Nos. 22-1151, 22-1157

IN THE

Supreme Court of the United States

CITY OF ARLINGTON,
Petitioner,
v.
DE'ON CRANE, *et al.*,
Respondents.

CRAIG ROPER,
Petitioner,
v.
DE'ON CRANE, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents, the parents and minor children of Tavis Crane, brought suit under 42 U.S.C. § 1983 against petitioners, Arlington Police Officer Craig Roper and the City of Arlington, Texas, after Roper shot Crane to death during a traffic stop. The summary judgment record presents numerous disputed issues of material fact that, if resolved in respondents' favor, establish that Roper shot an unarmed, non-violent suspect pointblank in the abdomen after he had done nothing more than verbally resist a command that he step out of his parked car, in the absence of any immediate threat or even any attempt to flee.

The question presented is whether the Fifth Circuit properly determined that on this record, Roper is not entitled to qualified immunity at the summary judgment stage.

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INTRODUCTION

In *Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam), this Court provided instructions on how to resolve motions for summary judgment based on qualified immunity: courts must ask "whether the facts, taken in the light most favorable to the party asserting the injury, … show the officer's conduct violated a [clearly established] federal right." *Id.* at 655-56 (original brackets and internal quotation marks omitted).

The Fifth Circuit faithfully applied that standard when it held that petitioner Craig Roper is not entitled to qualified immunity at the summary judgment stage for his use of deadly force against Tavis Crane. As the court of appeals explained, the evidentiary record presents numerous disputed issues of material fact that, if resolved in respondents' favor, establish that Roper shot an unarmed, non-violent suspect pointblank in the abdomen after he had done nothing more than verbally resist a command that he step out of his parked car, in the absence of any immediate threat or even any attempt to flee. On these facts, Roper's decision to shoot Crane falls squarely within the category of excessive force this Court has recognized as an "obvious" Fourth Amendment violation, *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004), one that is "beyond debate," *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (internal quotation marks omitted).

Neither petition identifies any basis for this Court's review of the Fifth Circuit's decision, which is both fact-bound and correct. Petitioners attempt to argue otherwise only by improperly construing disputed factual issues in their favor and entirely omitting undisputed facts that belie their version of

events. Tellingly, every one of the cases they cite as supporting their position involved officers who used deadly force on a suspect who was already fleeing in a manner that posed a serious risk of immediate harm to officers and civilians—in stark contrast to Roper's decision to shoot Crane while Crane's car was in park and he was attempting to comply with Roper's command that he turn off the ignition.

The City additionally asks the Court to review whether "the mere existence of a municipal policy of allowing traffic stops" is "sufficient to impose municipality liability" for "a subsequent unlawful use of force." City Pet. ii. But neither the district court nor the court of appeals ever addressed this question, so it is unsuitable for review.

The Court should deny the petitions.

STATEMENT OF THE CASE

I. Factual Background

On the night of February 1, 2017, Tavis Crane was driving with three passengers: his pregnant girlfriend Valencia Johnson, his two-year-old daughter, and his friend Dwight Jefferson. Pet. App. 4a.[1] Arlington Police Officer Elise Bowden pulled up behind Crane at a traffic light. *Id.* at 4a-5a. When the light turned green, Crane's toddler dropped part of a plastic candy cane out of the car window. *Id.* at 5a. Bowden, reportedly believing the item to be drug paraphernalia, pulled

[1] Because the appendices to the two petitions are identical, we cite them interchangeably.

Crane over. *Id.* Before approaching the car, Bowden called for backup. *Id.*

Bowden walked up to the front passenger-side door and asked Jefferson, in the front passenger seat, what he had discarded from the window. *Id.* He replied that the only thing he had thrown from the window was a cigarette butt. *Id.* Bowden asked Crane for his driver's license and proof of insurance; Crane did not have his license with him but provided Bowden with his insurance information and an identification card. *Id.*; ROA.712; ROA.987-88. During the exchange, Bowden noticed an object fall to the ground from the rear passenger-side window, where Crane's daughter was sitting. Pet. App. 5a. She recognized the object as the red top of a plastic candy cane and realized that the object previously thrown from the car was the candy cane's clear bottom half. *Id.* She laughed about the misunderstanding and returned the fallen candy cane to the toddler. *Id.*; ROA.1015 at 23:39:56-40:11.

Bowden returned to her car and ran a warrant check, which indicated that Crane had outstanding warrants for several misdemeanors and a possible felony probation violation for evading arrest. Pet. App. 5a. She wrote Crane a citation for driving without a license while waiting for confirmation on the warrants. *Id.*

About ten minutes after Bowden pulled Crane over, Officer Eddie Johnson arrived on the scene. *Id.* at 6a. Bowden told Johnson that Crane had outstanding warrants but that he had been cooperative, that she was not sure if he knew he had warrants out, and that she had pulled him over only because a baby

threw the bottom of a plastic candy cane out of the car window. *Id.*; ROA.1015 at 23:48:01-48:24. Bowden and Johnson decided to wait for a third officer, petitioner Craig Roper, before proceeding. ROA.1015 at 23:49:03-50:09.

When Roper arrived a few minutes later, the three officers approached Crane's vehicle without further conversation. Pet. App. 6a. Bowden walked up to the front driver's side door next to Crane, with Roper standing next to her by the rear driver's side door and Johnson standing by the front passenger side door. *Id.* Bowden asked Crane to get out of the car because he had outstanding warrants. *Id.* Crane denied having any warrants and said he did not want to get out of the car because he needed to get his daughter home to her mother. *Id.* Johnson asked Jefferson to turn off the car and give him the key, but Crane told Jefferson not to comply. *Id.* at 6a-7a. Bowden attested that Crane remained polite throughout the exchange and made no attempt to flee. ROA.988. The car remained in park the entire time. ROA.1003.

