No. 22-

IN THE

Supreme Court of the United States

CRAIG ROPER,

Petitioner,

v.

DE'ON L. CRANE, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Tavis Crane refused to comply with police commands to turn off his car and submit to arrest on warrants, including a prior charge of evading arrest. Officer Roper entered Crane's vehicle trying to prevent him from fleeing as Crane pressed the accelerator causing his car's engine to rev and tires to spin as the car swayed. Officer Roper warned Crane he would shoot him if he did not stop the engine. During this chaotic struggle, Crane's vehicle twice drove over another officer. Officer Roper shot Crane to stop the danger his actions posed. In two cases this Court found no violation of clearly established law and reversed lower courts that failed to grant qualified immunity to officers who fired upon suspects driving cars who had begun to flee or were preparing to flee. *Brosseau v. Haugen*, 543 U.S. 194, 196-97 (2004); *Plumhoff v. Rickard*, 572 U.S. 765, 780 (2014). The Fifth Circuit committed the errors this Court corrected in *Brosseau* and *Plumhoff* and the Fifth Circuit refused to correct the errors despite the criticism of Judge James C. Ho and six other Circuit Judges. The questions presented are:

> 1. Whether an objective police officer could have believed it reasonable to shoot a person who had warrants for his arrest, had locked the doors and raised the windows of his vehicle, had verbally and physically refused to comply with police commands to turn off and exit his vehicle, while the person was in the driver's seat of his vehicle revving the vehicle's engine and spinning the vehicles tires and one officer was partially inside the vehicle close to an open door, when other officers were nearby outside the vehicle.

2. If so, whether it would have been obvious to every objective police officer on February 1, 2017, that the driver posed no serious threat to life that warranted shooting the driver to stop a threat of harm.

PARTIES TO THE PROCEEDING

Petitioner Craig Roper is a City of Arlington, Texas, police officer who was one of the Defendants-Appellees in the courts below.

The City of Arlington was one of the Defendants-Appellees in the Courts below, and in this Supreme Court of the United States is separately filing a Petition for Writ of Certiorari.

Respondents De'On L. Crane, individually and as the administrator of the estate of Tavis M. Crane and on behalf of the statutory beneficiaries, G.C., T.C., G.M., Z.C. and A.C., the surviving children of Tavis M. Crane; and Alphonse Hoston were Plaintiffs-Appellants in the Court of Appeals.

Z.C., individually, by and through her guardian Zakiya Spence, Dwight Jefferson, and Valencia Johnson were also Plaintiffs-Appellants in the courts below.

RELATED PROCEEDINGS

- *Crane v. City of Arlington,* No. 4:19-cv-0091-P, U.S. District Court for the Northern District of Texas. Judgment entered June 8, 2021.

- *Crane v. City of Arlington,* No. 21-10644, U.S. Court of Appeals for the Fifth Circuit. Judgment entered September 30, 2022, revised October 4, 2022.

- *Crane v. City of Arlington,* No. 21-10644, U.S. Court of Appeals for the Fifth Circuit. Order entered denying rehearing en banc and Order entered denying panel rehearing February 24, 2023.

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The published opinion of the United States District Court for the Northern District of Texas, Fort Worth Division, filed on June 8, 2021, *Crane v. City of Arlington*, 542 F. Supp.3d 510 (N.D. Tex. 2021), *vacated in part and affirmed in part and remanded by*, *Crane v. City of Arlington*, 50 F.4th 453 (5th Cir. 2022), is set forth in Appendix B, pages 27a-35a.

The published opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing *en banc*, filed on February 24, 2023, *Crane v. City of Arlington*, 60 F.4th 976 (5th Cir. 2023), is set forth in Appendix C, pages 36a-43a.

The opinion of the United States Court of Appeals for the Fifth Circuit denying panel rehearing, filed on February 24, 2023, *Crane v. City of Arlington*, 60 F.4th 976 (5th Cir. 2023), is set forth in Appendix D, pages 44a-45a.

JURISDICTION

The Fifth Circuit entered judgment against Petitioner on September 30, 2022, and denied Petitioner's petition for rehearing en banc on February 24, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1) and Supreme Court Rule 13(3) because within 90 days after the Fifth Circuit denied Petitioner's petition for rehearing, Petitioner filed this petition for a writ of certiorari.

Petitioner seeks the Court's review under Supreme Court Rule 10 because the Fifth Circuit decided important federal questions in a way that conflicts with the relevant decisions of this Court, and the Fifth Circuit decision so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 United States Code § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or

declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 United States Code § 1988 provides in relevant part:

Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district and circuit courts [district courts] by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

STATEMENT OF THE CASE

A. Factual Background

On February 1, 2017, at about 11:45 p.m., Arlington, Texas Police Officer Elise Bowden saw a person in Tavis Crane's car throw an object out the car's window that

Bowden suspected was drug paraphernalia (App. 28a). Crane's car had three passengers – an adult male in the front seat, an adult female and a toddler in the rear seat (App. 28a). Crane did not possess a driver's license but he produced an identification card. Officer Bowden discovered that Crane was wanted for five warrants, one of which stemmed from violating parole on an evading arrest charge (App. 5a, 28a). Officer Roper, Petitioner herein, and another officer were called to the scene to serve as backups due to the warrants and the passengers in Crane's vehicle (App. 28a). Officer Bowden politely, calmly, and firmly negotiated with Crane for more than two minutes to turn off the car and step out of it (App. 29a). Crane refused. When an officer asked the front seat passenger to turn off the car, Crane stopped his passenger from doing so (App. 29a). Officer Roper then entered the backseat of Crane's vehicle directly behind where Crane was seated. Officer Roper unholstered his handgun, pointed it at Crane and warned Crane that if he did not turn off the car, the officer would shoot (App. 29a-30a). Two other officers were scrambling around the car and one of them attempted to break a window so he could turn off the ignition (App. 28a). Meanwhile, Officer Roper reached his left arm over the driver's seat in an effort to gain control of Crane, while Officer Roper had his handgun in his right hand (App. 29a). While Officer Roper struggled with Crane over the seat, Crane pressed on the car's accelerator which caused the car's engine to rev, the tires to spin, and the car to send up smoke (App. 15a, 30a).

The Fifth Circuit's Panel recognized that during these chaotic events, Officer Roper was inside the car with the door open so if Crane had sped off, Officer Roper could have fallen out and been seriously injured. The Fifth Circuit even

cited another Fifth Circuit case with similar facts in which a different Panel found there was no Fourth Amendment violation when an officer shot a driver because the officer reasonably feared that falling off the moving car could result in serious physical injuries (App. 15a) citing *Harmon v. City of Arlington*, 16 F.4th 1159, 1164 (5th Cir. 2021).

Officer Roper was also aware that two officers were adjacent to the car. One officer was trying to break out a window (App. 29a). When Officer Bowden was trying to run around the back of Crane's car, Crane's car launched into reverse, plowed over Officer Bowden and smashed into her police car. Crane's car then changed gears and propelled forward - running over Officer Bowden a second time. The video shows Crane's car rising and falling as it ran over Officer Bowden (App. 30a).

Officer Roper and the backseat passenger disagreed as to the exact timing of the shots during these few seconds, but the District Court recognized that "[s]omewhere amidst this chaos, Roper point-blank shot Crane in the ribs," and "... as the car sped down the road, Roper-hanging partially out the open back door-shot Crane two more times" before finally managing to guide the car to a controlled stop (App. 30a). Crane was later pronounced dead (App. 30a).

B. Procedural History

The District Court held that whether the Court considered Crane's account of the shooting or Officer Roper's account, Crane failed to show that Officer Roper's use of force was clearly excessive under Fourth Amendment standards (App. 33a). The District Court granted a final Summary Judgment, dismissing with

prejudice all claims against Officer Roper and the City of Arlington based on the rationale there was no Fourth Amendment violation (App. 35a).

On Appeal, a three Judge Panel of the Fifth Circuit concluded that under its view of the facts, Officer Roper shot Crane while the car was parked and not moving (while the engine revved and tires spun) so the car did not pose an imminent risk to Officer Roper or the two other officers at the scene (App. 15a-16a). The Fifth Circuit Panel concluded there was a fact issue as to whether Officer Roper's use of deadly force was unreasonable under Fourth Amendment. The Fifth Circuit Panel denied immunity to Officer Roper on the rationale that it was *obvious* his conduct was clearly illegal. Using this *obvious case* theory of liability, the Panel opined the *Graham* excessive force factors clearly established the law governing Officer Roper's conduct, so it was unnecessary to determine whether a body of relevant case law which considered similar facts would have placed Officer Roper on notice that his actions were forbidden (App. 23a note 72, citing *Graham v. Connor*, 490 U.S. 386 (1989)).

Officer Roper and the City of Arlington sought *en banc* review from the Fifth Circuit. While six Judges voted in favor of rehearing, 10 voted against rehearing (App. 37a). Five of the Judges who voted for rehearing joined a dissenting opinion by Judge Oldham (App. 42a-43a). While Judge Ho concurred in denial of rehearing *en banc*, Judge Ho stated that if he had been on the three Judge panel, he would have affirmed the District Court judgment (App. 38a). Judge Ho wrote that he fully agreed with the dissenting Judges and shared their frustration (App. 40a-41a).

However, Judge Ho recognized that there were only seven votes for *en banc* rehearing in the case, and there had only been seven votes in favor of *en banc* rehearing in yet another case, so there were not enough votes for rehearing. Recognizing there would not be enough votes even if he voted for *en banc* review, Judge Ho had "no desire to tilt at windmills" and therefore concurred in denying *en banc* review (App. 40a, citing *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019)). The Fifth Circuit denied Officer Roper's and the City of Arlington's Petitions for *En Banc* Rehearing. The City of Arlington's Petition for Panel Rehearing was likewise denied (App. 44a-45a).

SUMMARY OF THE ARGUMENT

The Fifth Circuit failed to apply the governing standard for clearly established law to the particularized facts of this case. "[W]here an offic[er's] duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). "In the last [now 10] years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases." *White v. Pauly*, 580 U.S. 73, 79 (2017). "The Court has found this necessary both because qualified immunity is important to 'society as a whole,' [*City and County of San Francisco v. Sheehan*, 575 U.S. 600, 611 n.3 (2015) (collecting cases)], and because as 'an immunity from suit,' qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial, *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).'" *White*, 580 U.S. at 79.

