No. 22-1151

IN THE

Supreme Court of the United States

CITY OF ARLINGTON, TEXAS,

Petitioner,

v.

DE'ON CRANE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

CYNTHIA WITHERS
JOSHUA A. SKINNER
CITY OF ARLINGTON
CITY ATTORNEY'S OFFICE
Post Office Box 90231,
MS 63-0300
Arlington, Texas 76004

BAXTER W. BANOWSKY
Counsel of Record
BANOWSKY, P.C.
12801 N. Central
Expressway, Suite 1700
Dallas, Texas 75243
(214) 871-1300
bwb@banowsky.com

Counsel for Petitioner

324076

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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The City of Arlington (the "City") respectfully submits this reply in support of its petition for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

REPLY ARGUMENT

I. Respondents Misstate the Record

In their response to the City's Petition, Respondents repeat the same straw argument relied upon by the Fifth Circuit panel to reverse the district court: that the district court ignored factual issues raised in the summary judgment record and discounted the testimony of one of the passengers, Valencia Johnson ("Johnson"). The Fifth Circuit opinion states that "[t]he district court acknowledged the competing factual accounts—specifically when Roper shot Crane—but relied on the dashcam video from Bowden's patrol car to reject Crane's account and adopt Roper's account." *Crane v. City of Arlington*, 50 F.4th 453, 462 (5th Cir. 2022) (*rehearing denied* 60 F.4d 976). The Fifth Circuit's characterization is incorrect and is based entirely on *dicta* in the district court's opinion. The summary judgment order did not rely on any purported rejection of Johnson's account of the events. On the contrary, the district court accepted Johnson's testimony as true and determined that summary judgment was warranted even under Respondents' factual account.[1]

1. While it is clear that the district court did not believe certain portions of Johnson's account of the events, it is equally clear that, in granting summary judgment for Officer Roper, the district court accepted her account as true.

> Applying this law to these facts, Crane failed to show Roper's use of force was clearly excessive. *This is true even under Crane's account of the shooting, where Roper shot Crane before the car went into reverse.*

Crane v. City of Arlington, 542 F. Supp. 3d 510, 514 (N.D. Tex. 2021) (*reversed in part and affirmed in part*, 50 F.4th 453, 462 (5th Cir. 2022) (*rehearing denied* 60 F.4d 976).

The question presented by this appeal is not whether Roper shot Crane before or after Crane's car ran over Officer Bowden. The question presented is whether a reasonable officer in Roper's position could have perceived Crane as presenting a threat or was such an officer required to wait until the car started moving before he could deploy deadly force? Not only does the panel opinion hold that Roper could not reasonably perceive Crane as a threat until *after* the car started moving, but the opinion also implies that, if Crane unintentionally ran over Officer Bowden because Roper had him in a "chokehold," Roper would still be unjustified in perceiving Crane as a threat. *Compare* Appendix A at 16a with Appendix A at 12a (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 attempting to flee."). The panel opinion employs its "chokehold" hypothesis to opine that "precedent 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 problem with the Fifth Circuit's analysis, which Respondents rely on to resist further review by this Court, is that there is simply no support in the summary judgment record that Crane was held in a "chokehold" and, in fact, the record negates this factual misstatement.[2] In response to Officer Roper's motion for summary judgment, Respondents submitted Crane's autopsy report. ROA at 1072-1088. The medical examiner specifically examined Crane's neck and trachea and noted no evidence of either internal or external injury to either the neck or trachea. *Id.* at 1077, 1081. Likewise, Johnson did not testify that Roper held Crane in a chokehold. ROA at 1070. She merely stated that Roper had his left arm around Crane's neck. *Id.* In its briefing to the Fifth Circuit, Respondents did not allege that Roper held Crane in a chokehold. There is simply no factual basis for asserting that Crane was held in a chokehold at all. Indeed, "a lay witness's use of the phrase 'choke hold' to describe the action does no more than say that Plaintiff was held around the neck." *Turner v. Viviano*, No. 04-CV-70509-DT, 2005 U.S. Dist. LEXIS 35119, at *1 (E.D. Mich. July 15, 2005). "Such statements do not demonstrate that an officer was using the police technique known as a chokehold. Where—as here—there is no evidence that the subject sustained injuries commonly associated with a chokehold (such as injury to the neck or loss of consciousness), lay witness testimony cannot create a jury question." *Bruck v. Petry*, 2022 U.S. Dist. LEXIS 103672, *20 (E.D. KY June 10, 2022) (*citing Turner,* 2005 U.S. Dist. LEXIS 35119, at *1).

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2. "A chokehold is a respiratory neck restraint during which the officer's forearm applies force to the front of the neck and throat. This restraint 'uses pressure to compress the trachea, generating strangulation and a high degree of pain.'" *Bruck v. Petry*, 2022 U.S. Dist. LEXIS 103672, *18 (E.D. KY June 10, 2022).

