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 EBONY N. JEFFERSON'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent objects to the Question Presented within the Petition for a Writ of Certiorari (hereinafter, the "Petition"), as it omits and misstates key factual allegations set forth in the Petitioners' operative pleading and inaccurately describes the holding and reasoning underlying the Fifth Circuit's *per curium* panel decision. More accurately stated, the Question Presented to this Court, if any, would be, "Where Petitioners' pleading affirmatively alleged that a suspect was tased, as he raised a lighter in a room filled with flammable vapors, officers, and family members and exclaimed he was going to burn the house to the ground, was it error for the panel to analyze those allegations utilizing this Court's well-established *Graham* factors and subsequently hold 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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STATEMENT OF THE CASE

Respondent objects to, and disagrees with, Petitioners' description of their operative pleading and the holding, and reasoning, of the *per curiam* panel of the Fifth Circuit. For purposes of clarity and completeness, the following affirmative allegations can be found within the operative pleading before the panel, which is Plaintiffs' First Amended Original Complaint (hereinafter, the "Complaint"):[1]

On July 10, 2017, Officer Guadarrama ("Guadarrama") and Sergeant Jefferson ("Jefferson") were dispatched to the home of Gabriel Olivas ("Olivas"). Pet. App. 71a¶15. Officer Elliott also responded to the call. *Id.* at 81a¶37-8. The caller, Olivas' son, said his father was threatening to commit suicide. *Id*. at 71a¶15. Importantly, Olivas' son further indicated that his father was also pouring gasoline in the house and threatening to burn it down. *Id*. Dispatch also reported that Olivas was high on methamphetamines, although the pleading is silent as to whether Guadarrama or Jefferson were informed of Olivas' purported drug use. *Id*. at 73a¶19. When the officers arrived, Olivas was in a bedroom, holding a gas can. *Id*. at 83a¶44. Olivas' wife and son were also in the

[1] As noted by Judge E. Grady Jolly, in the context of his separately issued concurrence set forth within the denial of the request for rehearing *en banc*, the Complaint is chaotic. "The dissent faults the unanimous panel for 'invoking something resembling summary-judgment review' in its Rule 12(b)(6) analysis. 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 speaks of 'disputes,' such differences are alleged in the complaint." Pet. App. 23a.

bedroom, with Olivas, which was filled with gasoline vapors. *Id*. at 76a¶25. Three officers – Guadarrama, Jefferson and Elliott – entered the bedroom. *Id*. at 79a¶34. With everyone in the bedroom, Olivas stood up and began to pour gasoline over himself. *Id*. at 85a¶49. Olivas then began screaming "non-sense" and exclaimed that he was going to "burn the place to the ground." *Id*. at 86a¶49. The officers then realized that Olivas was holding a lighter in his right hand. *Id*. at 87a¶52-3. The family members were generally in line with the officers (*Id*. at 76a¶25), in the bedroom with Olivas, which was now filled with gasoline vapors (*Id*. 83a¶43), approximately six feet away from where Olivas was standing. *Id*. at 87a¶51. The Complaint alleges that Guadarrama was concerned that Olivas would ignite the bedroom on fire, along with its occupants, because he could smell the gasoline vapors in the room. *Id*. at 75a¶22.

Elliott then heard a sudden pop, indicating to him that a Taser had been fired and Olivas was suddenly engulfed in flames. *Id*. at 88a¶54. Olivas then began to run around the room, engulfing the room in flames. *Id*. at 77a¶26. Jefferson also heard a Taser discharge from where Guadarrama was standing. *Id*. at 80a¶35. Upon hearing that discharge, and observing Olivas immediately catch on fire, Jefferson became startled by the flames and moved away from them. *Id*. at 80a¶35. Petitioners then alleged that Jefferson ***intentionally*** discharged his taser, despite his later assertion to his supervisor that his Taser discharge was ***unintentional***. *Id*. (emphasis added).

Petitioners filed suit. Respondents answered and immediately asserted the defense of qualified immunity. Guadarrama and Jefferson moved to dismiss the claims based upon the their defense of qualified

immunity. Petitioners, *sua sponte*, amended their complaint, resulting in the above allegations. Guadarrama and Jefferson again filed motions to dismiss. The district court, without any analysis of the factual allegations contained within the pleading, without separately considering each officer's conduct, and without considering either prong of the qualified immunity analysis, denied the motions to dismiss,[2] describing such motions as "a mismatch for immunity and almost always a bad ground for dismissal." *Id*. at 16a. Guadarrama and Jefferson appealed, and a *per curium* panel reversed and remanded the case, mandating that the officers be dismissed for the reasons set forth in the panel's opinion. *Id*. at 1a-14a.