Despite this Court's immunity decisions and the rationale underlying them, "[t]oday, it is again necessary

to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). As this Court explained decades ago, **the clearly established law must be 'particularized' to the facts of the case**." *Id.* (emphasis added) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "Otherwise, '[p]laintiffs would be able to convert the rule of qualified immunity … into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'" *Id.* Contrary to this Court's repeated and explicit admonition that particularized facts are required to clearly establish federal law, the Fifth Circuit denied immunity to Officer Roper by incorrectly defining clearly established law at a high level of generality. *See Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014); *Mullenix v. Luna*, 577 U.S. 7, 12 (2015).

And "[i]n split-second excessive-force cases, it's 'especially important' to define clearly established law with specificity and not at a 'high level of generality.'" *Crane*, 60 F.4th at 979 (Andrew S. Oldham, *Circuit Judge*, joined by Jones, Smith, Duncan, and Wilson, *Circuit Judges*, dissenting from the denial of rehearing en banc) (quoting *Mullenix*, 577 U.S. at 12)); accord *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (*per curiam*).

Instead of deciding Officer Roper's immunity based on the specific facts he encountered, "[t]he [Fifth Circuit] decision instead used the **obvious case exception** to swallow the *Mullenix* rule." *Crane*, 60 F.4th at 797 (emphasis added). This cannot be reconciled with the Court's consistent holdings that *Graham*, 490 U.S. 386 and *Tennessee v. Garner*, 471 U.S. 1 (1985) do not fairly warn an officer that force used in other contexts violates clearly established law. *Mullenix*, 577 U.S. at 11-14.

> "Officer Roper made a split-second decision to shoot a noncompliant driver (Crane) in the heat of a wrestling match just before Crane *twice ran over* another officer with his car. For several minutes, Crane (who had five outstanding warrants) repeatedly ignored commands to turn off and exit the car. Crane then pressed the accelerator causing the tires to spin and smoke and the engine to rev. At this point, Officer Roper sensibly concluded that Crane was going to kill or seriously injure someone using a three-ton projectile – so he shot Crane. It's all on video. And if a picture is worth 1,000 words, query how much this video is worth."

Crane, 60 F.4th at 978-79.

In denying immunity to Officer Roper, the Fifth Circuit erroneously applied the *obvious case* exception even though the dissenting opinion recognized that the Supreme Court has never applied that rare exception in a split-second excessive force case. *Crane*, 60 F.3d at 979 (emphasis added).

Frames of the video recording in evidence freeze the moments when Crane's car backed into Officer Bowden and when Crane ran over Officer Bowden the second time, unquestionably proving that Crane's actions created a serious threat to life, demonstrating the dire life-threatening consequences of an officer's failure to effectively stop the threat, and establishing the reasonableness of Officer Roper's split-second decision to shoot Crane, in an albeit unsuccessful effort to prevent Crane from harming Officer Bowden, but possibly an effective effort to prevent harm to others.

ROA.1021, 23:53:29

ROA.1021, 23:53:33

As horrific as these still images are, they pale in comparison to the moving images in the video demonstrating the terror Crane inflicted on Officer Bowden, and proving the reasonableness of Officer Roper's reaction. No objective officer who endured these circumstances could reasonably conclude Crane's actions did not present a serious risk to officers or that Officer Roper's reaction to the threat Crane presented was unreasonable or obviously violated established law.

The Fifth Circuit's "**refusal to take this case en banc is revelatory of a general reluctance (at best) or refusal (at worst) to devote the full [Fifth Circuit] court's resources to qualified-immunity cases**." *Crane*, 60 F.4th at 978 (Andrew S. Oldham, *Circuit Judge*, joined by Jones, Smith, Duncan, and Wilson, *Circuit Judges*, dissenting from the denial of rehearing en banc) (emphasis added).

Unless this Court exerts its supervisory power to correct the errors the Fifth Circuit made based on its arbitrary rationale Officer Roper's action *obviously* violated federal law, despite the fact the Fifth Circuit could not identify a single case opinion in which a judicial authority has held that an officer reacting to a deadly threat as did Officer Roper was found to have violated federal law, officers and courts will have no reliable means of identifying an objective legal standard under which officers' split-second defensive reactions will be judged in the Fifth Circuit. The Court should grant certiorari and correct the obvious error the Fifth Circuit failed to correct.

REASONS FOR GRANTING THE PETITION

A. An objective officer could have believed it reasonable to shoot Tavis Crane to protect officers and others from the risk of harm Crane's conduct presented.

1. The district court properly analyzed the evidence and appropriately applied the objective reasonableness standard.

Resolving an officer's immunity raises two questions: (1) did the officer's conduct violate the Constitution or a law of the United States; and (2) if so, "whether the right was clearly established … in light of the specific context of the case." *Scott v. Harris*, 550 U.S. 372, 377 (2007).

a. The evidence, construed under Crane's version of the facts, established that Officer Roper reasonably reacted to the threat that existed.

"Because 'police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.' [*Graham*, 490 U.S.] at 397, the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective. [*id.* at 396]." *Saucier v. Katz*, 533 U.S. 194, 205 (2001). This Court "set out a test that cautioned against the '20/20 vision of hindsight' in favor of deference to the judgment of reasonable officers on the scene." *Id.* (quoting *Graham*, 490 U.S. at 393, 396). Under the objective reasonableness Fourth Amendment test "[i]f an officer reasonably, but mistakenly, believed

that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." *Id.*

The district court evaluated the evidence in two alternative ways. The district court thoroughly evaluated the facts and applied the objective reasonableness standard based on Crane's version of the events, independent of whether Crane's version conflicts with recordings. *Crane v. City of Arlington*, 542 F.Supp.3d 510, 514 (N.D. Tex. 2021). The district court detailed its findings that

> "[e]ven 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 [Officer] Roper was half-in and half-out an open door."

Id. at 514.

The district court concluded that "[g]iven these facts, it was reasonable for [Officer] Roper to conclude that Crane posed a threat of serious harm to both himself and others." *Id*. The district court entered judgment for Officer Roper based on the rationale that, even under Crane's version of the facts, Officer Roper did not use unreasonable force. *Id*. at 514-515. The Fifth Circuit erred when it reversed the district court judgment entered on that basis.

b. The district court appropriately concluded no jury could reasonably construe the evidence under Crane's version of the facts.

The district court alternatively analyzed the evidence, in accordance with this Court's decision in *Scott*, 550 U.S. at 378-380. Like in *Scott*, "[t]he videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals." *Id.* As in *Scott*, the recordings refute the contention that Crane's actions posed "little, if any, actual threat." *Id.*

The district court concluded

> "a reasonable jury could not believe Crane's account of the shooting. Under Crane's account, after [Officer] Roper shot Crane, Crane's 'head [fell] backwards and then the car began to move backward until it ran into something. After the car ran into something, it started to go forward…Not only does this not make sense (how is the car shifting gears?), the video contradicts it." *See Scott*, 550 U.S. at 378. The car did not merely 'move' backward and forward, it accelerated – fast. These events require coordination between a foot on the accelerator and a hand shifting gears. Only Crane was in a position to do this. And in Crane's account, his head was back and he was apparently unconscious while this occurred. Thus, Crane's account excludes the possibility that *he* drove the car after being shot. But if he didn't drive the car, nobody else could have. Given the facts before the Court – including

> the dashboard video – the Court concludes that Crane's account is unbelievable and therefore adopts the officer's story."

Crane, 542 F.Supp.3d at 514.

Similarly, this Court has before found that when a stationary car's wheels were spinning it was due to the driver pressing on the accelerator in an effort to flee. *Plumhoff*, 572 U.S. at 780. "Under the officers' story, the reasonableness of [Officer] Roper's use of force becomes even stronger." *Crane*, 542 F.Supp.3d at 514. Like in *Scott*, Crane's "version of events is so utterly discredited by the [recordings in the] record that no reasonable jury could have believed him." *Id*. at 380.

2. Officer Roper's reasonable reaction to the threat of harm Crane's action presented did not violate the Fourth Amendment.

Scott further supports judgment in favor of Officer Roper because this Court has held that an officer can, consistent with the Fourth Amendment, "take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders." 550 U. S. at 374. The recordings in this case evidence the serious bodily harm Crane's actions inflicted on Officer Bowden, the further risk endangering the lives of other innocent bystanders, and the risk when Crane's vehicle careened down the roadway after twice running over Officer Bowden, a threat which did not end until after Crane succumbed to gunshot wounds. (See also the foregoing video frame at ROA.1021, 23:53:29 depicting Officer Johnson standing adjacent to Crane's car when it first ran over Officer Bowden).

After providing Crane more than a reasonable opportunity to comply with police commands to peaceably exit his vehicle, Officer Roper attempted to gain control of Crane before he started fleeing at a high speed like that involved in *Scott*. This Court has recognized that reasonable officers need not "hope[] for the best" by taking the chance that a non-compliant driver may choose to not operate a vehicle dangerously if officers cease efforts to apprehend the driver. *Id*. at 385. *Scott* informs reasonable officers that given such uncertainty, Crane might have been just as likely to respond by continuing to recklessly spin his vehicle's tires and speed away. *Id*.

Additionally, this Court has been

> "loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if he [drives recklessly]. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness."

Id.

In *Scott*, the Court also decided other legal issues that demonstrate the Fifth Circuit's opinion should be corrected. Crane, like the driver in *Scott*, argued the decision in the case was dictated by *Garner*, but "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Scott*, 550 U.S. at 382. "Whether or not [Officer Roper's] actions constituted application of

'deadly force,' all that matters is whether [his] actions were reasonable. *Id.* at 383. "Whatever *Garner* said about the factors that *might have* justified shooting the [nonthreatening unarmed suspect fleeing on foot] in that case, such 'preconditions' have scant applicability to this case, which has vastly different facts." *Id.* at 383. The Fifth Circuit refused to do what it must. *See Crane*, 60 F.4th at 977.

