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 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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The briefs in opposition rest on the theory that the panel below did not adopt the test it said it was adopting. That is wrong. Once Respondents' erroneous interpretation of the decision below is corrected, each of their arguments against certiorari loses its force.

Respondents' principal argument against certiorari is that the decision below "never suggested that Petitioners were required to plead additional alternatives." Jefferson Opp. 14; *see* Guadarrama Opp. 9.

Wrong. The panel opinion explains that dismissal was warranted because Plaintiffs failed to plead an "alternative course the defendant officers should have followed that would have led to an outcome free of potential tragedy." Pet. App. 11a. Removing any residual doubt, the Fifth Circuit subsequently confirmed that the decision below "*held* that an officer's conduct cannot be held 'unreasonable' under the Fourth Amendment in the absence of allegations or evidence regarding an 'alternative course the defendant officers should have followed that would have led to an outcome free of potential tragedy.'" *Jackson* v. *Gautreaux*, 3 F.4th 182, 187 (5th Cir. 2021) (quoting *Ramirez* v. *Guadarrama*, 3 F.4th 129, 136 (5th Cir. 2021)) (emphasis added).

Respondents do not otherwise defend the panel's addition of a new element in excessive-force cases, which they concede would "alter existing pleading standards." Jefferson Opp. 4. And they acknowledge that the First, Third, Fourth, Ninth, and Eleventh Circuits do not require plaintiffs alleging excessive force to plead alternatives, confirming a split on this important question. *See* Guadarrama Opp. 12-19; Jefferson Opp. 18-25.

Because Respondents cannot defend the panel's heightened pleading standard, they spend much of their briefs disputing the facts alleged in the complaint. *See, e.g.*, Guadarrama Opp. 1-4; Jefferson Opp. 7-12. That is an audacious tactic at the 12(b)(6) stage. For instance, Respondents insist that dismissal was warranted because their victim, Gabriel Eduardo Olivas, posed an "undeniable and serious threat to everyone in the room." Guadarrama Opp. 14. But the complaint plausibly alleges otherwise, and the truth of

that allegation is a fact question. Nor do Respondents dispute that the danger they supposedly sought to avoid—the risk to others if Olivas lit himself on fire—was the exact danger *they* precipitated when *they* lit him on fire.

In the end, Respondents do nothing to diminish the importance of this case. The Fifth Circuit's decision responds to this Court's summary rebukes last Term by creating a new way to deny victims of unconstitutional conduct their day in court. As a cross-ideological group of *amici* emphasize in urging this Court to grant review, unless corrected, the panel's decision will encourage the use of grossly disproportionate force in fraught encounters with civilians; will erode relationships between communities and police; and will deny victims of unconstitutional conduct their opportunity to make their case.

This Court should grant the petition and reverse.

I. RESPONDENTS DO NOT DEFEND THE FIFTH CIRCUIT'S HEIGHTENED PLEADING STANDARD.

The complaint alleges that Respondents set Olivas on fire "to prevent him from setting himself on fire." Pet. App. 49a (Willett, J., dissenting from rehearing denial). This is manifestly unreasonable conduct and plainly states an excessive-force claim. The Fifth Circuit dismissed the case anyway by adding a new element to such claims—requiring Plaintiffs to plead an "alternative course the defendant officers should have followed that would have led to an outcome free of potential tragedy." *Id.* at 11a.

Respondents do not defend the panel's heightened pleading standard. Indeed, they agree that requiring

a plaintiff to plead a superior alternative would amount to "an ersatz heightened pleading requirement." Guadarrama Opp. 9. Respondents instead insist that the panel did not *actually* "require that any additional proposed alternative course of conduct be pled." Jefferson Opp. 17.

Respondents are wrong. In the concluding section of its opinion, the panel held that the complaint failed because it did not establish what "alternative course the defendant officers should have followed that would have led to an outcome free of potential tragedy." Pet. App. 11a. Concurring in the denial of rehearing en banc, Judge Oldham—a panel member—explained that the complaint had been dismissed because Plaintiffs "are missing an element of their claim": namely, "a superior alternative." *Id.* at 36a.

The Fifth Circuit has since confirmed as much. It recently explained in a unanimous opinion that the decision below "*held* that an officer's conduct cannot be held 'unreasonable' under the Fourth Amendment in the absence of allegations or evidence regarding an 'alternative course the defendant officers should have followed that would have led to an outcome free of potential tragedy.'" *Jackson*, 3 F.4th at 187 (quoting the decision below) (emphasis added). Citing the decision below, the Fifth Circuit reaffirmed in *Jackson* that an excessive-force claim fails at the threshold unless the complaint pleads a tragedy-free "reasonable alternative to the officers' conduct." *Id.*

Thus, the Fifth Circuit itself has refuted Respondents' principal argument against certiorari. And *Jackson* shows that its impermissibly heightened standard is catching on.