REASONS FOR DENYING THE PETITION

The Petition should not be granted because each and every argument raised by the Petition is based entirely upon inaccurate or incomplete descriptions of the factual allegations contained within the operative pleading which sits at the center of this case. The Petition also misrepresents the holding of, as well as the reasoning behind, the Fifth Circuit panel's resulting decision.

To begin, Petitioners omit from the Petition critical affirmative factual allegations contained within their

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[2] Within the Petitioners' Appendix, both the district court's order of dismissal (Pet. App. 15a) and the First Amended Plaintiffs' Original Complaint (Pet. App. 61a) errantly reflect in the style of the pleading that this case originated from the "San Angelo District." This appears to be printing error within the Appendix. For purposes of clarity, although having no affect on the merits of the Petition, the case was originally filed in the Northern District of Texas, Dallas Division, and then subsequently transferred by order, dated December 13, 2019, to the Fort Worth Division and the original pleadings so reflect.

pleading, upon which the Fifth Circuit panel expressly relied, which clearly demonstrate that it was objectively reasonable for the officers to believe they were confronted with a deadly and exigent threat to themselves and the suspect's family members, at the moment force was employed.

The Petition should also be denied because it is based on the entirely erroneous assertion that the panel imposed a "heightened pleading standard," whereby Petitioners were required to allege "an alternative course the officers should have followed that would have led to an outcome free of potential tragedy." The panel imposed no such requirement and made no attempt to alter existing pleading standards. To the contrary, the panel dutifully discussed and followed this Court's pronouncement in *Graham v Connor,* 490 U.S. 386, 396 (1989) which requires 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." Pet. App. 11a. In the context of examining Petitioners' factual allegations, the panel made the compelling observation that, "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." *Id*. at 12a.

Once the totality of the allegations contained with Petitioners' operative complaint, and the substance and reasoning associated with the panel's holding, are fairly and accurately portrayed, the purported "conflict among the circuits" described in the Petition

similarly disappears, as none of these cases described by Petitioners as conflicting with the panel decision actually conflict. Instead, they are simply opinions utilizing the same legal principals, based upon materially different factual scenarios where, at the moment force was used, those plaintiffs posed no threat to the officers or others. Each court, including the Fifth Circuit panel in the case below, has adhered to this Court's pronouncement that, "[u]se of excessive force is an area of the law in which the result depends very much on the facts of each case."[3]

Petitioners also suggest that granting certiorari is critical to address the relationship between law enforcement, and what the Petition describes as our country's "mental health crisis." While not making light of the prevalence of individuals suffering from mental health challenges, this case would be a poor vehicle for such a discussion. Petitioners have expressly argued and solely pled that the officers violated Olivas' *Fourth Amendment* right through an unreasonable seizure. This Court's well-established *Fourth Amendment* doctrine considers both the severity of the crime committed by the suspect, and the threat posed to the officers and bystanders on the scene. The *Graham* factors focus on the objective reasonableness of the seizure, and the *Fourth Amendment* applies equally to all individuals. However, as the panel noted, "Olivas was credibly threatening to kill himself ***and feloniously burn down a house containing at least six other people***." Pet. App. 10a (emphasis added). The seizure, in this case, was an attempt to prevent Olivas from igniting a room full of people and

[3] *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019) (*per curiam*) (citations omitted).

the officers' conduct was therefore appropriately examined under the *Fourth Amendment*.

The Petition was also joined by the Brief of the Cato Institute, Law Enforcement Action Partnership, and Roderick & Solange MacArthur Justice Center as Amici Curiae in Support of Petitioners (hereinafter, the "Amici"). The Amici, after noting their disapproval of the qualified immunity doctrine, add little substance to the Petition. They suggest that the Petition should be granted to address "the lower court's formulation of the 'clearly established law' inquiry in this case," which the Amici describe as, "highlight[ing] an especially troubling trend, especially in the Fifth Circuit." Amici.Br. 2-3. But this argument is most kindly characterized as misguided. Aside from the Amici's apparent unfamiliarity with the underlying factual allegations, the Amici fail to recognize that the panel did not reach the "clearly established law" prong.[4] The district court initially refused to address either prong of qualified immunity, before denying the officers' motions to dismiss. Pet. App. 16a–17a. On appeal, the panel did note that Petitioners failed to offer a case with any degree of commonality sufficient to clearly establish that a Constitutional violation had occurred, but stopped short of addressing the "clearly established law" prong, because it concluded that, as an initial matter, the officers' conduct was neither clearly excessive, nor objectively