This Court's decision in *Plumhoff* likewise reveals the Fifth Circuit's failure to properly apply the reasonableness or immunity standards to the facts Officer Roper encountered. *Plumhoff*, 572 U.S. at 768. An officer pulled over a vehicle Rickard was driving with only one operating headlight. *Id.* Because Rickard [like Crane] failed to produce his driver license when requested, the officer asked Rickard to step out of the car. Rather than comply with [the officer's] request, Rickard sped away prompting a police pursuit, which ultimately involved several officers including Sergeant Plumhoff. *Id.* at 769. When Rickard exited the freeway he turned his vehicle and collided with two police vehicles, and spun into a parking lot. *Id.* "Now in danger of being cornered, Rickard put his car in reverse 'in an attempt to escape.'" *Id.* (citation to internal quotation omitted). Sergeant Plumhoff and Officer Evans approached Rickard's car on foot, and

> "At that point, Rickard's car 'made contact with' yet another police cruiser. Rickard's tires started spinning, and his car 'was rocking back and forth,' indicating that Rickard was using the accelerator even though his bumper was flush against a police cruiser. At that point, Plumhoff fired three shots into Rickard's car."

Id. at 769-770.

Rickard then maneuvered his car, nearly hitting Officer Evans, and as Rickard fled other officers fired 12 additional shots. Rickard's car crashed and both Rickard and his passenger died from gunshot wounds and injuries received in the crash. *Id*. at 769-770.

Like Officer Roper, in *Plumhoff* the officers "contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law." *Id*. at 773. "[D]eciding legal issues of this sort is a core responsibility of appellate courts…" *Id*. In performing that responsibility in *Plumhoff*, this Court analyzed the particular facts of that case under the Fourth Amendment standard the Court had applied in *Scott* and found no basis for reaching a different result. *Id*. at 776.

"Under the circumstances, at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he were allowed to do so, he would once again pose a deadly threat for others on the road." *Id*. at 777. "Rickard's conduct even after the shots were fired – as noted, he managed to drive away despite the efforts of the police to block his path – underscores the point." *Id*. Crane's conduct of continuing to drive forward after shots were fired demonstrates the same point. That a toddler, two other passengers and Officer Roper were inside Crane's vehicle did not deter Crane from continuing to drive recklessly. "In light of the circumstances we have discussed, it is beyond serious dispute that Rickard's flight posed a grave public safety risk, and here, as in *Scott*, the police acted reasonably in using deadly force to end that risk." *Id*.

The facts Officer Roper encountered, like those in *Scott*, demonstrate the serious threat to life presented by Crane's use of a vehicle to avoid arrest. Harris fled and engaged in dangerous actions while being chased. The vehicle chase continued until Deputy Scott applied the push bumper on his police vehicle to the rear of Harris' vehicle, which caused Harris to lose control of his vehicle and crash, rendering Harris a quadriplegic. *Id*. at 691.

Certainly, Harris' injury and Crane's death are tragic costs of senseless actions by suspects, but these consequences are not the product of unreasonable police actions. "So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person," who is using a vehicle to evade arrest. *Scott* at 384. The Court has found it

> "appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was [Crane like Harris], after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, [] flight that ultimately produced the choice between two evils that [Officer Roper like Officer Scott] confronted."

Id.

Those who might have been harmed had Officer Roper not taken the action he did were entirely innocent. *Scott* plainly demonstrates that it was objectively reasonable for Officer Roper to act to apprehend Crane and prevent him from recklessly driving his vehicle to avoid arrest, before officers and others could be injured.

"Although there is no obvious way to quantify the risks on either side, it is clear from the videotape that respondent [be it Harris or Crane] posed an 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." *Scott*, 550 U.S. at 383-384; accord *Plumhoff*, 572 U.S. at 775. Under the constitutional standard this Court's decisions establish, Officer Roper's reasonable reaction to the serious threat of harm Crane's action presented did not violate the Fourth Amendment.

3. The Fifth Circuit failed to apply the controlling Fourth Amendment standard.

The Fifth Circuit failed to apply the controlling objective reasonableness standard "from the perspective 'of a reasonable officer on the scene, rather than the 20/20 vision of hindsight." *Plumhoff*, 572 U.S. at 775 (quoting *Graham*, 490 U.S. at 396)). The Court "thus 'allo[ws] for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.'" *Id.* (quoting *Graham*, 490 U.S. at 396-397). Viewing the circumstances Officer Roper encountered from the point of view of a reasonable officer on the scene, the *only obvious fact* was that Crane's actions presented a serious risk of physical harm to everyone in the vicinity of his vehicle.

The Fifth Circuit recognized that an objective officer on the scene depicted by the recordings could reasonably have believed that "[a]s seen on the video, prior to the first shot, Crane's car was parked, the engine revved, and the tires spun," while Officer "Roper was inside the car with

the door open, so had Crane sped off, Roper could have fallen out and been seriously injured." *Crane*, 50 F.4th at 464.

Nonetheless the Fifth Circuit then inexplicably ignored *Brosseau* and *Plumhoff* by concluding "the car was not a threat to anyone until it began to move, which did not occur until Roper shot Crane." No rational officer could practically view the potential risk as did the Fifth Circuit, and no identifiable body of law supports such a view of the risk of harm. Certainly, it would not be immediately obvious to every reasonable officer – in the blink of an eye – that everyone was safe when Officer Roper fired during the wrestling match with Crane inside the car while the car's engine revved and tires spun.

In *Ryburn v. Huff*, 565 U.S. 469, 477 (2012), this Court reinforced the principle that appropriate evaluation of whether a set of facts present an imminent threat to safety must be "[j]udged from the proper perspective of a reasonable officer forced to make a split-second decision in response to a rapidly unfolding chain of events…"

In this case, the Fifth Circuit made the same errors in assessing reasonableness that the Ninth Circuit had made before this Court decided *Ryburn*. The Ninth Circuit "panel majority – far removed from the scene and with the opportunity to dissect the elements of the situation – confidently concluded that the officers really had no reason to fear for their safety or that of anyone else." *Ryburn*, 565 U.S. at 475. The Ninth Circuit majority "recit[ed] a sanitized account of this event." *Id*. at 473.

> "[T]he [Ninth Circuit] panel majority's method of analyzing the string of events that unfolded

> at the Huff residence was entirely unrealistic. The majority looked at each separate event in isolation and concluded that each, in itself, did not give cause for concern. But it is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture."

Id. at 476-477.

Twelve years later, in denying immunity to Officer Roper, the Fifth Circuit replicated the errors this Court corrected in *Ryburn*. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97. Certainly, Officer Roper had to do so, and it is far from obvious that his reaction to the threat Crane's actions presented was unreasonable, much less clearly unlawful.

The Fifth Circuit acknowledges the following undisputed facts. Crane was seated in the driver's seat of his vehicle with the engine turned on. A warrant check revealed that Crane had outstanding arrest warrants and had been driving without a driver's license. Crane rolled up his window almost entirely. Officer Bowden informed Crane of the arrest warrants and asked Crane to step out of his car. Crane refused and stated he would not get out of his car. Officer Bowden informed Crane he would face additional charges if he did not get out of his car. Officer Johnson ordered passenger Jefferson to turn off the car and give the key to the officer. When Jefferson began moving his hand toward the key to comply, Crane

told Jefferson to stop. Officer Roper told the back seat passenger to unlock the rear driver's side door and she did so. Officer Roper leaned into the car from the rear driver's side door, placed his arm around Crane's neck, and pointed his gun toward Crane. All three officers continued to tell Crane to open the car door and turn the engine off, but Crane did not comply. When Crane moved his hand toward the steering column of his car (where the gear shift and car keys were both located), Officer Roper fired two shots at Crane. There is no dispute that "the engine revved and Crane's car lurched backward, striking [Officer] Bowden – by [then] behind the car – before moving forward and running over Bowden again and speeding off." Officer Roper fired two more shots at Crane as Crane's vehicle careened down the road with the rear door open. After all this, "Officer Roper took the keys out of the ignition and steered the car to a stop." *Crane*, 50 F.4th at 459-460.

During the 17 seconds Officer Roper was inside Crane's car before it drove over Officer Bowden (Video ROA.1021, 23:53:13–23:53:30) some events are not clearly shown on the video and the parties dispute *why* Crane moved his hand toward the steering column, whether Officer Roper had his arm around Crane's neck or was pulling on his sweatshirt hood, whether Crane *intentionally* operated the gear shift, whether Crane *intentionally* drove the car into and over Officer Bowden, and whether Officer Roper first fired *before* or *after* Crane's vehicle began moving back toward Officer Bowden. *Id.* at 462. Disputes regarding these facts are not material in determining the objective reasonableness of shooting Crane or in deciding whether shooting Crane in these particular circumstances clearly violated federal law. *See Plumhoff*, 572 U.S. at 773.

The information the Fifth Circuit concluded was not visible on the dashcam video is not material for the purposes of determining the legal questions of the objective reasonableness of Officer Roper's decision to shoot Crane or whether Officer Roper's decision to shoot Crane under the particular circumstances of this case clearly violated established federal law. *See Plumhoff*, 572 U.S. at 773.

The Fifth Circuit did not recognize that the recordings proved other facts that are material in evaluating and deciding Officer Roper's immunity. The recordings and undisputed record prove the following facts that are material in evaluating the risk of harm that Officer Roper ultimately reacted to.

Officers devoted a substantial effort to persuade Crane to peaceably surrender before any force was used. Officers asked Crane to surrender, directed Crane to surrender, and cautioned Crane about the potential consequences of continuing to refuse to surrender. (ROA.1021, 23:51:10-23:51:55). Officer Roper attempted to enter Crane's vehicle by directing Crane's passenger to facilitate entry into Crane's car (ROA.1021,23:52:39). After it was obvious that force would be necessary to arrest Crane, Officer Roper initially utilized his arm in an effort to control Crane's ability to move inside his car and Officer Roper pointed his gun toward Crane in an effort to gain Crane's compliance with surrender commands (ROA.1004). But none of those tactics was successful. *Crane*, 50 F.4th at 460.