Nonetheless, approximately two minutes into Bowden's conversation with Crane, Roper abruptly opened the rear driver's side passenger door, pointed his gun directly at Crane, and ordered everyone in the car to put their hands up. Pet. App. 7a; ROA.1015 at 23:50:29-52:42. The three adult occupants complied. Pet. App. 7a. Roper then climbed into the backseat over Valencia Johnson and put Crane into a chokehold with his left arm while pointing his gun at Crane with his right hand. *Id.* at 29a. He screamed at Crane to turn off the "fucking car" and threatened to kill him if he refused. *Id.* at 8a, 29a-30a; ROA.1015 at 23:52:48-53:17. Bowden reached for Roper and yelled

at him three times to get out of the car. Pet. App. 7a; ROA.1015 at 23:52:48-53:17.

The parties dispute the rest of what happened in the car. Valencia Johnson attested that Roper ordered Crane to turn off the car, and that as Crane reached for the keys in compliance, Roper shot him. ROA.1070. After the gun discharged, she saw Crane's head fall back. *Id.* She subsequently felt the car begin to move backward until it hit something, at which point it started to move forward. *Id.* Roper then shot Crane two more times. *Id.* Roper attested that he merely grabbed the hood of Crane's sweatshirt, without choking him, and that he did not shoot Crane until after the car had begun to move. ROA.1005-06.

Although dashcam video captured much of what happened outside the car, it does not show what happened inside Crane's car after Roper jumped in. The footage shows only that approximately 18 seconds after Roper entered the backseat, the car engine began to rev, the brake lights turned on, and then the car lurched backward, running over Bowden (who had moved behind the car after Roper got inside) before rolling forward and eventually stopping down the road. ROA.865; ROA.1015 at 23:52:26-53:33. Roper then dragged Crane out of the car and continued yelling and cursing at him, though Crane was not making any noise. Pet. App. 8a. An autopsy determined that Crane was shot four times and died of gunshot wounds to the abdomen. *Id.*

II. District Court Proceedings

Crane's parents, respondents here, filed suit on behalf of themselves, Crane's minor children, and Crane's estate against the City of Arlington and

Roper under 42 U.S.C. § 1983. Pet. App. 8a. Respondents alleged that Roper violated Crane's Fourth Amendment right to be free from excessive force, and they sought to hold the City liable under *Monell v. Department of Social Services*, 436 U.S. 658 (1978).[2] Pet. App. 8a.

Roper moved for summary judgment on qualified immunity grounds. *Id.* at 30a. The district court granted the motion, holding that respondents "failed to show Roper's use of force was clearly excessive." *Id.* at 33a. The court also held that the dashcam video foreclosed Valencia Johnson's attestation that Roper shot Crane before the vehicle began to reverse. *Id.* at 33a-34a. Believing that the video showed the car "accelerat[ing]" backward, the court theorized that Crane must have hit the accelerator and shifted gears before Roper shot him. *Id.*

Because the court concluded that Roper did not violate Crane's Fourth Amendment rights, it held that the City also could not be liable for any such violation, and accordingly granted summary judgment to the City as well. *Id.* at 35a.

III. Court of Appeals Proceedings

The Fifth Circuit reversed. Pet. App. 1a-26a. The court first determined that the district court erred in holding that the dashcam video contradicted respondents' account of the facts such that the district court

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[2] The three passengers—Jefferson, Johnson, and Z.C.—also asserted Fourth Amendment claims against Roper and the City. Pet. App. 24a. Those claims were dismissed by the district court at the pleading stage, *id.* at 8a, and are not before this Court.

was entitled to adopt Roper's version of the facts. *Id.* at 11a-13a. The Fifth Circuit explained that "[w]hat happened inside Crane's car is not visible in the dash-cam video" and therefore could not establish "when Roper shot Crane, when Crane became unconscious, whether the car moved before or after Roper shot Crane, and whether Roper had his arm around Crane's neck or was grabbing Crane's sweatshirt." *Id.* at 12a.

Although the district court postulated that "the gear could change and the car could move only with the conscious intention of Crane," the Fifth Circuit explained that this theory "ignore[d] the other plausible explanation," which was that the gear was shifted "as Crane attempted to comply with Roper" and that "the chokehold caused Crane to press down on the accelerator as an attempt to relieve the stress on his neck." *Id.* Because both conclusions were "plausible," the district court "erred by applying its own interpretation of the video and accepting Roper's factual account over Crane's of what occurred inside the car." *Id.* at 12a-13a.

The Fifth Circuit then determined that the summary judgment record presented a genuine dispute of material fact as to whether Roper had violated Crane's right to be free of excessive force under *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), which permit an officer to use deadly force only where he "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officers or to others," Pet. App. 14a (quoting *Garner*, 471 U.S. at 11).

"Accepting the facts as the passengers allege," the court explained, "Crane was shot while unarmed with Roper's arm around his neck." *Id.* at 15a. With respect to Roper's claim that the car posed a threat, the court observed that, by respondents' account, Roper shot Crane while the car was still in park. *Id.* at 16a. "Roper was not at imminent risk of being expelled from a parked car," and Johnson and Bowden were not at risk of being hit by a parked car, particularly because they were standing to the side of the car at the time of the first shot. *Id.* The court cited its decision in *Deville v. Marcantel*, 567 F.3d 156 (5th Cir. 2009), as establishing that "an officer has no reason to believe a noncompliant driver in a parked car with the engine running is a threat," and its decision in *Lytle v. Bexar County*, 560 F.3d 404 (5th Cir. 2009), as establishing that police cannot use deadly force against a suspect simply for fleeing in a motor vehicle. Pet. App. 16a n.47.