II. RESPONDENTS' FACTUAL ARGUMENTS UNDERSCORE THE PANEL'S ERROR.

Because Respondents cannot defend the panel's heightened pleading standard, they spend much of their briefs disputing the facts. This effort only underscores how far the panel strayed from the proper approach to resolving a motion to dismiss.

1. Like the panel before them, *see* Pet. App. 45a-48a (Willett, J., dissenting from rehearing denial) (taking issue with the panel's selective reportage), Respondents cherry-pick allegations from the complaint, construing them in the light *least* favorable to Plaintiffs to generate a self-serving narrative about why they lit Olivas on fire. Their narrative rests on the premise that they had no choice but to deploy their tasers because, despite the complaint's specific allegations to the contrary, Olivas actually "presented an immediate and deadly threat to the officers and family members" in the room. Guadarrama Opp. 4; Jefferson Opp. 9.

The most obvious problem with Respondents' narrative is that it conflicts with the complaint's allegations. The complaint repeatedly alleges that Olivas had not "threaten[ed]" anyone in the home. Pet. App. 69a-71a, 77a, 80a. It further alleges that the family members were a "safe distance away from" Olivas, and that no one in the room was "close enough to Mr. Olivas to be in danger if Mr. Olivas had chosen to light himself on fire." *Id.* at 76a, 78a. These allegations were (at least) plausible—after all, no bystander was injured when *Respondents* chose to light Olivas on fire. Respondents make no real effort to address how dismissal could be appropriate in light of the complaint's allegations that Olivas was a safe distance away. Instead, Respondents ignore key facts and cite

others that (putting it charitably) do not faithfully describe the complaint's allegations. *E.g.*, Guadarrama Opp. 3 (describing how Respondent "fear[ed] for [his] safety" and citing Pet. App. 76a, which alleges nothing of the sort).

Respondents also make no real effort to address the complaint's allegations that Respondents *did* have alternatives—clearing the room, subduing Olivas after he was pepper-sprayed, or requesting aid from the crisis intervention team. *See* Pet. 17-20. Indeed, Jefferson admits that the panel did "not discuss any" of the "proposed alternative courses of action" that Plaintiffs "actually alleged." Jefferson Opp. 12.

Respondents also ignore the complaint's allegations about the risks, known to each of them, of tasing someone doused in gasoline. Neither even acknowledges the complaint's core allegation: that Respondents knew that tasing Olivas would set him on fire because, immediately before they deployed their tasers, Officer Elliott "shouted," "If we Tase him, he is going to light on fire." Pet. App. 85a. Respondents claim that they were "compelled to" tase Olivas "to prevent [him] from igniting his lighter." Jefferson Opp. 9-10. Translated: To prevent Olivas from lighting himself on fire and putting everyone in the house at risk, they were "compelled" to light Olivas on fire and put everyone in the house at risk. As Judge Willett observed in dissent below, that is plausibly—patently—unreasonable. Pet. App. 49a.

2. In a classic pot-kettle two-step, Respondents accuse Plaintiffs of omitting a key fact—Olivas's alleged statement, after Respondents pepper-sprayed and cornered him, that he would burn the house down. *See* Guadarrama Opp. 4; Jefferson Opp. 3-4. Wrong.

Plaintiffs expressly addressed that statement. *See* Pet. 21-22 (citing Pet. App. 8a-9a, 86a). As the petition explains, Plaintiffs' complaint recited that statement in describing Elliott's uncorroborated account of events. *See* Pet. App. 80a. The complaint's discussion also included important context that Respondents (again) elide—that Olivas was a safe distance away; that he "could have easily been subdued"; and that he made the statement while "not making any gestures or aggressive moves toward anyone." *Id.* at 85a-86a.

The petition describes the facts in the light most favorable to Plaintiffs, as appropriate at this stage in the litigation. Respondents, for their part, have no excuse for ignoring the complaint's core allegations. Their attempt to leverage contradictions in their own statements to justify adopting their preferred factual narrative exemplifies the basic error pervading their briefs and the decision below. By "hesitating over 'disputed facts,'" and "crediting the officers' allegations instead of Plaintiffs'," they "invoke[] something resembling summary-judgment review." *Id.* at 46a (Willett, J., dissenting from rehearing denial). Indeed, as the petition observes, *see* Pet. 18-19, the panel relied exclusively on summary judgment cases in justifying its dismissal—a fact to which Respondents have no answer.