Crane was revving his vehicle's engine and spinning the vehicle's tires as his vehicle rocked for 12 seconds while Officer Roper was partially inside the vehicle close

to an open rear door, while other officers were nearby outside the vehicle (ROA.1021, 23:53:17-23:53:19). One second later, Crane's car accelerated backward until it forcefully struck Officer Bowden and her police vehicle. Thereafter, within two seconds Crane's car changed direction and ran over Officer Bowden before the car accelerated forward and careened down a street with Officer Roper still inside the car next to the open car door. (Video ROA.1021, 23:53:30-23:53:33). Regardless of why these events occurred or when during the several seconds of these chaotic happenings Officer Roper fired shots, the recordings undeniably establish that any reasonable officer experiencing these actions could have believed it objectively reasonable to shoot Crane to end the threat to life. The Fifth Circuit failed to appropriately utilize the recordings under *Scott*, 550 U.S. at 378-379, and did not properly apply the controlling Fourth Amendment objective reasonableness standard in accordance with *Plumhoff,* 572 U.S. at 776-77; and *Saucier*, 533 U.S. at 205.

B. Reasonable officers were not fairly warned that it was clearly unlawful to react to the serious threat of harm Crane's conduct created by shooting Crane to stop his life-threatening actions.

The bedrock of immunity is fair notice to an officer warning him when he acts that his conduct is clearly unlawful in the specific circumstance the officer is facing. *See Brosseau*, 543 U.S. at 205. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). "To be clearly established, a right must be sufficiently clear that every reasonable offic[er] would [have understood]

that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012).

1. This Court has repeatedly directed courts not to use a high level of generality.

> "[T]here is no doubt that *Graham v. Connor*, *supra*, clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, [the Court] emphasized in *Anderson* 'that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense."

Brosseau, 543 U.S. at 198-199.

Like the Ninth Circuit had improperly done in *Brosseau*, 543 U.S. at 199, "[t]he Court of Appeals acknowledged this statement of the law, but then proceeded to find fair warning in the general tests set out in *Graham* and *Garner*." Compare, *Crane*, 50 F.4th at 466-467. "In doing so, it was mistaken. *Graham* and *Garner*, following the lead of the Fourth Amendment's text, are cast at a high level of generality." *Brosseau*, 543 U.S. at 590.

Like the Tenth Circuit in *White*, the Fifth Circuit denied immunity to Officer Roper based on this broad abstract standard this Court has repeatedly rejected. In doing so, the Fifth Circuit

> "misunderstood the 'clearly established' analysis: **It failed to identify a case where an officer acting under similar circumstances as Officer [Roper] was held to have violated the Fourth Amendment**. Instead, the [Fifth Circuit] relied on *Graham*, *Garner*, and their Circuit Court of Appeals progeny, which … lay out excessive-force principles at only a general level."

White, 580 U.S. at 79.

2. Governing precedent supports Officer Roper's immunity.

In *Brosseau*, 543 U.S. at 599, the Court answered "whether, at the time of [Officer] Brosseau's actions, it was '**clearly established**' **in this more 'particularized sense** that she was violating Haugen's Fourth Amendment right.'" *Id.* (emphasis added). "In *Brosseau*, an officer on foot fired at a driver who had just begun to flee and who had not yet driven his car in a dangerous manner." *Plumhoff*, 572 U.S. at 780.

Like with Crane, in *Brosseau*, 543 U.S. at 195, a warrant was outstanding for Haugen's arrest. Haugen fled with Officer Brosseau in foot pursuit. *Brosseau*, 543 U.S. at 196. Haugen "jumped into the driver's side of [a] Jeep and closed and locked the door." *Id.* "[Officer] Brosseau arrived at the Jeep, pointed her gun at Haugen, and ordered him to get out of the vehicle. Haugen ignored her command and continued to look for the keys so he could get the Jeep started." *Id.* After Officer Brosseau broke a window out of the Jeep, Haugen started the vehicle. *Id.*

> "As the Jeep started or shortly after it began to move, Brosseau jumped back and to the left. She fired one shot through the rear driver's side window at a forward angle, hitting Haugen in the back. She later explained that she shot Haugen because she was 'fearful for the other officers on foot who [she] believed were in the immediate area, for the occupied vehicles in [Haugen's] path and for any other citizens who might be in the area.'"

Id. at 196-197.

Even after being shot, Haugen drove a half block before deciding to stop. *Id.* at 197. This Court found that Officer Brosseau was immune, without assessing whether she violated the Fourth Amendment. *Id.* at 198. In doing so, this Court judged her immunity in light of the specific factual context of the case, rejecting a broad general application of clearly established law. *Id.* (quoting *Saucier*, 533 U.S. at 201).

The parallels between the actions of Officer Brosseau and Officer Roper and the context in which the two officers reacted are unmistakable. Because "this area is one in which the result depends very much on the facts of each case," an objective officer who had studied *Brosseau*, *Garner*, and *Graham* and who was challenged with the circumstances facing Officer Roper assuredly could reasonably find *Brosseau* most appropriate for providing notice of the legal standard under which the officer's reactions would be judged. It would not be **obvious** to any objective officer in Officer Roper's position that the officer's conduct would be judged under *Garner* and

Graham independently of *Brosseau* or that the officer's conduct would be deemed clearly unlawful when judged under a combination of these three Supreme Court decisions.

The same can be said considering *Plumhoff*, in which this Court held alternatively that Sergeant Plumhoff "would be entitled to summary judgment based on qualified immunity." *Plumhoff*, 572 U.S. at 778. This Court said "[w]e think our decision in in *Brosseau* squarely demonstrates that no clearly established law precluded petitioners' conduct at the time in question." *Id*. at 779. This Court surveyed the decisions of lower courts addressing the reasonableness of lethal force in response to actual or attempted vehicular flight and observed that the result depended very much on the facts of each case, and because *Garner* and *Graham* were cast at a high level of generality, those cases did not clearly establish that Sergeant Plumhoff's decision was clearly unreasonable. *Plumhoff*, 572 U.S. at 779.

As in *Plumhoff*,

> "[t]o defeat immunity here, then, respondent must show at a minimum either (1) that the officer['s] conduct in this case was materially different from the conduct in *Brosseau* or (2) that between February 21, 1999, and [February 2, 2017], there emerged either 'controlling authority' or a 'robust 'consensus of cases of persuasive authority … that would alter [the Court's] analysis of the qualified immunity question. Respondent has made neither showing."

Plumhoff, 572 U.S. at 779-780. Crane likewise has made neither showing.

While not as contextually comparable to the circumstances Officer Roper encountered as *Brosseau* and *Plumhoff*, *Mullenix*, 577 U.S. at 11-17, provided much more guidance to Officer Roper than did *Graham* or *Garner* regarding the standard under which the lawfulness of his conduct would be judged.

On March 23, 2010, an officer with an arrest warrant approached Leija's car and informed Leija he was under arrest. Leija sped off with a resulting 18 minute high speed police chase. *Mullenix*, 577 U.S. at 8. State Trooper Mullinex drove to an overpass, where he decided to attempt to stop Leija's flight by shooting bullets into the engine block of Leija's car. *Id.* at 9. As Leija approached the overpass, Mullenix fired six shots striking Leija's body four times, and none of the shots struck the car's radiator, hood, or engine block." *Id.* at 9-10.

The Fifth Circuit affirmed denial of qualified immunity to Trooper Mullenix, initially opining that the "immediacy of the risk posed by Leija is a disputed fact that a reasonable jury could find either in the plaintiffs' favor or in the officer's favor, precluding [the Fifth Circuit] from concluding that Mullenix acted objectively reasonably as a matter of law." *Id.* at 10.

Fifth Circuit Judge King dissented. She described the 'fact issue' referenced by the majority' as simply a restatement of the objective reasonableness test that applies to Fourth Amendment excessive force claims,' which, she noted, the Supreme Court has held 'is a pure

question of law.'" *Id.* (quoting *Luna v. Mullenix*, 765 F.3d 531, 544-545 (5th Cir. 2014). "Turning to that legal question, Judge King concluded that Mullenix's actions were objectively reasonable." *Mullenix*, 577 U.S. at 10.

The Fifth Circuit denied rehearing, but the Fifth Circuit panel majority withdrew its opinion and substituted it with *Luna v. Mullenix*, 773 F.3d 712 (5th Cir. 2014). "The revised opinion recognized that objective reasonableness is a question of law that can be resolved on summary judgment – as Judge King had explained in her dissent – but reaffirmed the denial of qualified immunity." *Mullenix*, 577 U.S. at 11. The panel majority concluded that Mullenix's actions were objectively unreasonable…" *Id.* "The [Fifth Circuit] court went on to conclude that Mullenix was not entitled to qualified immunity because 'the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a sufficiently substantial and immediate threat, violated the Fourth Amendment." *Id.*

This Court

> "address[ed] only the qualified immunity question, not whether there was a Fourth Amendment violation in the first place, and [reversed denial of immunity]. *Id.* In *Mullinex*, "the Fifth Circuit held that Mullenix violated the clearly established rule that a police officer may not 'use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.' [*Luna*], 773 F.3d at 725. Yet this Court has previously considered – and rejected – almost that exact formulation of

> the qualified immunity question in the Fourth Amendment context."

Mullenix, 577 U.S. at 12.

This Court pointed to its holding in *Brosseau* which rejected the use of *Garner's* general test as mistaken. *Mullenix*, 57 U.S. at 12. This Court again explained that the correct inquiry

> "was whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the 'situation [he] confronted'; whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.'"

Id. at 13.

> "Far from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which [Trooper] Mullenix acted. In *Brosseau* itself, the Court held that an officer did not violate clearly established law when she shot a fleeing suspect out of fear that he endangered 'other officers on foot who [she] *believed* were in the immediate area,' 'the occupied vehicles in [his] path, and 'any other citizens who *might* be in the area.' 543 U.S. at 197 (first alteration in the original; internal quotation marks omitted; emphasis added)."

Mullenix, 577 U.S. at 14.

