of action available to Respondent should have undergone examination in the discovery process. Pet. 19. Such a critical view of the qualified immunity defense conflicts with this Court's policy statements supporting qualified immunity. In *Saucier v. Katz,* the Court emphasized the importance of resolving the issue of qualified immunity at the earliest possible stage of litigation:

> In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985). The privilege is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is

> effectively lost if a case is erroneously permitted to go to trial." *Ibid.* As a result, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S. Ct. 534, 116 L.Ed.2d 589 (1992) (*per curiam*).

Saucier, 533 U.S. at 200-01 (italics emphasis in original). Respondent's motion to dismiss was asserted in reliance upon these principles.

The effect of the Petition's desire to deny Respondent qualified immunity is to create a conflict with this Court's guidelines regarding the qualified immunity analysis: "[I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness." *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019) (*per curiam*) (citing *Kisela v. Hughes*, 584 U.S. ___, ___, 138 S. Ct. 1148, 1153 (2018) (*per curiam*)). The Petition improperly seeks exactly that result.

Under Rule 10 of the Court's rules, "[a] petition for a writ of certiorari will be granted only for compelling reasons . . . A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup.Ct.R 10. The Petition only presents argument that the Fifth Circuit properly stated the rules of law applicable to qualified immunity analysis, yet misapplied those rules and/or reached the wrong conclusion. The Petition thus does not present compelling reasons to grant certiorari in this case.

II. The Fifth Circuit's Decision Did Not Create a Circuit Split.

From Petitioners' first point, that the Fifth Circuit's opinion created a "heightened pleading standard," Petitioners next argue that the Fifth Circuit's opinion "creates a circuit split regarding the proper pleading standard in excessive-force cases." Pet. 23. The facts of this case are highly unusual, and there is no prior case in the United States that can be deemed factually similar to create a circuit split. Neither Petitioners, nor Respondents, have found such a case. Further, the cases referenced by Petitioners from other circuits do not analyze an excessive force allegation under *Graham* that differs from the Court's recognition that excessive force cases are an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. *Kisela*, 138 S. Ct. at 1153. A review of the cases relied upon by Petitioners reveals that no circuit split was created by the Fifth Circuit's opinion.

The Petition first cites *Weiland v. Palm Beach County Sheriff's Office*, 792 F.3d 1313 (11th Cir. 2015). Pet. 23-24. In *Weiland*, the Eleventh Circuit did not examine the issue of whether alternatives must be pled to overcome qualified immunity. Significantly, the officers in *Weiland* did not argue that they were entitled to qualified immunity, and the Eleventh Circuit issued its opinion "without regard to the qualified immunity defense." *Weiland,* 792 F.3d at 1326. Furthermore, the Eleventh Circuit noted that the plaintiff pled that the deputy had shot the plaintiff, without warning, when he was sitting with a shotgun in his lap, that the plaintiff offered no

resistance or made any threat, and then after being shot, the plaintiff was tased and beaten without cause. *Id*. at 1327. Further, the complaint alleged that "[a]t no point did [Weiland] ever raise the shotgun from his lap or point it in the direction of the Deputies." *Id.* Petitioners assert that *Weiland* addressed the idea that alternative courses of action are not required to be pled in an excessive force case. That argument is inapposite to the Fifth Circuit's opinion because the Fifth Circuit did not require such a pleading. Pet. App. 1a-14a. The substantial factual and legal distinctions between *Weiland* and the instant case, therefore, make *Weiland* an inappropriate candidate to support a circuit split argument.

Next, Petitioners cite *Mercado v. City of Orlando*, 407 F.3d 1152 (11th Cir. 2005), as support for their circuit split argument, representing that *Mercado* involved the shooting of a suicidal person without the use of a crisis negotiation team to resolve the situation. Pet. 24. In the context of examining the *Graham* factors, the Eleventh Circuit in *Mercado* determined that the facts demonstrated that the suspect was not committing a crime, resisting arrest, or posing a threat to anyone. *Mercado,* 407 F.3d at 1157. Finding that none of the *Graham* factors supported the officers' actions, the Eleventh Circuit found that the district court erred in granting summary judgment.