The court thus concluded that, although "[r]easonable officers could debate the level of force" permitted to effect an arrest under these circumstances, Roper's abrupt decision to jump in the car, put Crane in a chokehold, and then shoot him in the abdomen was well outside the bounds of a rational response to Crane's verbal resistance to exiting the car. *Id.* at 18a-19a.

The court then explained that the constitutional violation was clearly established for qualified immunity purposes: "[P]recedent provided Roper with fair notice that using deadly force on an unarmed, albeit non-compliant, driver held in a chokehold in a parked car was a constitutional violation beyond debate." *Id.* at 22a. The court noted that, although the *Garner*

deadly force standard should not be applied at "a high-level of generality," where "'existing precedent … place[s] the statutory or constitutional question beyond debate,'" it is unnecessary to identify "'a case directly on point.'" *Id.* at 21a (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Applying this standard, the Fifth Circuit found it "clear enough" under *Garner* that "Roper should have known he could not use deadly force on an unarmed man in a parked car." *Id.* at 23a.

Having found that the district court erred in holding that Roper did not violate Crane's right to be free from excessive force, the Fifth Circuit found that it erred "perforce [in] dismissing the City" on that ground. *Id.*

Roper and the City filed petitions for rehearing en banc, which the Fifth Circuit denied in a ten to six vote. *Id.* at 37.

REASONS FOR DENYING THE PETITION

I. Petitioners Misrepresent The Summary Judgment Record.

As *Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam), explains, in resolving questions of qualified immunity at summary judgment, courts must ask "whether the facts, *taken in the light most favorable to the party asserting the injury*, … show the officer's conduct violated a federal right." *Id.* at 655-56 (brackets and internal quotation marks omitted; emphasis added). "This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a judge's function at summary judgment is not to weigh the evidence and determine the truth of the

matter but to determine whether there is a genuine issue for trial." *Id.* at 656 (internal quotation marks omitted).

Both petitions defy the summary judgment standard, not only by construing disputed factual issues in petitioners' favor, but also by entirely omitting undisputed facts that belie petitioners' version of events.

Roper, for example, repeatedly insists that he had to deploy deadly force to stop Crane from "fleeing at a high speed." Roper Pet. 16; *see id.* at 9, 15. But even the undisputed evidence establishes that Crane was not fleeing when Roper jumped in the car: Crane had been sitting calmly with the car in park for sixteen minutes without any attempt to flee; Crane remained calm and polite when he said he did not want to get out of the car; the car remained in park the entire time; and even Bowden disagreed with Roper's impulsive decision to escalate the situation to violence, yelling at Roper to get out of the car. ROA.988; ROA.1015 at 23:50:29-53:17. And an eyewitness attested that that Roper shot Crane while Crane was attempting to comply with Roper's command that he turn the car off, ROA.1070, which is the opposite of fleeing.

Roper also asserts that the "terror Crane inflicted on Officer Bowden" establishes that Crane "present[ed] a serious risk to officers." Roper Pet. 11. But even the uncontested evidence shows that Bowden was not in fear of Crane before Roper shot him: She and Crane had been calmly discussing Crane's reluctance to exit the car when Roper abruptly pulled his gun and jumped in the backseat, at which point Bowden repeatedly yelled at Roper to get out of the car. *See* ROA.988; ROA.1015 at 23:50:29-53:17. And it

is a logical fallacy to suggest that because the car subsequently hit Bowden, after Roper shot Crane, Bowden must have been in fear of Crane before the shooting; under respondents' account, it was *Roper* who inflicted terror on Bowden when he jumped in the car, shot Crane, and then caused the car to reverse backward over Bowden.

Finally, Roper asserts that he acted reasonably in shooting Crane in response to the revving engine, a claim that not only defies the summary judgment standard but also strays from Roper's own evidence. In his affidavit supporting his motion for summary judgment, Roper asserted that he shot Crane because the car started moving, ROA.1006, not because the engine revved while the car was still in park. Consistent with this claim, in the district court Roper relied on the car's movement as the justification for Roper's use of deadly force, according no significance to the revving engine. ROA.836-37. Roper argued for the first time on appeal that he reasonably shot Crane in response to the revving engine, Roper C.A. Br. 39, a claim he repeats before this Court as if it were uncontested that the engine revved before the first shot. Pet. 24-25. That point, however, is highly contested. Roper's own expert concedes that the engine did not begin revving approximately 18 seconds after Roper entered the vehicle. ROA.865. By respondents' account, it was during that time that Roper shot Crane as Crane attempted to comply with Roper's command that he turn off the car ignition, and Crane then threw his head back and pushed his feet down on both the

gas pedal and the brake pedal as he struggled in response to Roper's use of force.[3] At the summary judgment stage, respondents' account must be credited.

The City's likewise cherry picks its facts—suggesting in its Questions Presented, for instance, that Roper reasonably shot Crane in response to Crane "struggling with the officer and revving his vehicle, making the tires spin and causing it to smoke and sway side to side." City Pet. i. As just noted, this claim both conflicts with Roper's affidavit and fails to credit respondents' evidence that Roper shot Crane as he attempted to comply with Roper's command to turn off the car, before the engine revved.

Petitioners' failure to provide this Court with an accurate, comprehensive account of the factual record is reason alone to conclude that they have not presented the Court with a credible challenge to the Fifth Circuit's summary judgment determination.

II. The Fifth Circuit's Decision Is Correct.

Qualified immunity shields officials from civil liability where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v.*

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[3] Although the Fifth Circuit states in passing that the engine revved before the first shot, Pet. App. 15a, that appears to be an error. The panel acknowledged elsewhere in its opinion that at least two of the four shots are inaudible on the dashcam video, *id.* at 16a-17a n.48; Roper alleges that those shots occurred after the car moved, while respondents allege that at least one of the shots occurred when Crane reached to turn the car off, before the engine revved. "When the shots were fired," the court concluded, "is a question that ought to be resolved by a jury." *Id.*

Luna, 577 U.S. 7, 11 (2015) (internal quotation marks omitted). The Fifth Circuit correctly determined that petitioners are not entitled to qualified immunity at the summary judgment stage.