The panel opinion infers the chokehold hypothesis, without record support, to attempt to explain away what is clearly seen on the video of the incident: Crane revved the engine, shifted the car into reverse and ran over Officer Bowden, not once, but twice. With neither argument nor evidence that a chokehold occurred, the panel opinion states that "we must take Crane's account as true—that Roper had Crane in a chokehold . . ." Appendix A at 12a. Again, Respondents never alleged that Roper had Crane in a chokehold and the autopsy report clearly refutes it.

The panel opinion also relies on *dicta* in the district court's opinion to determine that the district court resolved a material factual dispute in Roper's favor even though the district court's opinion is clear that it turns on an analysis of Respondents' account of the events. Appendix B at 33a.

> Applying this law to these facts, Crane failed to show Roper's use of force was clearly excessive. *This is true even under Crane's account of the shooting, where Roper shot Crane before the car went into reverse.* Even under Crane's account, the following facts are true: Crane had not been complying for more than two minutes; he was wanted on a parole violation for evading arrest; he refused to turn the car off and rolled up the windows; inside the running car were four occupants, including a toddler, and outside the car were two officers; the car was on a residential street; and Roper was half-in and half-out an open door. Given these facts, it was reasonable for Roper to conclude that Crane posed a threat of serious harm to both himself and others.

Crane v. City of Arlington, 542 F. Supp. 3d 510, 514 (N.D. Tex. 2021) (*emphasis added*) (*reversed in part and affirmed in part*, 50 F.4th 453, 462 (5th Cir. 2022) (*rehearing denied* 60 F.4d 976)).

Similarly, Respondents allege that "[b]y 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." Response at pp. 11-12. Respondents also argue that their account of the events is that Officer Roper shot Crane before the engine began to rev. *Id*. at fn 3. However, Johnson's testimony, the only account placed into the record by Respondents, does not support either assertion. She testified only that, after Roper shot Crane, Crane's head fell backward and the car began to move. She does not discuss the revving engine at all. ROA at 1070. Similarly, she does not testify that, after being shot, Crane placed his feet on both the brake and accelerator.

However, the following facts, which support the district court's disposition, *are undisputed.*

- Crane had not been complying for more than two minutes;
- Crane was wanted on a felony parole violation for evading arrest;
- Crane refused to turn off the car;
- Crane rolled up the windows;

- Crane prevented the front seat passenger from turning off the car;
- There were three passengers inside the car, including a toddler;
- Two officers were outside the car and, at various times were in front of or behind the car;
- The car was on a residential street;
- Roper was half-in and half-out an open door; and
- Crane was revving the car's engine.

II. The Fifth Circuit's Opinion is Wrong

The panel opinion correctly concluded that the first shot was fired *after* Crane began revving the car's engine. Appendix A at 15a. The panel opinion even acknowledged that, had Crane sped off, Roper could have been seriously injured. *Id.* ("As seen in the video, prior to the first shot, Crane's car was parked, the engine revved, and the tires spun. As the district court noted, Roper was inside the car with the door open, so had Crane sped off, Roper could have fallen out and been seriously injured."). Accordingly, the only conclusion from the panel opinion is that, as long as the car remained in Park, Roper was not justified in perceiving Crane as a threat and, therefore, could not shoot him. Appendix A at 16a. ("As Roper was not at imminent risk of being expelled from a parked car, the vehicle did not in this sense pose a serious threat.").

Of course, it only takes an instant to shift the car from Park to drive. The car was revving violently. Shifting the car into drive while the engine was revving would result in the car surging forward which is exactly the force that might expel and injure Roper and is exactly the force that ended officer Bowden's career when Crane shifted the car into reverse. This could, and did, all happen in an instant yet the panel opinion second guesses whether Roper could reasonably perceive a threat.

The question in this case is not what Roper might have done differently. The question is not, did Crane intend to flee or injure Officer Bowden. The question is not even whether Roper or Officer Bowden were subjectively in fear of bodily harm. The question is, could a reasonable officer, half in and half out of the back seat of Crane's car, after Crane who was wanted on a felony warrant for evading arrest had refused to exit the vehicle, refused to turn off the engine, prevented the passenger from turning off the engine, rolled the car windows up and started revving the engine, make the split-second judgment that Crane presented a threat of serious harm to the officer, the passengers in the car or the other officers on the scene. The answer is yes. The panel opinion concedes as much when it acknowledges that "had Crane sped off, Roper could have fallen out and been seriously injured." Appendix A at 16a. This should have been the end of the analysis.

III. There is a Clear Circuit Split

One of the questions presented by this appeal is whether a police officer must wait to respond to a threat until a response can no longer terminate the threat. That

is exactly what the panel opinion requires in concluding that, while the car was in Park, it did not present a threat. While it is true that a car in Park will not move, it is equally true that, with the engine revving, that condition could change in an instant and before any officer would have time to react in such a way to affect the outcome.