As for the crisis negotiation team option, the Eleventh Circuit noted that because Mercado posed no immediate threat to himself or the officers, the officers "were also aware that alternative actions, such as utilizing a crisis negotiation team, were available means of resolving the situation." *Mercado,* 407 F.3d at 1158. *Mercado* focused on the connection between the exigency of the threat and the availability of

alternatives (*i.e.*, because there was no exigency, additional alternatives to the force used were available to the officers). *Id*. The distinction between *Mercado* and the instant case is meaningful: the suddenness and exigency of Mr. Olivas' undeniable and serious threat to everyone in the room left no time to call in a SWAT or crisis negotiation team. *Mercado* does not conflict with the Fifth Circuit's decision, but instead underscores the importance of the Fifth Circuit's consideration of the exigency of the threat facing the officers when analyzing the reasonableness of the seizure.

Petitioners next cite *Kelley v. O'Malley*, 787 Fed. App'x 102 (3d Cir. 2019) as another case that rejected a requirement to plead alternative courses of action. Pet. 24-25. In *Kelley*, the plaintiff alleged that the suspect (Kelley) had been cornered by no less than fourteen officers, all with their guns drawn, while he held a knife defensively. *Kelley*, 787 Fed. App'x at 104. Kelley was warned that if he did not put the knife down, the officers would release a trained attack dog. *Id*. Kelley said that if that occurred, he would stab the dog. *Id.* Kelley did not put the knife down, the officers released the dog, and the officers shot Kelley seven times, twice in the back, following Kelley's attack on the dog. *Id.* The Third Circuit reversed the lower court's dismissal of the plaintiff's claims, without regard to whether the plaintiff had alleged viable alternative conduct, because "it was not at all reasonable for officers to shoot someone who they have cornered and set an attack dog on, when that person poses little threat to anyone, is vastly outnumbered by armed officers, and is only defensively wielding a knife." *Id*. at 106. The Third Circuit did not employ a different pleading standard, but rather similarly considered the *Graham* factors, and reached a different

conclusion based upon a specific set of facts, which demonstrated that there was no exigent threat precipitating the use of force. Again, factually and legally, *Kelley* differs from the instant matter to a significant degree, so that this case does not create a circuit split.

Petitioners next cite *Brockington v Boykins*, 637 F.3d 503 (4th Cir. 2011), in support of their circuit split argument. Pet. 25. *Brockington* does not conflict with the Fifth Circuit's decision in this case. Using the same *Graham* standards, the Fourth Circuit in *Brockington* concluded that the plaintiff had pled a sufficient claim to survive a motion to dismiss where it was alleged that the officer in question stood, "execution style," above an injured and unarmed suspect who was lying on his back, and then fully discharged his clip, shooting the suspect multiple times at close range. *Brockington,* 637 F.3d at 507. Significantly, the plaintiff in *Brockington* had conceded that the officer's initial shots which took him to the ground constituted a reasonable seizure, but asserted that once on the ground, injured, on his back, and unarmed, the seizure was unreasonable because he ceased to pose a threat. *Id.*

When the exigency had ceased, the Fourth Circuit concluded that, "[r]ather than shoot Brockington as he lay helpless on the ground, a reasonable police officer would have asked him to surrender, called for backup or an ambulance, or retreated." *Brockington,* 637 F.3d at 507. There is no discussion regarding whether the plaintiff pled, or was required to plead, any such alternatives or whether the alternatives would have succeeded. Rather, the Fourth Circuit simply recognized that "there was a clear break in the sequence of events," and once the threat had ceased, a reasonable officer would have recognized that other less intrusive

options had emerged. *Id*. Factually and legally, the Fifth Circuit's opinion does not create a circuit split with the decision in *Brockington*.

Petitioners next point to *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011), as a case conflicted by the Fifth Circuit's opinion. Pet. 26. In *Glenn*, an intoxicated teenage subject was holding a knife to his own neck, did not present a threat to anyone but himself, yet officers shot him with a bean bag gun and semi-automatic weapons causing the teenager's death. *Glenn,* 673 F.3d at 874-76. In the context of analyzing the plaintiff's excessive force claim using the *Graham* factors, the Ninth Circuit noted that "[o]ther relevant factors include the availability of less intrusive alternatives to the force employed. . . ." *Id*. at 872. Significantly, the court in *Glenn* stated, "[t]he 'most important' factor is whether the individual posed an 'immediate threat to the safety of the officers or others.'" *Id*. (citation omitted). *Glenn*, therefore, actually supports the Fifth Circuit's opinion here.