Resolving the disputed issues of material fact in respondents' favor, the evidentiary record establishes that Crane's interactions with Bowden had been calm and polite throughout the sixteen minute encounter, even as they discussed Crane's reluctance to get out of the car; that the only confirmed warrants on Crane were based on misdemeanors; that the car was in park the whole time; that Roper jumped in the backseat two minutes after arriving on the scene without consulting Bowden, who yelled at him to get out of the car; that Roper threw Crane into a chokehold and then shot him in the abdomen as Crane attempted to comply with Roper's command that he turn off the car; and that either Roper or Crane *then* hit the gear shift, at which point the car began to move, reversing over Bowden and then moving forward. *See supra* pp. 3, 10-11.

In short, Roper shot an unarmed, non-violent suspect pointblank in the abdomen after he had done nothing more than verbally resist a command that he step out of his parked car, in the absence of any immediate threat or even any attempt to flee. Roper's decision to kill Crane under these circumstances was clearly unlawful under the Fourth Amendment, and no reasonable officer in Roper's position could have believed otherwise.

A. The Fifth Circuit correctly determined that Roper's use of deadly force violated the Fourth Amendment.

As the Fifth Circuit recognized, the application of the Fourth Amendment to Roper's use of deadly force is governed by *Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985). Pet. App. 14a. *Graham* sets forth a multi-factor test for determining whether an officer's use of force is reasonable, considering the severity of the crime at issue, whether the suspect is resisting or attempting to evade arrest, and whether the suspect poses a threat to the safety of the officers or others. *See* 490 U.S. at 396. *Garner* specifically holds that an officer may lawfully use deadly force only where he "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officers or to others." 471 U.S. at 11.

The Fifth Circuit found that all three *Graham* factors favored respondents. Pet. App. 14a-19a. With respect to the severity of the crime, the officers had already established that Bowden's reason for pulling Crane over was based on a misunderstanding, and that the suspected drug paraphernalia was in fact just a plastic candy cane. ROA.987-88. Bowden asked Crane to step out of the car based instead on several confirmed misdemeanor warrants and an unconfirmed felony probation violation warrant for evading arrest that Bowden found when she ran a warrant check on Crane's identification. ROA.988. Throughout the sixteen-minute encounter, Crane was calm and polite, even during the last two minutes when he verbally resisted Bowden's request that he step out of

the car, and he had not made any attempt to flee. *Id.*; ROA.1015 at 23:48:01-51:09.

Nor did Crane pose any immediate threat to the officers' safety. "Accepting the facts as the passengers allege," the Fifth Circuit explained, "Crane was shot while unarmed with Roper's arm around his neck." Pet. App. 15a. Although Roper claimed that he feared Crane might have a weapon, the court noted that both Roper and the other officers could have seen from their positions if Crane was reaching for a gun, "yet none of them—including Roper—reported a suspicion of a weapon." *Id.* The court thus concluded that Roper "could not have reasonably suspected that Crane had a weapon." *Id.*

With respect to Roper's claim that the car posed a threat, the court explained that, by respondents' account, Roper shot Crane while the car was still in park. *Id.* at 16a. "Roper was not at imminent risk of being expelled from a parked car," and Johnson and Bowden were not at risk of being hit by a parked car, particularly because they were standing to the side of the car at the time of the first shot.[4] *Id.*; ROA.1005.

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[4] As noted earlier, *supra* pp. 11-12, the summary judgment record does not resolve whether Roper shot Crane before or after the engine revved. In any event, given that the car was in park when the engine revved and that Roper was holding Crane in a chokehold at the time (and, by respondents' account, had just shot Crane in the abdomen), Roper could not have reasonably perceived Crane as pressing the accelerator in an attempt to flee rather than as a reflexive reaction to the impact of Roper's force on Crane's body, especially given that Crane was pressing the break at the same time. *See* Pet. App. 19a (noting that the jury

(cont'd)

The Fifth Circuit thus concluded that, although "[r]easonable officers could debate the level of force" permitted to effect an arrest under these circumstances, Roper's abrupt decision to jump in the car, put Crane in a chokehold, and then shoot him in the abdomen was well outside the bounds of a rational response to Crane's resistance to exiting the car. Pet. App. 18a-20a.

The court additionally found that the unreasonableness of Roper's resort to deadly force was apparent from his decision to "eschew lesser responses when such means [were] plainly available and obviously recommended by the situation." *Id.* at 17a (citing *Harmon v. City of Arlington*, 16 F.4th 1159, 1165 (5th Cir. 2021)). In stark contrast to Bowden's "admirable attempt to negotiate with Crane," Roper "shot Crane less than one minute after he drew his pistol and entered Crane's backseat aside a pregnant woman and a two-year-old." *Id.* "Not only was the option to get out of the car—as opposed to shooting Crane—plainly available," but Bowden "repeatedly urg[ed] Roper to 'get out' of the car, reflecting the sound view that they could not use deadly force to keep Crane from fleeing." *Id.*

Finally, although the Fifth Circuit focused its excessive force analysis solely on Roper's decision to shoot Crane in the abdomen while choking him, *see id.* at 20a, the unreasonableness of Roper's decision to

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could find that "Crane pressed the accelerator to relieve the pressure on his neck" and that "it was not reasonable for Roper to believe that Crane was attempting to flee or that any such attempt to do so posed a threat to life.").

jump into Crane's car further confirms the Fourth Amendment violation. In *County of Los Angeles v. Mendez*, 581 U.S. 420 (2017), this Court declined to address whether the reasonableness of an officer's use of force "tak[es] into account" any unreasonable conduct "prior to the use of force that foreseeably created the need to use it." *Id.* at 429 n.*. As *Graham* recognizes, however, the totality of the circumstances surrounding an officer's use of force at minimum bears on "the credibility of [the] officer's account" of what prompted his use of force. 490 U.S. at 399 n.12. Roper's unconscionable decision to upend the calm negotiations between Bowden and Crane by recklessly forcing his way into Crane's car is an additional factor demonstrating Roper's Fourth Amendment violation.