[4] Pet. App. 20a-21a n. 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. *Ramirez v. Guadarrama*, 844 F. App'x 710 (5th Cir. 2021)at 713-17. The unanimous panel did not reach the "clearly established law" prong. *Id*.") (Jolly, E., concurring in denial of rehearing *en banc*).

unreasonable, given the application of the *Graham* factors. *Id*. at 9a-10a.

The Petition does not assemble, or even suggest the existence of, "clearly established law" which might govern the factual scenario present in this case. Indeed, neither the Petition, nor the Amici, direct this Court to a single case which would begin to meet this burden. It is disingenuous, at best, for the Amici to suggest that this Court must grant the Petition to "reign in" the Fifth Circuit's application of the "clearly established law" prong, when the Fifth Circuit decided the case on other grounds. However, the issue raised by the Amici also exemplifies the futility of the Petition, as neither the Petition, nor the Amici, have "identified a single precedent finding a *Fourth Amendment* violation under similar circumstances," and as such, "the officers were thus entitled to qualified immunity." *City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021).

For the reasons set forth herein, the Petition does not fairly represent the record below, and considering the actual record below, this case does not involve a compelling reason for this Court to entertain certiorari review.

I. Misstatements of Fact Undermine the Merits and Credibility of the Petition.

In their "Factual Background" section, Petitioners represent to this Court that their operative pleading alleged that, "[a]fter being pepper-sprayed, Olivas poured gas on himself and began screaming ***something unintelligible***." Pet. 6. (emphasis added). However, the actual pleading states that, "Olivas began screaming 'non-sense' ***and yelling that he was going to burn the place to the ground***." Pet.

App. 86a (emphasis added). Petitioners' use of the word "unintelligible" to describe, not only chaotic non-sense, but also Olivas' sudden and clearly expressed exclamation that he was going to burn the house down – as he stood up and raised a lighter in a bedroom full of gas vapors – appears to be a disingenuous attempt to hide the affirmative allegation establishing that, at the moment force was used, Olivas had just exclaimed that he intended to commit felonious arson in a manner that placed his family and the officers in a life threatening scenario and, according to the allegations, was clearly capable of executing on the threat. Petitioners assert that this case does not involve an exigency or threat to the officers. However, they can only attempt to create that facade by omitting Olivas' expressed and deadly threat from the description of their pleading.

Additionally, Petitioners suggest that the Complaint, in conclusory fashion, alleged that Olivas was "a safe distance away from his family members." This partial quote, also taken out of context, fails to accurately portray the totality of the factual allegations in the Complaint. Specifically, Petitioners alleged that Olivas' wife and son were "in line with the officers facing Olivas," such that if Guadarrama had chosen to shoot Olivas with a firearm, it would be unlikely that he would have shot either his wife or son. Pet. App. 76a¶25. Conversely, the Complaint alleges, if he used a Taser, the whole room would potentially catch fire due to gas fumes. *Id*. At this point, the officers and family members were alleged to have been ***in the room, approximately six feet from Olivas***. Pet. App. 87a¶15 (emphasis added).

Moreover, the argument made by Petitioners – that Guadarrama had enough room between Olivas and

his family members to safely shoot Olivas with a firearm, but not a Taser[5] – contains a tacit admission by Petitioners that Olivas presented an immediate and deadly threat to the officers and family members. Petitioners in their briefing before the Fifth Circuit, affirmatively argued that, "***by igniting the fire***, the officers placed themselves in ***immediate danger***, ***threatened the safety of the family members they had allowed to remain***. . . ."[6] Put simply, if tasing carried with it a risk of sparking the vapors and endangering everyone in the room,[7] then Olivas, who raised a lighter designed for that task, and exclaimed that he was going to burn the place to the ground, clearly posed an immediate and deadly threat to everyone who was present in the bedroom. The officers were equipped with the only non-lethal device that could have potentially immobilized Olivas before he could ignite his lighter. Indeed, Petitioners affirmatively alleged that Guadarrama also recognized the risk that, "the suicidal male would ignite the

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[5] Aside from suggesting that a more lethal use of force would have been reasonable, the argument also ignores the fact that the muzzle flash from a firearm can also ignite gasoline vapors and is indisputably designed as a lethal weapon.