In *Glenn*, the observation regarding the connection between threat and reasonableness occurred, not within the context of analysis of pleading requirements, but in the context of the *Graham* factors analysis:

> As we have explained, it is well settled that officers need not employ the least intrusive means available so long as they act within a range of reasonable conduct. The available lesser alternatives are, however, relevant to ascertaining that reasonable range of conduct. Accordingly, the availability of those alternatives is one factor we consider in the *Graham* calculus.

Glenn, 673 F.3d at 878 (citations omitted). Contrary to the argument presented in the Petition, the Ninth Circuit and Fifth Circuit are in accord as to the objective unreasonableness analysis under *Graham* and that the analysis looks to available lesser alternatives. *Glenn*, therefore, supports the analysis employed by the Fifth Circuit's opinion in this case. The factual difference between *Glenn* and this case is that the teenager in *Glenn* threatened to injure only himself and posed no danger to the officers or others, while Mr. Olivas here created a serious and exigent life-threatening set of circumstances, as asserted in the Amended Complaint. There is no circuit split that needs to be addressed by the Court.

Lastly, Petitioners cite *McKenney v. Mangino*, 873 F.3d 75 (1st Cir. 2017), to support their contention that the Fifth Circuit's opinion creates a circuit split sufficient to invoke the Court's supervisory power under Rule 10. Pet. 26. Petitioners' reliance upon *McKenney* is misplaced. In *McKenney*, the First Circuit considered the appeal of an officer after a summary judgment denial where the officer did not challenge the district court's finding of a constitutional violation. *McKenney,* 873 F.3d at 82 n. 5. In the Fifth Circuit's opinion, however, finding no constitutional harm was the crux of the decision. Pet. App. 13a.

Nonetheless, in *McKenney* the First Circuit discussed several matters that actually support the Fifth Circuit's analysis in this case: "Timing is critically important in assessing the reasonableness of an officer's decision to use lethal force. Our case law is 'comparatively generous' to officers facing 'potential danger, emergency conditions or other exigent circumstances' and we have fashioned 'a fairly wide zone of protection' for the police in borderline cases."

McKenney, 873 F.3d at 81-82 (citations omitted). Further, the First Circuit observed that "a suspect's physical proximity and the speed of his movements are highly relevant. . . ." *Id*. at 82. The court in *McKenney* noted that "the most relevant factors in a lethal force case like this one are the immediacy of the danger posed by the decedent and the feasibility of remedial action." *Id*. at 84.[3] The opinion in *McKenney* pointed to the difference between suicidal individuals who posed no threat to others as compared to those who did threaten others. *Id*. at 83.

The analysis employed in *McKenney*, championed by Petitioners, does not meaningfully differ from the analysis used by the Fifth Circuit, which is criticized by Petitioners. The factual differences between the two cases, however, are significant. In *McKenney*, the suspect was slowly walking in his front yard, 70 feet away from the officer who was screened by his police cruiser, dangling a gun by his side when he was fatally shot by the officer without warning. *McKenney,* 873 F.3d at 84. Based on the facts, the district court determined that because there was no exigency, the officer had time and opportunity to employ viable remedial measures. *Id*. at 83 ("[T]he threat presented lacked immediacy and alternatives short of lethal force remained open. Seen in that light, this was a case in which the feasibility of a more measured approach was apparent.").

In the instant case, the situation facing Respondent and Sgt. Jefferson in the home was filled with immediacy and a lack of alternatives. *McKenney* and

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[3] By way of clarification, the Fifth Circuit has never held that the use of a taser is tantamount to the use of deadly force. *See Batiste v. Theriot*, 458 Fed. App'x 351, 355 (5th Cir. 2012).

the Fifth Circuit's opinion are not in conflict. *McKenney* instead confirms that both circuits are aware of the legal principals which underpin the qualified immunity objective reasonableness analysis and the necessity, in excessive force cases, to closely examine the factual allegations.

Petitioners fail to offer any comparable case arising out of any Circuit in which a plaintiff's pleading survived a motion to dismiss where the plaintiff pled that the suspect was actively threatening to commit a dangerous felony and posed an exigent threat to the officers and others. Petitioners have thus failed to adequately support their circuit split argument under Rule 10 of the Court's rules, in favor of the questions presented, and the Petition should be denied.