The panel opinion cannot be reconciled with *Martin v. City of Newark*, 762 Fed. Appx. 78 (3rd Cir. 2018). Ironically, in an attempt to distinguish *Martin* from the facts of this case, Respondents recite *the officer's* version of events rather than the plaintiff's version which the *Martin* court accepted as true for purposes of deciding the appeal. Under the plaintiff's version of events, after the police arrived at the parked car, the driver of the car was on the sidewalk; an officer said "come here" and "that car is stolen;" the driver responded "this is my car and I got the papers on it" and cursed at the officer; the driver then quickly reentered his car; after the driver cursed at the officer, the officer's demeanor changed; the officer approached the open driver's side door and tried to pull the driver out; the officer warned the driver that he would shoot him if he turned the car on; after the car was started, the officer leaned into the car and shot the driver; the officer was not dragged by the car, which only moved after the shots. *Martin*, 762 Fed. Appx at 80-81.

Here, Crane did not have to start his car because it was already running and he repeatedly refused commands to turn it off. Crane even prevented the front seat passenger from turning off the car. Although he had been speaking calmly with Officer Bowden, his demeaner changed and he rolled up the car's windows and locked all the doors. Johnson even admits that Roper warned Crane to turn off

the car or he would be shot. ROA at 1070. Only then, under Respondents' version of the events, did Officer Roper shoot Crane and this occurred only after the engine started revving, whether due to Crane's involuntary actions or his preparation for flight.

While the other cases cited in the City's Petition are not as factually similar to the present case as is *Martin*, each nevertheless addresses the question of whether an officer is Constitutionally required to wait until a suspect actually uses his car as a weapon before deploying deadly force. In each case, the question was the degree to which the suspect and his car posed a threat of harm. In each case, the court held that the threat of harm was sufficient even though the suspect was not driving his car at the officers at the time of the shooting. *See Cass v. City of Dayton*, 770 F.3d 368 (6th Cir. 2014) (shot fired after vehicle cleared the officers on the scene); *Long v. Slaton*, 508 F.3d 576, 581 (11th Cir. 2007) (shots fired into car backing away from officer); *McGrath v. Tavares*, 757 F.3d 20 (1st Cir. 2014), *cert. denied*, 135 S. Ct. 1183 (2015) (fatal shot fired through passenger window hitting suspect in the back as suspect was driving away); *Pace v. Capobianco*, 283 F.3d 1275, 1278 (11th Cir. 2002) (car had not started moving before shots were fired into it); *Tillis v. Brown*, 12 F.4th 1291 (11th Cir. 2021) (shots fired as soon as reverse lights illuminated even though officer was to the side of the car). These cases each stand for the general proposition 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." *Tillis,* 12 F.4th at 1301 (*quoting Long*, 508 F.3d at 581). But that is exactly what the panel opinion in this case requires. It requires Officer Roper to wait until the car starts moving

backward to shoot Crane. Of course, by that time, there is no opportunity left to save Officer Bowden.

IV. The Court Should Reaffirm *Whren*

In their response, Responds argue that the City is "cobbling together stray language in the opinion" to challenge the panel opinion's treatment of *Whren v. United States*, 517 U.S. 806, 810 (1996). Generally speaking, the opening sentence of an opinion framing what the court sees as the problem to be solved can hardly be considered "stray language." While the panel opinion does give lip service to the notion that the case was decided on existing law, it nevertheless betrays the panel's agenda. The panel opinion opines that municipal liability may be founded upon an otherwise lawful pretextual stop resulting in a subsequent use of deadly force, whether that use of force was justified or not. This is egregious in this case as Respondents don't contend the stop was pretextual and there is no evidence it was.

Police departments across the country look to this Court's opinions to craft policies consistent with the United States Constitution. *Whren* is a unanimous decision of this Court upon which all such departments rely. By suggesting that municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), may be founded upon Constitutionally permitted traffic stops because "they lead to the unnecessary and tragic ending of human life," the panel opinion rejects not just *Whren*, but also *Graham v. Connor*, 490 U.S. 386, 396 (1989) ("'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of

hindsight.'"). This case is sure to lead to confusion and misunderstanding and the Court should review the panel opinion and reaffirm that pretextual traffic stops executed upon probable cause do not offend the Fourth Amendment.

CONCLUSION

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

Respectfully submitted,

CYNTHIA WITHERS
JOSHUA A. SKINNER
CITY OF ARLINGTON
CITY ATTORNEY'S OFFICE
Post Office Box 90231,
MS 63-0300
Arlington, Texas 76004

BAXTER W. BANOWSKY
Counsel of Record
BANOWSKY, P.C.
12801 N. Central
Expressway, Suite 1700
Dallas, Texas 75243
(214) 871-1300
bwb@banowsky.com

Counsel for Petitioner