[6] Brief of Appellees Gabriel Olivas and Selina Ramirez before the Fifth Circuit Court of Appeals, filed on August 10, 2020, p. 44; *Id*. at 54 ("Discharging Tasers in these circumstances was unreasonable ***because of the fire hazard*** it created ***and the extreme danger it posed, both to Olivas and his family members***"); *see also* Complaint, Pet. App. 77a¶29 ("Officers, by shooting their Tasers at Mr. Olivas, also further endangered Mr. Olivas's wife and son.").

[7] The alleged training materials set forth in Petitioners' Complaint states, "A TASER ECW ***can*** ignite explosive materials, liquids, fumes, gases, vapors or other flammable substances . . . ." Pet. App. 99a ¶84 (emphasis added).

bedroom on fire igniting himself and innocent victims," because he "could smell the very strong odor of gasoline inside the bedroom." Pet. App. 75a¶22.

When this Court considers the totality of the alleged facts, it becomes clear that there are no compelling reasons to grant the Petition, as the decision below truly epitomizes the appropriate application of *Graham* and its progeny. The officers were in a gas filled room, with innocent family members present, within a few feet of a man who stood up, raised a lighter and threatened to burn the place to the ground. While the use of a Taser, as alleged in the Complaint, carried with it a risk of igniting gas vapors, its intended purpose is as an immobilization device, designed to cause muscular incapacitation,[8] and the totality of the Complaint very clearly alleges a scenario whereby the officers were compelled to react instantly to prevent Olivas from igniting his lighter with the smallest of movements from his right hand. Based upon this Court's well established *Graham* factors, the panel's opinion is therefore in line with decades of well-established precedent[9] in concluding 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." Pet. App. 13a.

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[8] *See e.g. Caetano v. Massachusetts,* 577 U.S. 411, 415 n.2 (2016); *Cloud v. Stone*, 993 F.3d 379, 382 n.2 (5th Cir. 2021).

[9] *See Graham v Connor*, 490 U.S. 386 (1989); *Scott v. Harris*, 550 U.S. 372, 384 (2007); *Cty. Of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1547 (2017); *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021).

The Petition also suggests that the panel's opinion resolved factual disputes in favor of Jefferson, regarding whether he tased Olivas simultaneously with Guadarrama, or after Olivas had become engulfed in flames. Pet. 21. Petitioners again misstate the record. Jefferson did argue, and the panel recognized that, the district court had failed to analyze each officer's conduct individually; and the panel agreed that the officers were entitled to such analysis. Pet. App. 12a n.4. The panel engaged in a separate analysis of each officer's conduct as alleged, but ultimately concluded that the "point was inconsequential," as the panel found that the alleged conduct of either officer entitled each of them to qualified immunity. *Id*.

As far as the factual allegations pled by Petitioners, the Complaint indeed alleged that Elliott then heard a sudden pop, indicating to him that a Taser had been fired and Olivas was suddenly engulfed in flames. *Id*. at 88a¶54. The Complaint further alleged that Olivas then began to run around the room engulfing the room in flames. *Id*. at 77a¶26. The Complaint recited that Jefferson also heard a Taser discharge from where Guadarrama was standing. *Id*. at 80a¶35. The Complaint continues that, upon hearing that discharge, and observing Olivas immediately catch on fire, Jefferson became startled by the flames and moved away from them. *Id*. at 80a¶35. The Complaint finally alleged that Jefferson intentionally discharged his Taser, despite his later assertion to his supervisor that his Taser discharge was unintentional. *Id*.

The panel did not resolve factual disputes in the Jefferson's favor. To the contrary, each of those allegations were made by the Petitioners. In any event, as practical matter, the issue is truly irrelevant and certainly not a compelling reason to grant the

Petition, as the panel held that the timing of tasings was inconsequential to their decision because both tasings – whether they occurred simultaneously, or in seriatim – were objectively reasonable uses of force.