III. The Fifth Circuit's Decision Did Not Create Critically Important Issues Warranting Reversal.

Petitioners assert that critically important issues justify the grant of certiorari in this case. Pet. 27-31. Petitioners' arguments do not justify the Court's resources in this case. First, Petitioners' present several social policy arguments that allowing excessive force to persist will engender more excessive force cases, to the detriment of the public and of the police. Pet. 28-29. Petitioners characterize this argument by referring to it as a "dangerous feedback loop," and argue that the Fifth Circuit's decision will "metastasize" into more unlawful uses of excessive force cases in Texas, Louisiana and Mississippi. Pet. 29. The basis for Petitioners' concerns is flawed, however, because it is based on the belief that the Fifth Circuit adopted a "heightened pleading standard" in excessive force cases. Pet. 29. This belief is without merit, and is an incorrect characterization of the Fifth Circuit's

decision. Rather than repeat his arguments herein, Respondent refers to his argument in Section I, above, that the Fifth Circuit has not created a new heightened pleading standard in this case.

Next, Petitioners assert that this case underscores the need to address police interactions with persons suffering from mental illness. Pet. 29-30. Specifically, Petitioners posit that by reducing the availability of qualified immunity, police interactions with mentally ill persons will somehow improve, or at the very least, lawsuits against police officers may proceed more easily, unfettered by qualified immunity considerations. *Id*. The Brief of Amici also presents a similar version of this argument in asserting that qualified immunity, when misapplied, erodes public trust and undermines the rule of law. Brief of Amici 14-17. These assertions by both Petitioners and Amici are unfounded based on the facts of this case, as alleged in the Amended Complaint, and based on the Fifth Circuit's opinion.

The allegations in this case do not present the factual scenario of a police interaction with a mentally ill person, and then Respondent over-reacted by intentionally lighting Mr. Olivas on fire. Pet. App. 74a-78a. Here, Respondent was faced with the need to immobilize a person in a bedroom who had doused himself with gasoline and threatened to catch himself and others, and the house, on fire with a lighter in his hand. Pet. App. 74a-78a. The allegations are not based on an assertion that Mr. Olivas was a mentally ill patient. This case is an inappropriate candidate, therefore, to address broader policy issues concerning police encounters with mentally ill persons.

Third, Petitioners argue that this case presents important issues similar to the Court's recent decisions

in *Tolan v. Cotton*, 572 U.S. 650, 659 (2014) (*per curiam*); *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020); *McCoy v. Alamu*, 141 S. Ct. 1364 (2020); and *Cope v. Cogdill*, 3 F.4th 198 (5th Cir. 2021), *petition for writ of cert. filed* (U.S. Nov. 22, 2021), in a type of "here we go again" argument against certain qualified immunity case decisions by the Fifth Circuit. Pet. 22, 30-31. The Brief of Amici similarly relies upon *Taylor* and *McCoy* and the assertion that in "clearly obvious" cases, the doctrine of qualified immunity is not burdened with compliance with the clearly established law requirement. Brief of Amici 10-12. Factually and legally, Petitioners' and Amici's reliance on *Tolan*, *Taylor* and *McCoy* is inapt.[4] *Tolan* presented the situation where officers shot an unarmed man on the front porch of his house under circumstances that did not justify the shooting. *Tolan*, at best, provides only general guidance regarding qualified immunity principles, and does not compare to the facts of this case.

Petitioners' and Amici's reliance upon *Taylor* and *McCoy* as guidance to the Court in this case is even more attenuated. In both cases, inmates asserted claims under the Eighth Amendment against prison officials, complaining of their conditions of confinement or of the improper use of force against an inmate while in his cell, and did not involve Fourth Amendment claims. In *Taylor*, the Court found that ". . . no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." *Taylor*, 141 S. Ct. at 53

[4] Since *Cope* is not a decision by the Court, and since Petitioners' argument focuses on *Tolan*, *Taylor* and *McCoy*, Respondent need not address *Cope* at this time.

(citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). In *McCoy*, the Court simply remanded the case without opinion, stating that the case warranted "further consideration in light of *Taylor*." *McCoy*, 141 S. Ct. 1364. Neither *Taylor* nor *McCoy* sheds any light on the Fifth Circuit's opinion's application of qualified immunity principles under the Fourth Amendment as applied to the unique, rapidly-evolving and dangerous circumstances facing Respondent when he encountered Mr. Olivas drenched in gasoline and threatening to burn down the house and harm everyone in it. Pet. App. 3a-4a, 7a-9a, 71a-80a.