Before *Mullenix*,

> "[t]the Court considered excessive force claims in connection with car chases on only two occasions since *Brosseau*. In *Scott* this Court held that an officer did not violate the Fourth Amendment by ramming the car of a fugitive whose reckless driving posed an actual and imminent threat to the lives of any pedestrians who might have been present, and to other motorists, including the officers involved in the chase. 550 U.S. at 384. And in *Plumhoff*, the Court reaffirmed *Scott* by holding that an officer acted reasonably when he fatally shot a fugitive who was 'intent on resuming' a chase that 'pos[ed] a deadly threat for officers on the road.' 572 U.S. at 777. The Court has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity."

Mullenix, 577 U.S. at 14-15.

Brosseau, *Scott*, *Plumhoff*, and *Mullenix*, establish that an objective officer could reasonably believe that Officer Roper's reaction to the serious threat Crane's actions presented was lawful. It would not be **obvious** to any objective officer in Officer Roper's position that his conduct was clearly unlawful based on *Garner* and *Graham*. *See Saucier*, 533 U.S. at 201.

C. The Fifth Circuit's refusal or reluctance to faithfully apply this Court's precedent in qualified immunity cases is not isolated to Officer Roper's case.

Officer Roper is not the only officer in the Fifth Circuit who has been deprived of the opportunity to have his immunity judged under the standards this Court has identified as proper for appropriately assessing and applying clearly established federal law. If this Court does not correct that trend in the Fifth Circuit, no doubt other officers will face the same fate. Reasonable officers deserve fair notice of the legal standards their actions will be judged under, and judges are entitled to fair notice of the legal standards under which appellate courts will review trial court judicial decisions.

Fifth Circuit Judge James C. Ho provided insight into this widespread problem in the Fifth Circuit that begs this Court's intervention.

> "The dissent persuasively argues why the panel should've affirmed [the district court judgment]. And that's what I would've done had I been a member of the panel. That's because I firmly agree that it's not the job of the judiciary to second-guess split-second, life-and-death decisions made by police officers who acted in a reasonable, good faith manner to protect innocent law-abiding citizens from violent criminals. These same themes have been sounded in our recent cases like *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019)(en banc), *certiorari denied*, *Hunter v. Cole*, 141 S. Ct. 111 (June 15, 2020); *Winzer v. Kaufman County*, 940 F.3d 900

> (5th Cir. 2019) (denying rehearing en banc); and (again) *Cole v. Carson*, 957 F.3d 484 (5th Cir. 2020)(en banc). But here's the problem: These themes appeared in our dissenting opinions (which I either joined or authored). The majority of the en banc court rejected those concerns in case after case."

Crane, 60 F.4th at 977 (James C. Ho, *Circuit Judge*, concurring in denial of rehearing en banc).

"As the dissent here rightly observes, 'we sow the seeds of uncertainty in our precedents – which grow into a briar patch of conflicting rules. ensnaring district courts and litigants alike.'" *Id*. at 978 (quoting *Id*. at 979 Andrew S. Oldham, *Circuit Judge*, joined by Jones, Smith, Duncan, and Wilson, *Circuit Judges*, dissenting from the denial of rehearing en banc).

"The dissent expresses further exasperation because this should've been a straightforward case – after all, '[i]t's all on video. And if a picture is worth 1,000 words, query how much this video is worth.'" *Id*. at 978 (quoting *Id*. at 979).

> "In fact, I would say (and I *did* say) the exact same things last year in *Edwards v. Oliver*, 31 F.4th 925 (5th Cir. 2022). "Like this case, *Edwards* involved a police officer shooting at a driver in an effort to prevent serious or fatal injury to innocent bystanders. In my panel dissent in *Edwards*, I explained that that case was factually indistinguishable from an earlier case that our court had just decided the previous year. I noted that video evidence in

> the two cases confirmed the similarities in the two police actions. The officers in the two cases took similar action in response to a similar threat. A panel of our court granted immunity to the officer in the earlier case. Yet the panel majority denied immunity to the officer in *Edwards*. So *Edwards* presented the exact same problems of 'uncertainty' and 'conflicting rules' that rightly concern the dissent today. Yet our [Fifth Circuit] court denied the officer's petition for rehearing en banc in *Edwards* – no doubt making the same judgment call about the futility of rehearing en banc in that case that I do in this case."

Crane, 60 F.4th at 978.

> "I have no desire to tilt at windmills. En banc rehearing can be taxing on our court, but well worth the effort – so long as there's a genuine opportunity to advance the rule of law. But I see no hope of advancing the cause here. Rehearing this case en banc would be futile. *See, e.g.*, *Cole*, 935 F.3d 444 (en banc majority reaching same result as panel majority). It doesn't matter that I fully agree with the dissent. Seven votes (the six dissenters and me) do not a majority make on our en banc court. We had seven votes in *Cole*, too – and it wasn't enough there, either. *See id.*"

Crane, 60 F.4th at 978.

After *Cole* was remanded from this Court for reconsideration under this Court's decision in *Mullenix*,

the Fifth Circuit doubled down on its rejection of the controlling immunity precedent "that got [the Fifth Circuit] reversed in *Mullenix*." *See Cole*, 935 F.3d at 460 (Edith H. Jones, joined by Smith, Owen, Ho, Duncan, and Oldham, Circuit Judges, *dissenting*); and 935 F.3d at 473 (James C. Ho and Andrew Oldham, joined by Jerry E. Smith, *Circuit Judges*). As *Crane* and *Cole* show, the root causes of the inconsistency in the Fifth Circuit opinions is the Fifth Circuit's refusal to consistently insist on particularized identification of clearly established law and the Fifth Circuit's willingness to expand the *obvious case exception* into the realm of use of force during incidents that are tense, uncertain, and rapidly evolving - despite this Court never having done so.

This Court must exert its supervisory power to correct the errors the Fifth Circuit made in this case based on the arbitrary rationale that Officer Roper's action *obviously* violated federal law even though the Fifth Circuit did not identify a single analogous case opinion in which a judicial authority has held that an officer reacting to a deadly threat as did Officer Roper was found to have violated federal law. If not, then law enforcement officers and courts in the Fifth Circuit will have no reliable means of identifying the legal standard by which officers' split-second defensive reactions will be judged.

CONCLUSION

Applying the precedents cited herein to the particular facts Officer Roper encountered as this Court's precedent requires, this is not a case where it is obvious that there was a violation of the Fourth Amendment or clearly established law. Therefore, for that reason Officer Roper seeks review of the denial of his qualified immunity.

Additionally, the Fifth Circuit has decided important federal questions regarding qualified immunity in a way that conflicts with the relevant decisions of this Court. The Fifth Circuit decision, rejecting controlling precedent that has been consistent in this Court over the last 18 years, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

The Court should grant certiorari, correct the Fifth Circuit's errors, and enter judgment in favor of Officer Roper.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 30, 2022, REVISED OCTOBER 4, 2022

REVISED 10/4/22

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-10644

DE'ON L. CRANE, INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF TAVIS M. CRANE AND ON BEHALF OF THE STATUTORY BENEFICIARIES, G. C., T. C., G. M., Z. C., AND A. C., THE SURVIVING CHILDREN OF TAVIS M. CRANE; ALPHONSE HOSTON; DWIGHT JEFFERSON; VALENCIA JOHNSON; Z. C., INDIVIDUALLY, BY AND THROUGH HER GUARDIAN ZAKIYA SPENCE,

Plaintiffs-Appellants,

versus

CITY OF ARLINGTON, TEXAS; CRAIG ROPER,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CV-91.

Before HIGGINBOTHAM, DENNIS, and GRAVES, *Circuit Judges.*

Appendix A

PATRICK E. HIGGINBOTHAM, *Circuit Judge*:

In 1996, the Supreme Court approved the use of pretextual stops in *Whren v. United States*.[1] Since then, pretextual stops have become a cornerstone of law enforcement practice.[2] Police officers follow a suspicious person until they identify a traffic violation to make a lawful stop, even though the officer intends to use the stop to investigate a hunch that, by itself, would not amount to reasonable suspicion or probable cause.[3] Often pulled over for minor traffic violations, these stops create grounds for violent—and often deadly—encounters that disproportionately harm people of color.[4]

When *Whren* was decided, the Court did not have what we have now—twenty-five years of data on the effects of

1. 517 U.S. 806, 810, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).

2. David D. Kirkpatrick, Steven Eder & Kim Barker, *Cities Try to Turn the Tide on Police Traffic Stops*, N.Y. TIMES (Apr. 15, 2022), https://www.nytimes.com/2022/04/15/us/police-traffic-stops.html.

3. Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 Stan. L. Rev. 637, 640 (2021).

4. *See* Sam Levin, *US Police Have Killed Nearly 600 People in Traffic Stops Since 2017, Data Shows*, GUARDIAN (Apr. 21, 2022), https://www.theguardian.com/us-news/2022/apr/21/us-police-violence-traffic-stop-data ("Black drivers make up 28% of those killed in traffic stops, while accounting for only 13% of the population. Research has consistently found that Black and brown drivers are more likely to be stopped, searched and subjected to force.").

pretextual stops.[5] Indeed, the *Whren* Court differentiated pretextual stops from "extreme practices" like the use of deadly force.[6] Today, traffic stops and the use of deadly force are too often one and the same—with Black and Latino drivers overrepresented among those killed—and have been sanctioned by numerous counties and major police departments.[7]

While several major cities have restricted the practice,[8] in much of America, police traffic stops still seine for warrants despite the shadows of *Monell v. Department of Social Services*,[9] where a § 1983 claim can succeed against a city with a showing that city policy was the moving force behind a constitutional injury, and was implemented with deliberate indifference to the known or obvious consequence that constitutional violations

5. *See* Rushin & Edwards, *supra*, at 657-58 (noting the emergence of race-profiling research as a modern field of study).

6. *Whren*, 517 U.S. at 818.

7. Kirkpatrick et al., *supra.*

8. Los Angeles, Philadelphia, Pittsburgh, Seattle, Berkeley, and the State of Virginia have all banned or restricted pretextual stops. *Id.*; *see* Los Angeles Police Department Manual §240.06 (2022) (established by Special Order No. 3); Achieving Driving Equality, Phila. Code §§ 12-1701-1703 (2021); Pittsburgh, Pa., PGH Code Ordinances § 503.17 (2021); Seattle Police Department Manual § 6.220 (2020); Berkeley Police Dep't, Law Enforcement Services Manual §401(2) (2022); Va. Code Ann. §§ 46.2-1014, 46.2-1052, 46.2-646, 46.2-1157 (limiting ability to use evidence discovered or obtained as a result of a stop for a minor traffic violation).