3. Respondents maintain that the panel viewed the facts in the light most favorable to Plaintiffs because "the opinion * * * states that the court did so." Guadarrama Opp. 8; Jefferson Opp. 12. Parroting the proper standard is not the same as applying it. The Fifth Circuit has been called out for that before. *See Johnson* v. *City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam) (reversing Fifth Circuit decision *reciting*

proper standard for *imposing* a "heightened pleading standard"). A court cannot evade review by winking at the proper standard while applying a markedly different one.

III. THE CIRCUITS ARE SPLIT.

Five circuits do not require plaintiffs to plead less-intrusive alternatives that "would have" avoided the harm. The panel below, by contrast, "held" that an officer's actions cannot be deemed unlawful absent "allegations or evidence" of a superior "alternative." *Jackson*, 3 F.4th at 187 (citing the decision below). This Court should resolve this consequential split.

1. Had this case arisen in the First, Third, Fourth, Ninth, or Eleventh Circuit, Respondents do not dispute that Plaintiffs need not have pled alternatives that "would have" avoided the harm. Respondents concede, for example, that the Third Circuit in *Kelley* v. *O'Malley*, 787 F. App'x 102 (3d Cir. 2019), reversed the dismissal of a suit "without regard to whether the plaintiff had alleged viable alternative conduct." Guadarrama Opp. 14; Jefferson Opp. 20. They also concede that, in the Ninth Circuit, "the availability of less intrusive alternatives to the force employed" is merely a "relevant factor[]"—not an element. Guadarrama Opp. 16; Jefferson Opp. 22 (quoting *Glenn* v. *Washington County*, 673 F.3d 864, 872 (9th Cir. 2011)). And they make similar concessions about the Eleventh, Fourth, and First Circuits. *See* Guadarrama Opp. 12-18; Jefferson Opp. 18-24; *e.g.*, *Brockington* v. *Boykins*, 637 F.3d 503, 507 (4th Cir. 2011) (feasibility of alternatives "depend[ed] on the facts that emerge through discovery").

Respondents argue instead that the decision below does not conflict with these cases because the panel

did not *actually* require Plaintiffs to plead an alternative. That is wrong for all the reasons already explained.

2. Given the clear split on the question presented, Respondents attempt to distinguish the other cases on their facts. They maintain that the difference between those cases and this one is that the victims in those cases "did not pose an exigent and deadly threat to others." Jefferson Opp. 24; Guadarrama Opp. 19. Again, that argument only highlights the panel's refusal to accept Plaintiffs' allegations as true. *See* Pet. App. 7a-8a.

Respondents' attempts to distinguish the cases on their facts also fail on their own terms. Consider, for example, the First Circuit's decision in *McKenney* v. *Mangino*, 873 F.3d 75 (1st Cir. 2017). As here, the officer there killed a suicidal victim, arguing that "he reasonably perceived [the victim] as an imminent danger" and had "no real choice but to fire his weapon." *Id.* at 83. The court rejected that argument, explaining that the officer improperly relied on "disputed issues of fact and cherry-picked inferences"—including about "the feasibility of less drastic action." *Id.* at 84. Instead, "taking the facts and the reasonable inferences therefrom in the light most favorable to the plaintiff, the threat presented lacked immediacy and alternatives short of lethal force remained open." *Id.* at 83. The same analysis should have applied here.

3. Respondents also point to procedural distinctions between this case and some of the others. Respondents note, for example, that some cases arose on summary judgment. *See* Jefferson Opp. 19-23; Guadarrama Opp. 13, 17. Indeed they did. And—again—

that's the point. That these other courts found it necessary, even after summary judgment, for a jury to resolve the factual disputes only underscores how inappropriate it was for the panel to *dismiss* this case outright. *See Jacobs* v. *City of Chicago*, 215 F.3d 758, 775 (7th Cir. 2000) (Easterbrook, J., concurring in part and in the judgment) ("Rule 12(b)(6) is a mismatch for immunity and almost always a bad ground of dismissal.").