Petitioners and Amici nonetheless argue that *Taylor* and *McCoy* support the conclusion that Respondent's use of his taser in an attempt to subdue Mr. Olivas under the facts alleged was a "clearly obvious" constitutional violation, notwithstanding the factual and legal differences between this case and those in *Taylor* and *McCoy*. Pet. 30-31; Brief of Amici 10-13. Such arguments are without merit because, as has already been noted, the factual and legal issues in *Taylor* and *McCoy* bear no resemblance to the factual and legal issues presented in this case other than that qualified immunity was under analysis.

The Petition and the Brief of Amici, therefore, suggest that the law should be changed as a result of this case, and that Respondent's qualified immunity should be denied as a result. As noted by the Court in *Hunter v. Bryant*, 502 U.S. 224, 228 (1991), "the court should ask whether the [government official] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed . . . years after the fact." This Court has rejected the attempt to employ a 20/20 hindsight review of an officer's actions.

Graham, 490 U.S. at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."). Yet the Petition, and the Brief of Amici, invite such 20/20 hindsight review to argue that Respondent's actions were plainly and obviously unconstitutional. The Petition conflicts with well-established precedent, and should be denied.

IV. The Brief of Amici's Belief That This Case Provides the Appropriate Opportunity to Revisit the Justifications for Qualified Immunity is Misplaced.

1. Noting that the Petition does not itself request the Court to revisit qualified immunity as a defense available to public officials, the Brief of Amici nonetheless urges the Court to revisit the jurisprudential basis for qualified immunity *en toto*. Brief of Amici 5-9. Nothing in Amici's argument connects the complained of qualified immunity policies established by the Court's precedent to the Fifth Circuit's opinion in this case, nor does it explain why this case in particular presents the ideal opportunity to revisit qualified immunity as a whole. *Id*. Further, the Brief of Amici begins its criticisms of qualified immunity with arguments concerning 42 U.S.C. § 1983 when it was enacted in 1871. Brief of Amici 5-6. The issue in this case concerns the Fifth Circuit's determination of the reasonableness of Respondent's actions, which appears more contextually related to the language of the Fourth Amendment's prohibition "against unreasonable searches and seizures." U.S. Const. amend. IV. Thus, there is no need to revisit the historical parameters of § 1983 and qualified immunity presented by this case.

The Court recognizes "the importance of qualified immunity to society as a whole." *City and County of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 611 n.3 (2015) (citing *Harlow*, 457 U.S. at 814). Respondent is aware, however, that certain members of the Court have occasionally expressed a desire to someday revisit qualified immunity and its jurisprudential basis. *See, e.g., Ziglar v. Abassi*, 137 S. Ct. 1843, 1872 (2017) (J. Thomas, concurring) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."). Nothing in the Brief of Amici, however, supports the suggestion that this is such an appropriate case. Brief of Amici 5-9. Just the opposite: the facts and circumstances that gave rise to Respondent's need to make a split-second decision demonstrate why the qualified immunity defense is appropriate when a police officer is instantly called upon to react and exercise his judgment in responding to a real and tangible threat of serious harm to other officers and other persons in a bedroom where a man has doused himself with gasoline and is threatening to light himself on fire and burn down the house with everyone in it. In other words, this case is an example of what qualified immunity is all about when a good officer is faced with no good options under circumstances not of his own making. The effect of the Petition's purpose would be to unfairly and retroactively deprive Respondent of qualified immunity when the law was not clearly established to guide his actions on July 10, 2017.

2. The Brief of Amici asserts, at p. 9, that even though "the petition does not call for the reconsideration of qualified immunity entirely," the Petition nonetheless presents the Court with an opportunity to clarify the clearly established law prong of the qualified immunity defense. Brief of Amici 9-14. This assertion is tied to the "clearly obvious" type of

exception that is presented in the *Taylor* and *McCoy* cases, cited above, and also cited as dicta in the dissent to the denial of rehearing *en banc* at the Fifth Circuit. Pet. App. 54a-59a. A request for review of the clearly established law element of qualified immunity is not presented in the Petition, which is understandable because the Fifth Circuit's opinion 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. Pet. App. 13a. Since the question presented may be deemed to include such analysis, however, Respondent provides the following to demonstrate that the Petition need not be granted because the Fifth Circuit's opinion does not warrant review even if an analysis of clearly established law is undertaken in this case.

"[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*, 457 U.S. at 818 (citations omitted). The qualified immunity analysis has two components: (1) whether a plaintiff alleges or shows 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. 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*, 483 U.S. at 640.