9. 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

would result.[10] The potential liability attending a policy of pretextual stops aside, their empirical consequences are clear: they lead to the unnecessary and tragic ending of human life. Here, a child threw a candy cane out the window. Twenty-five minutes later, the driver, her father, was dead.

To be clear, we apply only settled laws that govern this case today, cast as they are against the larger frame of their play in the streets across the country.

I.

Tavis Crane's estate and the passengers of Crane's car sued Arlington Police Officer Craig Roper and the City of Arlington for the use of excessive force during a traffic stop in violation of the Fourth Amendment. The district court dismissed the passengers' claims, finding that they could not bring claims as bystanders, and granted summary judgment to Roper and the City after determining that Roper was entitled to qualified immunity. We affirm the dismissal of the passengers' claims and vacate the grant of summary judgment on Crane's claims and remand to the district court for further proceedings consistent with this opinion.

On February 1, 2017, Tavis Crane was driving in Arlington, Texas with three passengers: Dwight Jefferson, Valencia Johnson, who was pregnant with Crane's child, and Z.C., Crane's two-year-old daughter. While Crane was stopped at a traffic light at approximately 11:38 p.m.,

10. *Alvarez v. City of Brownsville*, 904 F.3d 382, 389-90 (5th Cir. 2018) (en banc).

Officer Elsie Bowden pulled up behind him. After the light turned green, Crane pulled away from the intersection and Bowden saw an object being tossed from the passenger's side. She claims that she thought the object might be a crack pipe and called for backup; Roper responded.

Bowden turned on her police car's lights and Crane pulled over. Bowden approached the passenger side of the vehicle and asked Jefferson what he threw out the window. Jefferson replied that the only thing he threw was a cigarette butt. Bowden asked Crane for his driver's license and proof of insurance. Crane provided Bowden with his identification card, as he did not have a driver's license. Bowden then noticed an object fall on the ground behind her, outside the window by Z.C. She recognized the object as the red top of a large plastic Christmas candy cane and realized the object thrown from the car was the candy cane's clear bottom half. Bowden laughed about the misunderstanding and handed the red piece back to Z.C. But she did not send the family on. Rather, she returned to her vehicle and ran a warrant check, which found that Crane had warrants for several misdemeanors and a possible felony probation violation.

Bowden requested additional backup and confirmation of the warrants and was informed that Officer Eddie Johnson was also en route. While waiting for the other officers to arrive, she confirmed five misdemeanor warrants from Grand Prairie but was still waiting for a reply from Dallas County for the felony probation warrant, and began writing Crane a citation for driving without a license.

At 11:47 p.m., Officer Johnson arrived. Bowden informed him that the passengers had been cooperative and that she wasn't sure if Crane even knew he had a warrant out. Roper arrived after that conversation and received no briefing, knowing only the information relayed to his in-car computer display, which showed Crane's unconfirmed outstanding warrant for a felony probation violation.

All three officers then approached Crane's car at 11:50 p.m., by which point Crane had rolled up his window almost entirely. Bowden stood next to Crane's window; Roper was behind Bowden, next to Valencia Johnson, with Officer Johnson on the other side of the car, next to Jefferson. Bowden asked Crane to step out of the car because he had outstanding warrants, which Crane denied. Bowden told Crane that if he did not get out of the car, he would face additional charges. Crane said he needed to get Z.C. home to her mother. Bowden asked if he could leave Z.C. with the other passengers and alternatively offered to call someone to pick her up. Crane refused, insisting that he did not have any outstanding warrants and reiterating that he was not getting out. Bowden told him five tickets had been confirmed. Crane asked what the warrants were for. Bowden said she didn't know yet. Bowden told Crane, "I need you to step out of the car, honey. Tavis if you go and do something stupid then we are gonna be breaking windows, it's gonna get crazy, it ain't worth it."

Officer Johnson ordered Jefferson, sitting in the passenger seat, to turn off the car and give him the key. Jefferson began moving his hand toward the key to

comply, but Crane told him to stop. Roper then ordered Valencia Johnson to unlock the rear driver's side door where she was seated; she did. Roper opened the door, unholstered his pistol, and ordered everyone to put their "f---ing hands up." Crane, Jefferson, and Valencia Johnson all put their hands up. He initially pointed his pistol at Jefferson before entering the car, climbing over Valencia Johnson, and pointing his gun at Crane.

According to the passengers, Roper put his arm around Crane's neck. Roper contends that he grabbed the hood of Crane's sweatshirt. All three officers continued to order Crane to open the door and turn the car off. Officer Johnson circled behind Crane's car to move next to Bowden as she shouted "Tavis don't do it." The car engine began to rev, and the car shook as the brake lights turned on and off sporadically. Bowden reached for Roper in the back seat, and told Roper three times to "get out" of the car. Roper remained in the car. Officer Johnson broke the window next to Crane with his baton as Bowden began to move toward the rear of the car.

The passengers contend that when Crane, with Roper's gun pointed at him, moved his hand to turn off the car in compliance with Roper's order, Roper shot him, his head fell backwards, the engine revved and the car lurched backward, striking Bowden—by now behind the car—before moving forward and running over Bowden again and speeding off.

Roper claims that Crane shifted the car in gear while the two struggled, and that it was only after the car ran

over Bowden and after Roper warned Crane that he would kill him if Crane did not stop the car that Roper shot Crane twice. Roper claims that the first two shots "did not cause Crane to stop the vehicle, [so] he fired two other shots."

After Roper shot Crane, the car careened down the road and Roper took the keys out of the ignition and steered the car to a stop. Officer Johnson caught up in his squad car and told Roper to pull Crane from the driver's seat and perform CPR. Roper continued to shout and curse at Crane, asking why he had not stopped, but Crane was silent. An autopsy concluded that Crane was shot four times and died of gunshot wounds to his abdomen.

II.

On January 31, 2019, Crane's mother, as the administrator of Crane's estate and on behalf of his surviving children, and the other passengers filed a 42 U.S.C. § 1983 claim against the City of Arlington and Officer Roper, individually and in his official capacity. The plaintiffs allege that Roper violated their Fourth Amendment rights and that the City is liable under *Monell v. Department of Social Services*.[11]

The City and Roper moved to dismiss the plaintiffs' claims. The district court concluded that the passengers—Jefferson, Valencia Johnson, and Z.C.—could not bring claims as bystanders and dismissed their claims with prejudice but denied the motions to dismiss Crane's claims.

11. 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

Asserting qualified immunity, Roper then moved for summary judgment, which the district court granted. The district court acknowledged that Valencia Johnson and Roper presented different accounts of when the first shot occurred,[12] but found that "a reasonable jury could not believe [the passengers'] account of the shooting."[13] Finding Roper entitled to qualified immunity, the district court dismissed Crane's claims against Roper and the City with prejudice.[14] The plaintiffs timely appealed the order on the motion to dismiss and the grant of summary judgment.

III.

We review *de novo* a district court's grant of summary judgment.[15] Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[16] "Only disputes over facts that might affect the outcome of the suit under the governing law will properly

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12. *Crane v. City of Arlington*, 542 F. Supp. 3d 510, 513 (N.D. Tex. 2021) ("The backseat passenger swears the shot occurred *before* the car started reversing . . . . The officers claim Roper fired his gun *after* the car ran over Bowden the second time.").

13. *Id.* at 514.

14. *Id.*

15. *Aguirre v. City of San Antonio*, 995 F.3d 395, 405 (5th Cir. 2021).

16. Fed. R. Civ. P. 56(a).

preclude the entry of summary judgment."[17] We may affirm on any grounds supported by the record and presented to the district court.[18]

We likewise review *de novo* a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6).[19] To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."[20] When reviewing a motion to dismiss, we "must accept all facts as pleaded and construe them in the light most favorable to the plaintiff."[21]

IV.

First, we review the district court's grant of summary judgment. "When a defendant official moves for summary judgment on the basis of qualified immunity, 'the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established

17. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

18. *Hernandez v. Velasquez*, 522 F.3d 556, 560 (5th Cir. 2008).

19. *Waste Mgmt. La, L.L.C. v. River Birch, Inc.*, 920 F.3d 958, 963 (5th Cir. 2019).

20. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

21. *Reed v. Goertz*, 995 F.3d 425, 429 (5th Cir. 2021) (internal quotation marks and citations omitted).

law.'"[22] All facts must be viewed in the light most favorable to the nonmovant and all justifiable inferences must be drawn in his favor.[23]

When there is video evidence in the record, courts are not bound to accept the nonmovant's version of the facts if it is contradicted by the video.[24] But when video evidence is ambiguous or incomplete, the modified rule from *Scott v. Harris* has no application.[25] Thus, "a court should not discount the nonmoving party's story unless the video evidence provides so much clarity that a reasonable jury could not believe his account."[26]

The 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. But the video does *not* clearly contradict Crane's account of events such that the district court was entitled to adopt Roper's factual account at the summary judgment stage. "*Scott* was not an invitation for trial courts to abandon the standard principles of summary judgment by making credibility determinations or otherwise weighing the

22. *Aguirre*, 995 F.3d at 406 (quoting *Darden v. City of Fort Worth*, 880 F.3d 722, 727 (5th Cir. 2018)).

23. *Darden*, 880 F.3d at 727.

24. *Harris v. Serpas*, 745 F.3d 767, 771 (5th Cir. 2014) (citing *Scott v. Harris*, 550 U.S. 372, 381, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)).

25. *Aguirre*, 995 F.3d at 410 (citing *Scott*, 550 U.S. at 378).

26. *Darden*, 880 F.3d at 730.

parties' opposing evidence against each other any time a video is introduced into evidence."[27]

What happened inside Crane's car is not visible in the dashcam video. As such, the video does not resolve the relevant factual disputes. It is not clear from the video 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. Because the video evidence does not clearly contradict Crane's account, for purposes of this appeal, we must take Crane's account as true[28] —that Roper had Crane in a chokehold and that Roper shot Crane before the car began to move.