Respondents' other purported distinctions are even less persuasive. Respondents assert that *Weiland* v. *Palm Beach County Sheriff's Office*, 792 F.3d 1313 (11th Cir. 2015), was not a qualified-immunity case. *See* Guadarrama Opp. 12; Jefferson Opp. 18-19. But the question in *Weiland*—whether the plaintiffs had alleged an excessive-force claim, 792 F.3d at 1326-27—is the same question here. Respondents also argue that *McKenney* addressed the second qualified immunity prong rather than the first. *See* Guadarrama Br. 17; Jefferson Br. 23. But *McKenney*'s holding—that the defendant's conduct violated *clearly established law*—yet again underscores the split rather than dispelling it. None of Respondents' arguments refutes the existence of a square split requiring this Court's attention.

IV. THIS CASE PRESENTS A CRITICALLY IMPORTANT QUESTION.

Fraught encounters between police officers and citizens threating suicide are all too common. *See* Pet. 27-30. In these encounters, "the overarching principle is, slow things down and don't force a confrontation"—indeed, "good agencies have been emphasizing these

concepts and principles for decades."[1] Respondents here failed to adhere to this principle, using grossly disproportionate force against a man they had been called to protect. Congress enacted Section 1983 to provide relief to victims of such unlawful force, and to deter other officers from similar misconduct. *Id.*

As has become a habit in the Fifth Circuit, however, the panel granted Respondents qualified immunity even though the facts as alleged state a particularly egregious constitutional violation. *See Tolan* v. *Cotton*, 572 U.S. 650, 659 (2014) (per curiam) (summarily reversing the Fifth Circuit after concluding that the ruling "reflect[ed] a clear misapprehension of summary judgment standards"); *Taylor* v. *Riojas*, 141 S. Ct. 52, 54 (2020) (per curiam) (summarily reversing the Fifth Circuit); *McCoy* v. *Alamu*, 141 S. Ct. 1364, 1362 (2020) (mem.) (summarily vacating the Fifth Circuit); *see also* Petition for a Writ of Certiorari at 13-24, *Cope* v. *Cogdill*, No. 21-783 (U.S. Nov. 22, 2021). As Judge Willett noted in his dissent, after last Term's two summary rejections of Fifth Circuit Section 1983 decisions, the panel's opinion provides this Court "yet another message-sending opportunity." Pet. App. 42a.

Respondents urge this Court to deny review on the ground that, unlike the Fifth Circuit's other recent misapplications of Section 1983, the panel below held that Plaintiffs failed to state a constitutional violation rather than holding that the law was not "clearly established." *See* Jefferson Opp. 26; Guadarrama Opp.

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[1] Kim Barker et al., *After 4 Killings, 'Officer of the Year' Is Still on the Job*, N.Y. Times (updated Jan. 8, 2022), https://nyti.ms/3rgwV7k.

28. That distinction does not diminish the importance of this case; if anything, this new procedural front is further cause for concern. As *amici* emphasize, the panel's heightened pleading standard "distorts basic rules of civil procedure" to foreclose even limited discovery for victims of unconstitutional force. *Amicus* Brief of Cato Institute *et al.* 14. And the panel's decision will "hurt[] the law enforcement community itself" by feeding the perception "that police are held to a far lower standard of accountability than ordinary citizens." *Id.*

Guadarrama maintains that even limited discovery would be inappropriate here because qualified immunity must be resolved "at the earliest possible stage of litigation." Guadarrama Opp. 10. That argument—a bid for flat dismissal even in the most egregious of circumstances—says the quiet part out loud. Qualified immunity is not an end unto itself; merely invoking it is not enough. Qualified immunity instead shields officials from liability only "when they perform their duties reasonably." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009). Respondents' conduct, as alleged in Plaintiffs' complaint, was manifestly unreasonable. The district court therefore properly contemplated discovery tailored to evidence "needed to make a determination on defendants' qualified immunity defenses." Pet. App. 17a. The panel did not let the case get even that far.

Respondents contend that granting the petition would be "futile" because they would be entitled to qualified immunity if the complaint survived. Jefferson Opp. 28; Guadarrama Opp. 24-30. Not so. Only after the complaint's allegations are "properly credited" and the "factual inferences are reasonably

drawn" in Plaintiffs' favor can a court evaluate whether Respondents' "actions violated clearly established law." *Tolan*, 572 U.S. at 660. Here, the "complaint alleges a plausible Fourth Amendment violation, and an obvious one at that." Pet. App. 49a (Willett, J., dissenting from rehearing denial). Reversing the panel's decision is essential to give Plaintiffs—and other victims of state violence in the Fifth Circuit—a fair opportunity to make their case.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted and the decision reversed.

Respectfully submitted,

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