B. The unlawfulness of using deadly force under the circumstances here was clearly established at the time of the violation.

Qualified immunity is designed "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001). Officers must therefore have "fair warning that their conduct violated the Constitution." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). This "fair warning" is typically provided by prior cases establishing the unlawfulness of the conduct. *See Brosseau v. Haugen*, 543 U.S. 194, 200-01 (2004). But "[o]f course, in an obvious case, [the *Garner/Graham*] standards can 'clearly establish' the answer, even without a body of relevant case law." *Id.* at 199 (citing *Hope*, 536 U.S. at 738).

Applying these principles, the Fifth Circuit correctly determined that "[p]recedent provided Roper with fair notice that using deadly force on an unarmed, albeit non-compliant, driver held in a chokehold in a parked car was a constitutional violation beyond debate." Pet. App. 22a. In *Garner*, this Court "made clear that '[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.'" *Id.* (quoting *Garner*, 471 U.S. at 11). The Fifth Circuit did not apply this standard with "a high level of generality," but rather recognized that where "'existing precedent … place[s] the statutory or constitutional question beyond debate,'" it is unnecessary to additionally identify "'a case directly on point.'" *Id.* at 21a (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Applying this standard, the Fifth Circuit found it "clear enough" under *Garner* that "Roper should have known he could not use deadly force on an unarmed man in a parked car." Pet. App. 23a.

Moreover, Fifth Circuit precedent clearly established the unreasonableness of Roper's conduct under *Graham*. In *Deville v. Marcantel*, 567 F.3d 156 (5th Cir. 2009), the Fifth Circuit applied the *Graham* factors to conclude that an officer engaged in excessive force when he dragged a woman out of her car because she refused to step out after being pulled over for speeding. *Id.* at 167-69. Like Crane, the woman was in control of the car with the motor running and the gear in park, and she had not given any indication that she would flee or use the vehicle as a weapon. *Id.* at 167. Like Crane, she told the officers that she was

not complying with the instruction to exit the car because she had a child in the car and she had not done anything wrong. *Id.* at 161-62. Like Roper, the second officer who arrived on the scene abandoned any efforts at negotiation and "quickly resorted" to physical force, "breaking her driver's side window and dragging her out of the vehicle." *Id.* at 168.

The Fifth Circuit explained in *Deville* that although "[o]fficers may consider a suspect's refusal to comply with instructions during a traffic stop in assessing whether physical force is needed to effectuate the suspect's compliance," a jury could reasonably find "that the *degree* of force the officers used in this case was not justifiable under the circumstances." *Id.* at 167-68; *see also* Pet. App. 16a (citing *Deville* as establishing that "an officer has no reason to believe a noncompliant driver in a parked car with the engine running is a threat"). Given that *Deville* provided Roper with fair warning that it would be unlawful to physically drag a suspect out of his car under these circumstances, it certainly provided fair warning that it would be unlawful to choke that suspect and then shoot him pointblank in the abdomen.

Fifth Circuit precedent also clearly established that an officer may not use deadly force simply because a suspect is fleeing in a motor vehicle. Pet. App. 16a (citing *Lytle v. Bexar Cty.*, 560 F.3d 404 (5th Cir. 2009)). Again, if Roper had fair warning that he could not shoot Crane for fleeing, he certainly had fair warning that he could not shoot Crane for simply declining to get out of his car.

In short, the Fifth Circuit correctly held that if the disputed material facts in this case are resolved in respondents' favor, the unlawfulness of Roper's conduct was "beyond debate" at the time of the incident, thus foreclosing qualified immunity at the summary judgment stage.

C. Petitioners' contrary arguments lack merit.

Petitioners challenge the Fifth Circuit's decision only by continuing to defy the summary judgment standard:

- Roper asserts that his use of deadly force was reasonable because he was trying "to stop the motorist's flight from endangering the lives of innocent bystanders," Roper Pet. 15, ignoring the Fifth Circuit's determination that a reasonable jury could conclude that Crane was not fleeing or endangering anyone when Roper shot him, Pet. App. 16a.

- Roper asserts that his use of deadly force was reasonable because he tried to "gain Crane's compliance with surrender commands" and those tactics were not "successful," Roper Pet. 24, ignoring the Fifth Circuit's determination that a reasonable jury could conclude that Crane was in fact trying to comply by turning off the car when Roper shot him, Pet. App. 19a.

- Roper asserts that his use of deadly force was reasonable because, if Crane had sped off, Roper could have fallen out of the car, Roper

Pet. 20-21, ignoring the Fifth Circuit's determination that a reasonable jury could conclude that Roper shot Crane while the car was in park and there was no indication that he would flee, Pet. App. 16a, and, moreover, that Roper could easily have neutralized any such threat by simply getting out of the car as Bowden had urged him to do, *id*. at 17a.

- The City asserts that Roper's use of deadly force was justified by the "undisputed fact" that "[d]uring the struggle that ensued, 'Crane pressed the gas down, causing the car's engine to roar, tires to spin, and sending smoke up around the car,'" City Pet. 10 (quoting Pet. App. 30a), ignoring the Fifth Circuit's determination that a jury could reasonably find that Roper should have perceived that Crane reflexively pressed down on the pedal while he was attempting to relieve the pressure on his neck from Roper's chokehold, Pet. App. 19a, and that in any event, by respondents' account, that happened *after* Roper shot Crane, *see supra* pp. 11-12.