The district court found that the gear could change and the car could move only with the conscious intention of Crane.[29] But that 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. When two conclusions are plausible, at the summary judgment stage, we must accept as true that which is most favorable to the nonmovant. [30] The district court erred by

27. *Aguirre*, 995 F.3d at 410.

28. *See Darden*, 880 F.3d at 730 ("[A] court should not discount the nonmoving party's story unless the video evidence provides so much clarity that a reasonable jury could not believe his account.").

29. *Crane*, 542 F. Supp. 3d at 514.

30. *Darden*, 880 F.3d at 727.

applying its own interpretation of the video and accepting Roper's factual account over Crane's of what occurred inside the car. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter," that job is reserved for the jury.[31]

A.

Next, we must consider whether Roper is entitled to qualified immunity under Crane's account of events. We hold he is not at this stage.

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[32] When reviewing a motion for summary judgment based upon the affirmative defense of qualified immunity, we engage in a two-pronged inquiry.[33] First, the constitutional question, asking whether the officer's conduct violated a federal right.[34] Second, asking whether that right was clearly established at the time of the violation.[35]

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31. *Id.* at 730.

32. *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam) (internal quotation marks and citation omitted).

33. *Aguirre*, 995 F.3d at 406.

34. *Tolan v. Cotton*, 572 U.S. 650, 655-56, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014) (per curiam).

35. *Id.* at 656.

The constitutional question in this case is governed by the principles enunciated in *Tennessee v. Garner* [36] and *Graham v. Connor*,[37] which establish that claims of excessive force are determined under the Fourth Amendment's "objective reasonableness" standard.[38] Specifically regarding deadly force, Justice White explained in *Garner* that it is unreasonable for an officer to "seize an unarmed, nondangerous suspect by shooting him dead;" but, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."[39]

We analyze the reasonableness of the force used under factors drawn from *Graham*, including the severity of the crime at issue, whether the suspect poses a threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest.[40] While all factors are relevant, the "threat-of-harm factor typically predominates the analysis when deadly force has been deployed."[41] The reasonableness is judged from the

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36. 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

37. 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

38. *Brosseau v. Haugen*, 543 U.S. 194, 197, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (quoting *Graham*, 490 U.S. at 388).

39. *Garner*, 471 U.S. at 11.

40. 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

41. *Harmon v. City of Arlington*, 16 F.4th 1159, 1163 (5th Cir. 2021).

perspective of a reasonable officer on the scene,[42] and only the facts then knowable to the defendant officers may be considered.[43]

First, we address whether Crane posed an immediate threat to the safety of the officers. Accepting the facts as the passengers allege, Crane was shot while unarmed with Roper's arm around his neck. Roper first argues that he had a reasonable fear that Crane might have a weapon. But from his position, Roper could see if Crane was reaching for a gun, as could the other officers outside the vehicle, yet none of them—including Roper—reported a suspicion of a weapon. Roper could not have reasonably suspected that Crane had a weapon.

Roper alternatively contends that the threat came from the car.[44] 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.[45]

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42. *Graham*, 490 U.S. at 396.

43. *White v. Pauly*, 580 U.S. 73, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (per curiam); *see also Cole v. Carson*, 935 F.3d 444, 456 (5th Cir. 2019), *as revised* (Aug. 21, 2019) (en banc) ("[W]e consider only what the officers knew at the time of their challenged conduct.").

44. *See Scott*, 550 U.S. at 379, 383 (noting that, in certain circumstances, a moving vehicle can pose a threat to individuals in its vicinity).

45. *See Harmon*, 16 F.4th at 1164 ("Common sense confirms that falling off a moving car onto the street can result in serious physical injuries.").

However, accepting the facts as Crane alleges, Roper shot Crane while the car was still in park and before the car began to move. 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. Roper also asserts that Bowden and Officer Johnson were in danger, but at the time Roper shot Crane, Bowden and Officer Johnson were standing to the side of Crane's car, not behind it, unlikely to be hit by the car.[46] Ultimately, the car was not a threat until it began to move, which did not occur until Roper shot Crane. Whether Roper's use of deadly force was reasonable may well turn on whether the car was in park or moving at the moment Roper shot Crane.[47] But that is a question for the jury.[48]

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46. Only after the alleged first shot did Bowden walk behind the car, when she was then run over.

47. *Compare Brosseau*, 534 U.S. at 197, 200 (holding a vehicle was a threat when it was driven in a manner indicating a willful disregard for the lives of others), *and Harmon*, 16 F.4th at 1165 (holding a vehicle was a threat as it sped off with an officer holding on to its edge), *with Deville v. Marcantel*, 567 F.3d 156, 169 (5th Cir. 2009) (holding an officer has no reason to believe a noncompliant driver in a parked car with the engine running is a threat). *But see Lytle v. Bexar County*, 560 F.3d 404, 411 (5th Cir. 2009) ("[T]he [Supreme] Court's decision in *Scott* did not declare open season on suspects fleeing in motor vehicles.").

48. *See Lytle*, 560 F.3d at 411 ("Our standard of review [in a qualified immunity] interlocutory appeal—namely, whether a reasonable jury could enter a verdict for the non-moving party—emphasizes the importance of juries in cases of alleged excessive force."). Roper provided a report from the department's forensic expert identifying the sound of two shots occurring after Bowden was shot. Roper argues that the two other shots are not audible in the video because they occurred when Crane's car was too far away

Finally, this Court considers the speed with which an officer resorts to force where officers deliberately, and rapidly, eschew lesser responses when such means are plainly available and obviously recommended by the situation.[49] Officer Bowden demonstrated an admirable attempt to negotiate with Crane. Roper, on the other hand, 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.[50] Not only was the option to get out of the car—as opposed to shooting Crane—plainly available, but Bowden, reached into the backseat to touch Roper, repeatedly urging Roper to "get out" of the car, reflecting the sound view that they could not use deadly force to keep Crane from fleeing. But Roper remained in the car, shooting Crane just seconds later. A reasonable jury could conclude that reasonable officers, like Bowden, would have been keenly aware that deadly force should not have been used, and that instead, Crane should have

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for the dashcam to pick up the noise. When the shots were fired, and whether there was a continuing threat that necessitated the use of deadly force, is a question that ought to be resolved by a jury. *See Mason v. Lafayette City-Parish Consolidated Gov.*, 806 F.3d 268, 278 (5th Cir. 2015) (holding an officer was entitled to qualified immunity as to the first five shots, but given the competing narratives, material fact disputes precluded qualified immunity as to the final two shots).

49. *See Harmon*, 16 F.4th at 1165.

50. We note that Roper did warn Crane that he would shoot him if he did not turn the car off. "*Garner* . . . requires a warning before deadly force is used 'where feasible,' a critical component of risk assessment and de-escalation." *Cole*, 935 F.3d at 453 (quoting *Garner*, 471 U.S. at 11). However, according to the passengers, when Crane lowered his hand to comply, Roper shot him.

been let go to take his child home; that Crane did not pose a threat of harm such that the use of deadly force was reasonable. The threat-posed factor favors Crane.

While the remaining two factors do not weigh as heavily upon our analysis, they yet demand attention.[51] As to the severity of the crime at issue, Roper was attempting to effect an arrest for an unconfirmed felony probation violation warrant and multiple confirmed misdemeanor warrants. Although police officers have the right to order a driver to exit the car,[52] they cannot use excessive force to accomplish that end.[53] Reasonable officers could debate the level of force required to effect an arrest given the severity of the violations at issue,[54] but neither of the other officers felt the need to enter the car or draw their pistols to address the severity of the violation. Rather, the arresting officer attempted to intervene to stop Roper. This factor favors Crane.

The third *Graham* factor is whether Crane was actively resisting arrest or attempting to evade arrest by fleeing. "Officers may consider a suspect's refusal to comply with instructions during a traffic stop in assessing

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51. *Aguirre v. City of San Antonio*, 995 F.3d 395, 408 (5th Cir. 2021).

52. *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977).

53. *Deville*, 567 F.3d at 167.

54. *Tucker v. City of Shreveport*, 998 F.3d 165, 178 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 419, 211 L. Ed. 2d 388 (2021).

whether physical force is needed to effectuate the suspect's compliance."[55] While Crane was compliant with Bowden's initial requests, he refused to comply once the officers attempted to arrest him. It is clear from the video that the officers attempted to arrest Crane peacefully, but he refused to cooperate. Bowden first told Crane to step out of the car and within one minute she informed him that there was an outstanding warrant for his arrest. Two minutes later, Roper entered the vehicle and applied physical force, grabbing Crane, and pointing his gun at him. The other officers continued to order Crane to turn off the vehicle. On the present record, Roper shot Crane within 30 seconds of entering Crane's vehicle, as Crane reached to turn off the vehicle. The car was in park and Crane pressed the accelerator to relieve the pressure on his neck. Taking the facts as we must, a jury may well conclude 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. Additionally, "officers must assess not only the need for force, but also 'the relationship between the need and the amount of force used.'"[56] The only confirmed warrants against Crane were for misdemeanors. A jury could reasonably find that the *degree* of force the officers used was not justifiable under the circumstances. This factor favors Crane. In sum, with all three of the *Graham* factors favoring Crane, Crane prevails.

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55. *Deville*, 567 F.3d at 167.

56. *Deville*, 567 F.3d at 167 (quoting *Gomez v. Chandler*, 163 F.3d 921, 923 (5th Cir. 1999)).

Crane argues, notwithstanding the *Graham* factors, that Roper created the situation by escalating the confrontation—entering the car and grabbing Crane. But our precedent dictates that the threat be examined only at the moment deadly force is used and that an officer's conduct leading to that point is not considered.[57] Roper's actions prior to the moment he used deadly force, escalatory as they were, cannot be considered. The issue is not whether Roper created the need for deadly force, the issue is whether there was a reasonable need for deadly force.

Under the *Graham* factors, Roper's use of deadly force was unreasonable. Because Roper's use of force in this situation was unreasonable, violating Crane's Fourth Amendment right, we now turn to the clearly established prong.

B.