II. The Fifth Circuit Did Not Impose a Heightened Pleading Standard.

Granting the Petition is not warranted to address a purported heightened pleading standard, quite simply, because the panel's opinion did not impose a heightened pleading standard. The panel recognized that the court, "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiffs." *Id*. at 5a. Petitioners, and to a much lesser extent the Amici, suggest that the panel reversed the district court because the Petitioners were required, and failed, to plead alternative conduct which the officers could have pursued which would have avoided harm. Pet. 16. However, the panel never made such a finding, and as an aside, Petitioners had actually alleged what they considered to be proposed alternative courses of action within their Complaint. Pet. App. 110a-111a. The panel's opinion does not discuss any alternative course of action contained within the Complaint, urged at oral argument, or purportedly absent from the pleading. There is no mention, within the panel's opinion, of a requirement that differing, more reasonable conduct, was required to have been pled. The panel did not dismiss the claims because of the absence of such allegations. Rather, the panel discussed the officers' conduct, as was factually alleged, in the context of this Court's mandate that,

"courts must not judge officers with the 20/20 vision of hindsight:"[10]

> 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 (emphasis added).

The above quotation from the panel's opinion is the only reference which Petitioners identify to suggest that the panel imposed a "heightened pleading standard" upon the Petitioners. However, the above-referenced passage clearly indicates that the panel was noting ***its own inability, even in hindsight,*** to

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[10] *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 615 (2015).

imagine what the officers might have done differently, at the moment Olivas raised a lighter and exclaimed that he would burn the place to the ground. The panel's decision went no further and never suggested that Petitioners were required to plead additional alternatives, or any alternatives, for that matter.[11]

The consideration of *dicta*, located solely in a concurrence or dissent, in connection with the denial of a rehearing *en banc*, does not constitute a "compelling reason" to grant a petition for certiorari pursuant to Supreme Court Rule 10. However, Petitioners request that the Court grant such exceptional relief for just that purpose. Specifically, Petitioners urge this Court to grant the Petition in order to consider or discuss various statements made by individual judges of the circuit, in the context of the denial of the request for rehearing *en banc*.

Solely for purposes of clarity and context, Respondent will attempt to briefly address some of the comments relied upon by Petitioners in that regard. As noted by Judge Oldham in his concurrence of the denial of rehearing *en banc*, Petitioners were also given the opportunity, at oral argument, to further educate the panel as to what else the Petitioners felt a reasonable officer might have done in response to Olivas' exigent and deadly threat of

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[11] The balance of Petitioners' references to the panel's decision do not actually arise from the panel's opinion, but rather from comments made within individual concurrences, or dissents, in the context of the denial on the petition for rehearing *en banc*, which was denied by a poll of four to thirteen. Pet. App. 19a. None of the concurrences, which totaled three, were joined by a majority of the Fifth Circuit and therefore do not technically constitute the law of the Circuit or the law of the case.

felonious arson, beyond attempting to immobilize Olivas with a Taser. Pet. App. 33a–34a. As noted by Judge Oldham in his concurrence in the denial of the request for rehearing *en banc*, Petitioners suggested that a reasonable officer would have either: (1) tackled Olivas and risked immolation themselves; or (2) waited for a crisis intervention team and engaged in negotiations. Pet. App. 33a-34a. Judge Oldham, in his concurrence, noted his rejection of either proposed alternative course: "both options are absurd–so absurd in fact that today's dissent cannot even bear to mention them, let alone embrace them." Pet. App. 34a.

Judge Oldham went on to reiterate the importance of viewing the facts from the officers' perspective, recognizing that officers are often forced to make split second decisions:

> 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 from the closest officer. The officers were forced to make a "split-second judgment[]" regarding how to subdue Olivas. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (*per curiam*) (*quoting Graham v. Connor*, 490 U.S. 386, 396-97 (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. Pet. App. 33a.

The panel's decision did not turn on Petitioners' ***failure to plead*** a safer alternative course of action, but was instead based upon the factual circumstances ***which were affirmatively pled to have confronted the officers at the moment the force was used***, which caused the panel to conclude that the officers were faced with the immediate potential for the destruction of lives and property. The panel did not create a new pleading standard, but rather emphasized a point, which has been repeatedly emphasized by this Court, that the issue must be examined from the perspective of a reasonable officer on the scene, at the moment the force is used.[12] The panel, examining the totality of the allegations pled by Petitioners, concluded that the facts pled let to the inescapable conclusion that officers were objectively reasonable in concluding that Olivas was imminently threatening to commit arson in a manner that put innocent lives in grave danger. The panel noted that the situation was so dire, even viewing the matter years later, no one could suggest a more promising solution.

And while the individual members of the Court may have engaged in debate within the context of denying the Petitioners' motion for rehearing *en banc*, none of the debate was contained within the *per curiam* panel opinion itself.