Roper also emphasizes the district court's conclusion that the officers' dashcam video footage forecloses respondents' account of the shooting because the car could only have accelerated backward and then forward if Crane was driving it. Roper Pet. 14. But the Fifth Circuit explained why that determination was in error: "The [district court's] conclusion ignores the other plausible explanation that the gears were shifted during the struggle between Crane and Roper, as Crane attempted to comply with Roper, and

that the chokehold caused Crane to press down on the accelerator as an attempt to relieve the stress on his neck, as opposed to an attempt to flee." Pet. App. 12a. Indeed, the video footage shows that Crane was pressing on both the gas pedal and the brake pedal at the same time, strongly indicating that he reflexively pushed his feet down out of physical distress, not in an effort to drive away. ROA.1015 at 23:52:26-53:33.

The district court latched onto Valencia Johnson's statement that Crane's head went back when he was shot, which it saw as evidence that Crane must have immediately lost consciousness under respondents' account. But Johnson never said that Crane immediately lost consciousness, nor would that be expected from a bullet wound to the abdomen; the more plausible explanation is that Crane threw his head back and reflexively pushed his feet down as he struggled to breathe and felt the bullet enter his body, and that the car subsequently went backward and then forward when the car was knocked into gear after Crane was shot. Indeed, if there is anything implausible about the parties' competing accounts of what happened in the car, it is petitioners' claim that Crane attempted to flee by both applying the brakes and revving the engine while the car was in park and then reversing backward, instead of simply driving away.

Finally, Roper seems to suggest that he is necessarily entitled to qualified immunity because his decision to shoot Crane was "split-second." Roper Pet. 9. There is no dispute, of course, that when an officer is confronted with "rapidly evolving" circumstances, the reasonableness of an officer's use of force "must be judged from the perspective of a reasonable officer on

the scene." *Graham*, 490 U.S. at 396-97. But it cannot be true that an officer's decision to use deadly force is reasonable simply because it was split-second; petitioners would surely agree, for example, that qualified immunity would not protect Roper if he had abruptly decided during the "melee" to intentionally shoot the three passengers, as the constitutional violation would have been obvious to a reasonable officer even in that moment.

Indeed, it would have been so obviously unconstitutional under *Garner* and *Graham* that it is unlikely there is any published precedent addressing a factually identical situation. This Court accordingly has recognized that even in "split-second" Fourth Amendment excessive force cases, the constitutional violation may be so glaring that "*Graham* and *Garner* alone offer a basis for decision." *Brosseau*, 543 U.S. at 199; *see also Mullenix v. Luna*, 577 U.S. 7, 12 (2015) ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." (internal quotation marks omitted)). The Fifth Circuit faithfully applied that standard when it held that Roper should have known it was unlawful to shoot "an unarmed, albeit non-compliant, driver held in a chokehold in a parked car," Pet. App. 22a, regardless of the "split-second" nature of the decision.

III. The Decision Below Is Consistent With This Court's Precedent.

Roper urges that the Fifth Circuit's denial of qualified immunity in this case is inconsistent with this Court's precedent. Each of the cases Roper cites, how-

ever, involved officers who received qualified immunity for using deadly force *after* the suspect fled in a manner that posed a serious risk of immediate harm to officers and civilians in the vicinity, and are thus inapposite.

In *Mullenix v. Luna*, 577 U.S. 7 (2015), the reportedly intoxicated suspect had led officers on an 18-minute high-speed chase, during which he twice called the police dispatcher claiming to have a gun and threatening to shoot at the officers if they continued their pursuit. *Id.* at 8-9. An officer shot the suspect while he was still driving dangerously at a high speed on the interstate. *Id.* at 9. Because it was not clearly established whether the Fourth Amendment permitted the use of deadly force in the situation the officer confronted—i.e., whether to shoot "a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer" on the road he was speeding down, *id.* at 13—the officer was entitled to qualified immunity, *id.* at 19.

In *Plumhoff v. Rickard*, 572 U.S. 765 (2014), the suspect led six police cruisers on a high-speed chase, "swerving through traffic at high speeds," and exceeding 100 miles per hour. *Id.* at 769 (internal quotation marks omitted). On exiting the highway, the suspect's car hit a police cruiser and spun out, colliding with a different police cruiser. *Id.* Trying to escape, the driver began to reverse, and officers got out on foot and approached the car, which clipped a third police cruiser. *Id.* at 769-70. As the suspect continued to flee, one of the officers fired three shots into the car, after which the suspect drove off again, forcing an officer to

step to the side to avoid being hit. *Id.* at 770. Two officers continued firing as the car continued "fleeing down" the street. *Id.* Under these circumstances, it was "beyond serious dispute that [the suspect] posed a grave public safety risk" and that "the police acted reasonably in using deadly force to end that risk." *Id.* at 777.

In *Scott v. Harris*, 550 U.S. 372 (2007), after an officer attempted to pull a driver over for going 73 miles per hour in a 55-mile-per-hour zone, the driver instead accelerated, reaching speeds exceeding 85 miles per hour on a two-lane road. *Id.* at 374-75. Other police cruisers joined the chase, at one point boxing in the driver, who drove into an officer's car to evade the trap. *Id.* at 375. When the high-speed chase resumed, the officer whose car had been hit used his own car to push into the rear bumper of the suspect's car, causing the car to spin out and crash. *Id.* Because the suspect had already caused "extreme danger to human life" during the chase, which was ongoing, the Court held the officer acted reasonably to eliminate the "actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." *Id.* at 383-84.