In a case concerning the allegation of excessive force, even assuming that a particular use of force is clearly excessive and violated the protections of the constitution, a plaintiff must also establish that at the

time of the events in question, it had been clearly established, that is, it was beyond debate, that the particular conduct was unlawful. *See Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (*per curiam*) ("The dispositive question is whether the violative nature of *particular* conduct is clearly established." (emphasis in original). 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. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (*per curiam*). *See also Mullenix*, 136 S. Ct. at 308 ("[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'") (quoting *Saucier*, 533 U.S. at 205).

As the Court has held recently:

> Under our cases, the clearly established right must be defined with specificity. This Court has repeatedly told courts . . . not to define clearly established law at a high level of generality. That is particularly important in excessive force cases, as we have explained: Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing

> precedent squarely governs the specific facts at issue. . . .[I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.

City of Escondido, 139 S. Ct. at 503-05 (internal citations omitted).

Tasing an individual under tense, stressful circumstances cannot be considered, and has not been found to be, unlawful deadly force that is clearly established in the Fifth Circuit. *See, e.g., Batiste*, 458 Fed. App'x at 355 ("Even if Plaintiffs accurately describe the tasing, they have not shown that the use of a non-lethal weapon in a less than optimal manner necessarily equates to the use of a loaded firearm as was the case in [*Tennessee v. Garner*, 471 U.S. 1 (1985)]."). *See also Samples v. Vadzemnieks*, 900 F.3d 655, 662-63 (5th Cir. 2018) (discussing whether use of taser was clearly established to be unlawful); *Hale v. City of Biloxi*, 731 Fed. App'x 259 (5th Cir. 2018) (holding that use of taser under circumstances had not been clearly established to be unlawful); *Carroll v. Ellington*, 800 F.3d 154, 174-75 (5th Cir. 2015) (officer's use of taser under circumstances not clearly established to be unlawful). More to the point here, this Court has noted, in *Hunter*, 502 U.S. at 228, "the court should ask whether the [government official] acted reasonably under settled law in the circumstances, not whether another reasonable, or

more reasonable, interpretation of the events can be constructed . . . years after the fact."

The Brief of Amici points to no clearly established law that should have guided Respondent in the instant matter: a man who was high on drugs, threatened to commit suicide, poured gas on himself, holding a lighter, and threatened to burn the house down with everyone in it. As alleged in the pleadings, the claims against Respondent must be dismissed because it was not clearly established that the use of a taser, or other electronic device to subdue or immobilize a suspect, amounted to excessive force that violated the Fourth Amendment. *Mullenix*, 136 S. Ct. at 308 (dispositive question is whether the violative nature of the particular conduct is clearly established). *See, e.g., Cooper v. Flaig*, 779 Fed. App'x 269, 272-72 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 131 (2020) (in a use-of-taser case, reviewing other Fifth Circuit taser decisions, and granting qualified immunity to the defendants-officers: "It is exactly because clearly established law would not have put a reasonable officer on notice that deployment of a taser under these circumstances was unreasonable that [the officers] are entitled to qualified immunity.").

To avoid that result, Amici point to the "obviousness doctrine" (Brief of Amici 12) and assert that cases such as *Taylor* and *McCoy*, discussed above, require a reversal of Respondent's qualified immunity defense. Brief of Amici 10-13. *Taylor* and *McCoy* are not instructive under these facts. *Taylor* and *McCoy* both require courts to look for "particularly egregious facts" where there is no allegation or evidence of "necessity or exigency." *Taylor*, 141 S. Ct. at 54 (citing *Hope*, 536 U.S. at 741). This Court has noted that an "obvious case" is rare, not the rule:

> "[W]e have stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment . . . . While there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular [action] beyond debate . . . . Of course, there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances . . . . But a body of relevant case law is usually necessary to clearly establish the answer . . . ." [*District of Columbia v.*] *Wesby*, 583 U.S., at ___, 138 S. Ct. [577] at 581 (internal quotation marks omitted).

City of Escondido, 139 S. Ct. at 504.

In this case, there are overwhelming allegations of dire, life-threatening exigencies facing Respondent that, in his judgment, required immediate responsive action. Pet. App. 74a-78a. The rationales of *Taylor* and *McCoy* do not apply to the exigencies of this case. As summarized in one of the concurrences to the denial of rehearing *en banc*:

> 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.

Pet. App. 38a. The Brief of Amici thus fails to justify the grant of certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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