Setting aside the fact that Petitioners' claims were not dismissed because of a failure to plead alternative courses of conduct, the "alternatives" which Petitioners were urging to demonstrate the purported unreasonableness of the officers' conduct ran the spectrum from truly irrelevant to specious. Petitioners effectively

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[12] *Cty. Of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1547-8 (2017).

urged three separate alternatives, having apparently abandoned the argument that it would have been more reasonable to shoot Olivas with a firearm. Petitioners now urge this Court to grant the Petition and reverse the panel's opinion, because Petitioners alleged that the officers could have: (1) evacuated the home and formulated a plan to remove Olivas; (2) established a perimeter and called in SWAT or a CIT team; or (3) subdued Olivas by tackling him before he sparked his lighter. Pet. 19.

Clearly, once Olivas raised the lighter and exclaimed that he was going to burn the place to the ground, there was no time to retreat and reformulate a plan or call for additional reinforcements. *See Scott v. Harris*, 550 U.S. 372, 385 (2007) ("We think the police need not have taken the chance and hoped for the best."). Nor could the officers have known, within that instant, whether they had time to rush and tackle Olivas; and in any event, there has never been a decision by this Court, or otherwise, to suggest that the *Fourth Amendment* obligates law enforcement officers to tackle a man covered in gasoline, holding a lighter and threatening to commit arson and suicide in the hopes that they could wrestle away the lighter before he was able to ignite it and them in the process.

The panel did not purport to require that any additional proposed alternative course of conduct be pled, but instead dutifully followed existing precedent which requires that the alleged facts be reviewed from the perspective of a reasonable officer on the scene, allowing for the fact that 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. *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014). It was, and continues to be, the Petitioners who have pressed these alternatives – not the panel.

As they argue in their Petition, "Plaintiffs' complaint alleges numerous alternatives that would not have resulted in setting Olivas on fire." The problem is, and has always been, that Petitioners fail to recognize that they have alleged that, at the moment the force was used, it was Olivas who exclaimed that he was setting himself and the entire house on fire. The officers had a split-second to react and none of the alternatives pled by Petitioners eliminate the risk that Olivas would do exactly as he had declared.

No additional pleading requirements were forced upon the Petitioners, and the alternative courses of conduct repeatedly urged by Petitioners do nothing to substantiate a cognizable claim. As such, the Petition should be denied.

III. There is No Conflict Among the Circuits.

Setting aside for the moment that the panel did not dismiss Petitioners' *Fourth Amendment* claim because of a failure to plead alternatives which would have resulted in a less tragic outcome, the cases upon which Petitioners rely to suggest a conflict among the circuits, do not conflict with the panel's opinion in any material regard.

With respect to the first case cited in the Petition, *Weiland v. Palm Beach County Sheriff's Office*, 792 F.3d 1313 (11th Cir. 2015), the Eleventh Circuit did not examine the issue of whether alternatives must be pled to overcome qualified immunity. Indeed, the officers in *Weiland* did not argue that they were entitled to qualified immunity and the Eleventh

Circuit issued their opinion "without regard to the qualified immunity defense." *Id*. 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, he was tased and beaten on the ground. *Id*. at 1327. Further, the complaint alleged that, "at no point did Weiland ever raise the shotgun from his lap or point it at the officers." *Id.* Ignoring for a moment that qualified immunity had not been asserted as a defense, there exist obvious and substantive factual distinctions between the allegations in *Weiland* and the instant case. Most notably, the suspect posed no threat to the officers or others. *Id.*

Mercado v. City of Orlando, 407 F.3d 1152 (11th Cir. 2005), briefly cited in the Petition as an adjunct to *Weiland*, did not involve a motion to dismiss on the pleadings, but rather summary judgment. In any event, *Mercado* does not conflict with the panel's opinion. In *Mercado*, in the context of examining the *Graham* factors, the Eleventh Circuit determined that the facts demonstrated that the suspect was not committing a crime, resisting arrest, or posing a threat to anyone. *Id*. at 1157. Given that none of the *Graham* factors favored the officers, the Eleventh Circuit found that the district court erred in granting summary judgment. The Eleventh Circuit further 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." *Id*. at 1158. As a case was resolved by summary judgment, *Mercado* obviously makes no mention of pleading requirements, but does

discuss 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). The meaningful distinction between *Mercado* and the instant case was that the suddenness and exigency of Olivas' threat offered no opportunity for the officers in the room to retreat and call in a SWAT or CIT team. The cases do not conflict, but rather demonstrate the importance of a court's consideration of the relationship between the exigency of the threat and reasonableness of the seizure.