And in *Brosseau v. Haugen*, 543 U.S. 194 (2004), the "disturbed" suspect initially fled from the police by foot, and then got into his car, which the officer reasonably believed he had done to retrieve a weapon. *Id.* at 196, 200. After an altercation at the car, the suspect began driving off, and the officer—fearing for the other officers pursuing the suspect on foot "in the immediate area" and individuals in occupied vehicles in the driver's path—shot once into the car to prevent

that "risk to others." *Id.* at 195-97, 200 (internal quotation marks omitted). The Court explained that the undisputed facts established that the suspect "had proven he would do almost anything to avoid capture and that he posed a major threat to, among others, the officers at the end of the street." *Id.* at 200 (internal quotation marks omitted). Because the "situation [the officer] confronted" was "far from the obvious one where *Graham* and *Garner* alone offer a basis for decision," the Court held that the officer was entitled to qualified immunity. *Id.* at 199-200.

In short, in each of these cases, the summary judgment record established that the officer used deadly force to stop an already fleeing suspect whose flight posed an immediate risk of serious harm to other people in the vicinity. Here, by contrast, the summary judgment record permits a finding that Roper "us[ed] deadly force on an unarmed, albeit non-compliant, driver held in a chokehold in a parked car," Pet. App. 22a—a starkly different situation.

IV. The Decision Below Does Not Implicate Any Circuit Split.

Roper does not assert any circuit split, and for good reason, as none exists. In every case the City cites for its alleged split, the police employed deadly force because the suspect had either nearly killed officers or bystanders or was actively fleeing in a dangerous manner. None presented disputed issues of material fact regarding whether the officer shot the decedent *before* any danger to the officer or others arose.

First Circuit. In *McGrath v. Tavares*, 757 F.3d 20 (1st Cir. 2014), several police cars were pursuing a suspect in his vehicle who "refused to stop," began

"speeding" and "zigzagging," drove the wrong way through a bank's drive-through teller window, and crashed into both a stone wall and one of the officers' vehicles. *Id.* at 23-28. As the officers approached the suspect's car on foot, the driver "look[ed] straight" at one of the officers, "revved the [car's] engine[,] and accelerated forward towards" him. *Id.* at 23. The endangered officer shot twice at the driver while the car was heading in his direction. *Id.* at 28. As the driver veered off and began driving toward the other officer, the same officer fired two more shots, including the fatal one. *Id.* The First Circuit affirmed the grant of qualified immunity, emphasizing that the officer shot the decedent during a dangerous car chase and that the "uncontroverted facts in the record" showed that when each shot was fired, the shooting officer was either himself directly in the path of the vehicle or was protecting his partner from being hit. *Id.* at 28-30. Nothing about these facts resembles the present case.

Third Circuit. In *Martin v. City of Newark*, 762 F. App'x 78 (3d Cir. 2018), two officers heard screeching tires and saw a car traveling in their direction at "a high rate of speed." *Id.* at 80. The officers followed the car and found it parked. *Id.* The officers saw the driver exit the car "holding his right hand side waistband area," and believed he might be armed. *Id.* The driver denied having stolen the car and then reentered the vehicle, at which point the officer and the driver "engaged in a struggle at the open driver's side door," with the driver seated in the car and the officer's hands inside the car. *Id.* at 83. The officer warned the suspect that if he started the car, he would be shot. *Id.* Nonetheless, with the officer stand-

ing just outside the car and reaching into it, the suspect turned the key in the ignition, and the officer then shot him. *Id.*

In an unpublished opinion, the Third Circuit concluded that the officer's conduct was not objectively unreasonable. *Id.* It highlighted that the officer was faced with an "erratic and noncompliant driver who disregarded his explicit warning not to start the car" and noted that, by starting the car, the driver put the officer at risk of "being injured by a moving vehicle." *Id.* Given the driver's "bold" and escalating actions, a reasonable officer "would have feared for his life." *Id.*

The City contends that *Martin* is inconsistent with the Fifth Circuit's decision in this case because the Third Circuit concluded that the officer's conduct in *Martin* was reasonable "even assuming that the car had not yet moved at the time of the shooting." City Pet. 13. The City suggests that the Fifth Circuit concluded here that Roper was "required to wait for the car to move before deploying deadly force." *Id.* But this is another example of petitioners resisting the summary judgment record. The Fifth Circuit held only that, under respondents' factual account, the threat of flight was *not* "clearly imminent," City Pet. 13, because Crane was not trying to flee at all, Pet. App. 19a.

Sixth Circuit. In *Cass v. City of Dayton*, 770 F.3d 368 (6th Cir. 2014), a fleeing suspect "'punched the gas' and accelerated" toward officers who had yelled at him to stop. *Id.* at 372. The vehicle first hit one officer, who rolled across the hood of the vehicle, and then struck another officer in the hand, prompting him to discharge his weapon accidentally. *Id.* At that

point, inferring that his partner had shot "in self-defense," the first officer fired a single shot toward the driver "in the belief that he was protecting … officers and civilians who might have been seriously injured had the car continued on." *Id.* at 372-73. The Sixth Circuit held that because the driver "had proven he would do almost anything to avoid capture," including already hitting two officers with his car, the shooting officer "reasonably understood that [the driver], in his quest to escape, posed a continuing risk to the other officers present in the immediate vicinity." *Id.* at 376-77 (internal quotation marks omitted). Contrary to the City's representation, *Cass* does not stand for the proposition that it was reasonable for the officers to shoot "after the immediate danger to officers on the scene had passed." City Pet. 16. Instead, the Sixth Circuit emphasized the ongoing danger the driver posed to officers on the scene. 770 F.3d at 376-77.

Eleventh Circuit. In *Pace v. Capobianco*, 283 F.3d 1275 (11th Cir. 2002), five police cars were pursuing a fleeing suspect who "drove dangerously in several ways": He turned directly in front of a police car, swerved into police cars driving toward him from the opposite direction, tore through a residential front yard at 50-60 miles per hour, almost hit an elderly motorist head-on while driving on the wrong side of the road, and accelerated toward a police car trying to block the road. *Id.* at 1277. After the officers momentarily stopped the car by boxing in the driver, one officer shot twice into the suspect's car at the same time the car resumed moving. *Id.* at 1278. As the car continued accelerating forward, the same officer and another officer shot into the car, killing the driver. *Id.*

"[I]n light of all the circumstances[] posed by [the suspect] at the time of the shooting," the Eleventh Circuit determined that a reasonable officer could have concluded that the suspect had turned his car into a deadly weapon and that the chase was not over when they fired. *Id.* at 1280-81.

The City argues that this case is similar because Crane also resisted arrest and was shot when his car was stopped, City Pet. 16-17, omitting the obvious distinction: the officers in *Pace* shot the decedent only after he had led them on a high-speed chase and endangered multiple officers' and civilians' lives, and when it appeared that the chase was ongoing.

Long v. Slaton, 508 F.3d 576 (11th Cir. 2007), is similarly inapposite. The decedent was in the middle of a psychotic episode when his father called the police and asked for assistance. *Id.* at 578. An officer arrived at the house and got out of his marked police car, leaving his keys in the ignition and the driver's door open. *Id.* When the officer took out his handcuffs and told the decedent he was going to arrest him, the decedent resisted and then ran to the officer's car and got in, closing the door behind him. *Id.* at 579. After the officer ordered the decedent to exit the car and threatened to shoot him if he did not, the decedent backed down the driveway and toward the road. *Id.* The officer then fired three shots, one of which struck and killed the decedent. *Id.* The Eleventh Circuit concluded that the officer's conduct was "not outside the range of reasonableness in the light of the potential danger posed to officers and to the public if [the decedent] was allowed to flee in a stolen police cruiser." *Id.* at 581.

The City describes *Long* as a case in which an officer shot the decedent "in a car which was backing away from the officer." City Pet. 17. The City neglects to mention the two facts the Eleventh Circuit deemed most significant: the decedent's psychosis and his theft of a police cruiser, both of which made him "dangerous" to anyone he might encounter in the stolen car. 508 F.3d. at 581. The City also isolates the Eleventh Circuit's comment that "the law does not require officers in a tense and dangerous situation to wait until the moment a suspect *uses* a deadly weapon to act to stop the suspect." City Pet. 17. But the Eleventh Circuit was describing a situation where the officer already had reason to believe that the suspect was a danger to the officer or others, not a situation where an individual who does *not* pose such a threat is behind the wheel of a car.

Finally, in *Tillis v. Brown*, 12 F.4th 1291 (11th Cir. 2021), a police officer began pursuing a car reported as stolen. *Id.* at 1294. Once the police car turned on its lights, the driver of the stolen car "smashed the gas," speeding through commercial and residential neighborhoods, going the wrong way down a one-way street, and "driving … crazy" "at a high rate of speed," hitting 107 miles per hour. *Id.* at 1294-95 (internal quotation marks omitted). The car ran several stop signs and at least one red light and "veer[ed] between lanes." *Id.* at 1295. After the driver crashed the car, an officer parked behind the vehicle and approached on foot. *Id.* The stolen car's reverse lights turned on as the car began backing up toward the officer, at which point the officer started shooting and continued to do so as the vehicle reversed past him. *Id.*

The Eleventh Circuit concluded that it was reasonable for the officer to "perceive[] that his life was in danger when the [stolen car] shifted into reverse," given that the decedent had "led the police on a high-speed chase through commercial and residential areas and across state lines before he crashed." *Id.* at 1299.

To suggest some inconsistency between *Tillis* and this case, the City simply omits most of the pertinent facts establishing the reasonableness of the officer's conduct in *Tillis*. Instead, the City emphasizes that the officer began shooting as soon as the car shifted into reverse, implying that this was the sole basis for the officer's decision to shoot and ignoring the dangerous high-speed chase that preceded the shooting. City Pet. 17-18.

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In sum, in each of the City's cases, the officers shot suspects who had shown that they were willing to risk injuring others and/or who were in the midst of dangerous flights: They led police on dangerous high-speed chases, rammed their cars into police officers, or were fleeing in ways that endangered officers and others—none of which happened here. The circuit law is thus consistent: Officers do not act unreasonably when they meet grave threats with deadly force, but they may not use deadly force on suspects who do not pose such a threat.

V. The City's Third Question Presented Is Not Presented By The Decision Below.

Finally, the City asks this Court to grant review to decide whether "the mere existence of a municipal

policy of allowing traffic stops" is "sufficient to impose municipal liability" for "a subsequent unlawful use of force." City Pet. ii. But neither the district court nor the Fifth Circuit ever addressed this question.

The district court dismissed respondents' claim against the City because the court found that Roper did not violate Crane's right to be free from excessive force, and "a municipality … cannot be held liable when its employee did not violate the Constitution." Pet. App. 35a. The Fifth Circuit reversed that dismissal only because it concluded that the district court had erred in holding that respondents' excessive force claim against Roper did not survive summary judgment. *Id.* at 23a. Neither court engaged in any further analysis of the municipal liability claim. The City's argument to the contrary proceeds only by cobbling together stray language in the opinion that the Fifth Circuit specifically stated had no bearing on its excessive force analysis. *Id.* at 4a.

Because the Fifth Circuit had no occasion to and did not pass upon the standard for *Monell* liability, the City's third question presented is not properly before this Court. *See Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) (the Court does not "decide in the first instance issues not decided below").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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