Petitioners next turn to the Third Circuit's decision in *Kelley v. O'Malley*, 787 Fed. App'x 102 (3d Cir. 2019). 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.* Both events transpired, 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 very

different set of facts, which demonstrated that there was no exigent threat precipitating the use of force.

Petitioners suggest that the Fourth Circuit is also in conflict, based on its opinion in *Brockington v Boykins*, 637 F.3d 503 (4th Cir. 2011). *Brockington* does not conflict with the panel's decision in the instant case. Using the same legal standards espoused in *Graham*, the Fourth Circuit 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 laying on his back and fully discharged his clip – shooting the suspect six times at close range. *Id*. at 507. Notably, the plaintiff had conceded that the initial shots which took him to the ground, constituted a reasonable seizure, but once on the ground, injured, on his back, and unarmed – he ceased to pose a threat. *Id.*

Given that any exigency had ceased, the Fourth Circuit concluded that, "rather 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." *Id.* 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*. at 507.

With regard to the Ninth Circuit, Petitioners direct the Court to *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011). Once again, this is a case decided on summary judgment. *Glenn*, 673 F.3d at 869.

Additionally, this was a case where the facts demonstrated that the intoxicated teenage subject was holding a knife to his own neck and did not present a threat to anyone, but himself, as the officers shot him with a bean bag gun and semi-automatic weapons, causing his death. *Id*. at 874 – 6. Importantly, in the context of analyzing the claim in accordance with *Graham*, the Ninth Circuit noted that, "other relevant factors included the availability of less intrusive alternatives to the force employed. . . ." *Id*. at 872. The court went on to say, "[t]he 'most important' factor is whether the individual posed an 'immediate threat to the safety of the officers or others.'" *Id.*

This discussion occurred, not within the analysis of pleading requirements, but in the context of the *Graham* factor analysis – answering the objective reasonableness question of law:

> 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. *Id*. at 878.

As such, this is an instance in which the Ninth Circuit and the Fifth Circuit are in accord. The difference, once again, is that the subject in *Glenn*, while threatening to injure himself, posed no danger to the officers or others.

Finally, Petitioners identify a single opinion from the First Circuit, *McKenney v. Mangino*, 873 F.3d 75 (1st Cir. 2017), to suggest that the panel's opinion also

conflicts with the First Circuit. In *McKenney*, the First Circuit considered the appeal of an officer who was denied summary judgment. Procedurally, it is important to note that the First Circuit dismissed the majority of the appeal because it lacked jurisdiction to review what the district court considered to be issues of fact which were resolved by the district court. *McKenney*, 873 F.3d at 84. It also should be noted that the officer in *McKenney* "[did] not challenge the district court's finding of a constitutional violation . . . ." *Id*. at 82 n. 5.

Beyond these critical procedural distinctions, the First Circuit set forth various legal principles that are in accord with the panel's decision. "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 case." *Id*. at 81-2. Also consistent with the case at hand, the First Circuit noted that "a suspect's physical proximity and the speed of his movements are highly relevant. . . ." *Id*. at 82. Finally, the court 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 feasibility of remedial action." *Id*. at 84. The First Circuit noted the difference between suicidal individuals who posed no threat to others, as compared to those who threaten others. *Id*. at 83.

The legal principles do not meaningfully differ. Once again, where the cases differ, are the facts. 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. *Id*. at 84. Based on the totality of 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, there were no allegations that Olivas dropped the lighter, that he offered to surrender, or any other allegation suggesting that the threat had ceased. Put simply, one cannot conclude the *McKenney* opinion is evidence of any conflict between the Fifth and First Circuits. Indeed, it suggests that both circuits are aware of the legal principals which underpin qualified immunity and the necessity, in excessive force cases, to closely examine the factual allegations.

In conclusion, Petitioners fail to offer any opinion, 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. Once the factual allegations of each case are examined, it becomes clear that each of the cases, including the panel's decision, was decided by following the same well-established legal principles. The difference, as is to be expected, was that each of these cases turned on materially different factual allegations, where, unlike this case, the suspect did not pose an exigent and deadly threat to others. Petitioners attempt to create a conflict, by simply omitting the very facts which they admittedly alleged, which created a deadly

exigency. Once the totality of the facts alleged are considered, it becomes clear that no conflict exists and granting the Petition is not warranted.

IV. The *Fourth Amendment*, Upon Which Petitioners' Exclusively Rely, Applied Equally to Olivas.

Petitioners errantly assert that because the panel's opinion below mandates a plaintiff plead an alternative that "would have" avoided a "potential tragedy" as a prerequisite to proceeding with a case, those suffering from mental illness who encounter excessive force will effectively be precluded from any chance of recovery. Pet. 30. This argument fails because the panel's decision did not impose any such pleading requirement.

Perhaps more importantly, Petitioners have attempted to convince this Court to grant the Petition in order to discuss police interaction with people involved in a mental health crisis, where the only risks present in the moment that the force is employed, are those self-imposed risks limited to the individual suffering from the crisis. As the Court can now see, that is not this case. As Olivas suddenly raised a lighter and made the deadly and eminent threat that he would burn the place to the ground, Olivas' actions were no longer confined to himself, but also directed at the house and its occupants.

The panel dismissed the Petitioners' *Fourth Amendment* claim, in part, because in the instant it takes to spark a lighter, the officers were forced to react to what was alleged to be a deadly and imminent threat – in an attempt to save lives. Olivas, whether he was high on methamphetamines, suicidal, or distraught and seeking attention (all of which were

alleged at differing points in the Complaint), did not have a *Fourth Amendment* right to ignite a bedroom full of innocent people, free from government intrusion. *See e.g. Scott v. Harris*, 550 U.S. 372, 383 (2007) ("We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."). This case, which clearly turns upon a felonious and deadly exigency and a single *Fourth Amendment* claim, is not the vehicle for a policy discussion regarding the interaction between law enforcement and those endangering themselves as a result of a mental health crisis. As such, the Petition should be denied.

V. The Clearly Established Law Prong Presents Insurmountable Hurdles to the Petition.

The Amici suggest that this Court should grant the Petition, because "the lower court's formulation of the 'clearly established law' inquiry in this case highlights an especially troubling trend, especially in the Fifth Circuit." Amici.Br. 3. While the Amici have filed similar briefs in other cases emanating from the Fifth Circuit, their attempts to do so in the instant case, badly misses the mark. That is because, "[t]he unanimous panel resolved this appeal on the constitutional-violation prong of qualified immunity, concluding that plaintiffs had not pleaded a *Fourth Amendment* violation. *Ramirez*, 844 F. App'x at 713-17. The unanimous panel did not reach the 'clearly established law' prong." Pet. App. 20a-21a n.2.

The Petition does not discuss or address the clearly established law prong and fails to cite the Court to any case which would begin to meet Petitioners' "clearly established law" burden. The Amici similarly make no

reference to any case law, but simply refer to this as an "obvious" case in which no clearly established law should be required. Of course, the Amici make such a declaration based on their incomplete understanding of the Petitioners' alleged facts.[13]

Because the panel did not reach the "clearly established law" prong, and under the circumstance, was not required to do so in order to reverse the ruling made by the district court, the Amici's attack on the Fifth Circuit is misplaced and their argument for granting certiorari is meritless. Substantively, the attempt to avoid the clearly established law burden is even more specious, as this Court has recently raised the importance of meeting this burden in the context of excessive force cases brought under the *Fourth Amendment*:

> 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

[13] The Amici describe this case as "obvious" and therefore suggest that the clearly established law prong can be ignored, solely because they erroneously believed that Olivas was tased "even though he presented no danger to others." Amici.Br.4. The Amici argued that tasing a person who posed no danger to others is so "obviously unlawful that a police officer need not have opened a casebook to understand that their conduct was prohibited under the Constitution." *Id.* The Amici's description of "obviousness" fails, however, because the alleged facts squarely support, not only the seriousness of the crime, but the deadly and exigent threat to the officers and others.

> 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, Cal. v. Emmons*, 139 S. Ct. 500, 503-05 (2019) (*per curiam*) (*internal citations* omitted) (emphasis added).

Notably, neither the Petition, nor the Amici, offer a single case in which the "contours were sufficiently definite," such that Guadarrama or Jefferson would have understood that they were violating the *Fourth Amendment*. And while the panel did not reach the question of clearly established law, it did note that none of the cases relied upon by Petitioners to meet that burden, "involved a suicidal individual, flammable material, a credible threat of arson, or the potential immolation of others." Pet. App. 10a.

As such, granting the Petition would be futile, as the Petitioners have repeatedly failed to discharge their

burden of coming forward with clearly established law and the panel decided the case on other grounds. Consequently, such review would not affect the ultimate outcome of this case, and the Petition should be denied.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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