The second step of the qualified immunity inquiry is asking "whether the violated constitutional right was clearly established at the time of the violation."[58] The

57. *Serpas*, 745 F.3d at 772. We recognize a split among the Circuits as to whether the officers' actions leading up to the shooting is relevant for purposes of an excessive force inquiry. *Compare id.* ("[A]ny of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in this Circuit."); *with Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) (considering an officer's reckless and deliberate conduct in creating the need to use force to determine the reasonableness of the force).

58. *Lytle*, 560 F.3d at 417.

purpose of this inquiry is to determine whether the officer "had fair notice that [his] conduct was unlawful."[59]

"It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others."[60] This applies not only to a felon fleeing on foot,[61] but also to one fleeing in a motor vehicle.[62] We note that the Supreme Court and this court decline to apply *Garner* with a high-level of generality.[63] While "[w]e do not require a case directly on point, . . . existing precedent must have placed the statutory or constitutional question beyond debate."[64] The central concept is that of "fair warning,"[65] in which "the contours of the right in question are 'sufficiently clear that a reasonable official would

59. *Brosseau*, 543 U.S. at 198.

60. *Lytle*, 560 F.3d at 417.

61. *Garner*, 471 U.S. at 20-21.

62. *Lytle*, 560 F.3d at 417-18.

63. *See, e.g.*, *Brosseau*, 543 U.S. at 199; *Harmon*, 16 F.4th at 1166.

64. *Ashcroft*, 563 U.S. at 741; *see also Trent v. Wade*, 776 F.3d 368, 383 (5th Cir. 2015) ("The law can be clearly established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." (quoting *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir.2004) (en banc))).

65. *Trent*, 776 F.3d at 383.

understand that what he is doing violates that right.'"[66] We have recognized that "qualified immunity will protect 'all but the plainly incompetent or those who knowingly violate the law.'"[67] Here, 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.

At the time of Roper's use of deadly force, "the law was clearly established that although the right to make an arrest 'necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it,'"[68] the constitutionally "permissible degree of force depends on the severity of the crime at issue, whether the suspect posed a threat to the officer's safety, and whether the suspect was resisting arrest or attempting to flee."[69] In *Garner*, the Supreme 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."[70]

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66. *Breen v. Texas A&M Univ.*, 485 F.3d 325, 338 (5th Cir. 2007), *withdrawn in part on reh'g*, 494 F.3d 516 (5th Cir. 2007) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)).

67. *Harmon*, 16 F.4th at 1167 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)).

68. *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008) (footnote omitted) (quoting *Saucier*, 533 U.S. at 201-02).

69. *Id.*

70. *Garner*, 471 U.S. at 11.

Here, under Crane's account, Crane was shot while he was held in a chokehold in a parked car while evading arrest for several confirmed misdemeanors and an unconfirmed felony parole violation. Roper was on notice that the use of deadly force is objectively reasonable only where an officer has "a reasonable belief that he or the public was in imminent danger ... of death or serious bodily harm."[71] Again, Roper's alleged belief that Crane had a gun was not reasonable, nor was his belief that a parked car posed a danger to himself, the passengers, or the other officers standing on the side of the car. When we accept the facts as we must, this case is an obvious one.[72] "While the Fourth Amendment's reasonableness test is 'not capable of precise definition or mechanical application,"[73] the test is clear enough that Roper should have known he could not use deadly force on an unarmed man in a parked car.

Because the facts seen in the light most favorable to Crane indicate a violation of a clearly established right and material facts are in dispute, the district court erred in granting summary judgment to Roper and perforce dismissing the City.

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71. *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004).

72. *See Roque v. Harvel*, 993 F.3d 325, 335 (5th Cir. 2021) ("[I]in an obvious case, general standards can 'clearly establish' the answer, even without a body of relevant case law." (cleaned up) (quoting *Brosseau*, 543 U.S. at 199)); *see also Darden*, 880 F.3d at 733 ("[I]n an obvious case, the *Graham* excessive-force factors themselves can clearly establish the answer, even without a body of relevant case law.").

73. *Bush*, 513 F.3d at 502 (quoting *Graham*, 490 U.S. at 396).

V.

We turn to the claims of the three passengers—Jefferson, Valencia Johnson, and Z.C.—against Roper and the City, suing under § 1983 and claiming that Roper's actions violated their Fourth Amendment rights. The passengers argue that they are entitled to damages under two theories of liability.

First, they claim that they suffered emotional trauma by witnessing the excessive use of force against Crane. But witnessing the use of force is not enough. "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law."[74] "Negligent infliction of emotional distress is a state common law tort; there is no constitutional right to be free from witnessing [ ] police action."[75] Thus, bystanders may recover when they are subject to an officer's excessive use of force such that their own Fourth Amendment right is violated; however, bystanders cannot recover when they only witness excessive force used upon another.[76]

Second, the passengers claim that Roper used excessive force when he pointed his gun at them while

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74. *Baker v. McCollan*, 443 U.S. 137, 146, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979).

75. *Grandstaff v. City of Borger*, 767 F.2d 161, 172 (5th Cir. 1985).

76. *Harmon*, 16 F.4th at 1168 ("Bystander excessive force claims can only succeed when the officer directs the force toward the bystander—that is to say, when the bystander is not really a bystander.").

entering the car, leading to psychological injuries.[77] The district court dismissed the passengers' claims for failing to "establish that they were the objects of Roper's actions or that Roper's actions physically injured them."[78]

There is no express requirement for a physical injury in an excessive force claim,[79] but even if the passengers stated a plausible claim for psychological injuries, Roper is entitled to qualified immunity. "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[80] We previously held that pointing a gun can be reasonable given the circumstances,[81] and that "the momentary fear experienced by the plaintiff when a police officer pointed a gun at him did not rise to the level of a constitutional violation[.]"[82] Here, there was no

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77. Roper argues that the passengers waived this argument, but the complaint states that the passengers sought damages for the psychological injuries arising both from witnessing Crane's death and as a result of Roper's excessive force, preserving this argument.

78. *Crane v. City of Arlington*, 2020 U.S. Dist. LEXIS 125222, 2020 WL 4040910, at *6 (N.D. Tex. July 16, 2020).

79. *Flores*, 381 F.3d at 400-01.

80. *Graham*, 490 U.S. at 396.

81. *Hinojosa v. City of Terrell*, 834 F.2d 1223, 1230-31 (5th Cir. 1988).

82. *Dunn v. Denk*, 54 F.3d 248, 250 (5th Cir. 1995), *on reh'g en banc*, 79 F.3d 401 (5th Cir. 1996) (discussing *Hinojosa*, 834 F.2d at 1230-31).

unreasonable use of force against the passengers, so no constitutional injury occurred.

As we affirm the dismissal of the passengers' claims against Roper for a failure to state a claim in the absence of a constitutional injury, we also affirm the dismissal of their claims against the City.

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We AFFIRM the dismissal of the passengers' claims and VACATE the grant of summary judgment on Crane's claims and REMAND to the district court for further proceedings consistent with this opinion.

APPENDIX B — ORDER GRANTING SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION, FILED JUNE 8, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:19-cv-0091-P

DE'ON L. CRANE, *et al.*,

Plaintiffs,

v.

THE CITY OF ARLINGTON, TEXAS
AND CRAIG ROPER,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

On February 1, 2017, Arlington police initiated a routine traffic stop of Tavis Crane, which led to Crane's car running over an officer twice, and another officer, defendant officer Craig Roper, shooting Crane dead. Crane's mother, on behalf of his estate, sued Roper and the City of Arlington, claiming Roper used excessive force. The law pardons an officer's use of force—even deadly force—when the officer reasonably believed that a suspect posed a threat of serious harm. That was true here. But Plaintiffs argue that the threat of harm only arose because Roper escalated the situation. Although

the Court is sympathetic to this argument, it isn't the law. The Court can only consider the threat from the officer's perspective "*at the moment of the threat . . . .*" *Harris v. Serpas*, 745 F.3d 767, 773 (5th Cir. 2014) (emphasis in original). Applying the applicable law, there is no genuine issue of material fact, and Roper is entitled to judgment as a matter of law. Accordingly, Roper's motion will be **GRANTED**.

BACKGROUND

On February 1, 2017, at about 11:45 p.m., Arlington police officer Bowden was patrolling the streets when she noticed something shiny—possibly drug paraphernalia—tossed out of a car. Pl.'s MSJ App'x at 2. She stopped the car on the side of the road, parking her car behind it. Roper's MSJ App'x at 151, ECF No. 69. The suspect car had four occupants. Pl.'s MSJ App'x at 1. Tavis Crane, the decedent in this wrongful-death and survival action, was driving. *Id.* The front passenger was an adult male, and the backseat had an adult woman and a toddler. *Id.* Officer Bowden obtained their ID cards and asked them about the object. As she talked with them, the toddler threw a chunk of candy cane out the window. *Id.* at 2. The candy's plastic wrapper shined in the light. *Id.* at 2. Officer Bowden now believed there was no drug paraphernalia, only candy. *Id.*

But when she ran Crane's name, he was wanted for five warrants, including one for violating parole on an evading-arrest charge. Roper's MSJ App'x at 135, 138. Due to these warrants, and the car's three other occupants, Bowden called for backup. *Id* at 138. Two other officers arrived,

including defendant Officer Roper, and together they approached the car—which was still running. *Id.* Bowden and Roper stood on the driver's side. Bowden respectfully asked Crane to get out of the car. *Id.* at 151 (Bowden's dashboard video). He refused. *Id.* Demonstrating model policing, Bowden politely, calmly, and firmly negotiated with Crane—for more than two minutes—to turn the car off and step out of the car. *Id.* But he refused. *Id.* As this continued, Crane's cooperation vanished and was replaced with hostility. *Id.* He would not listen to Bowden and justified himself by saying he had done nothing wrong. *Id.* The officers started to suspect that Crane would drive off, and the passenger-side officer asked the front-seat passenger to turn the car off. *Id.* at 138-39, 151. Crane stopped the passenger and said that he was not turning the car off. *Id.* at 144, 151.

As Crane's resistance hardened, Roper promoted his role from sideline participant to main player. All the car's doors were locked, so Roper gestured for the backseat passenger to unlock her door. *Id.* at 144, 151. She complied, and Roper opened the door. *Id.* at 151. He stepped into the car, one foot in and one foot out. The tension immediately and drastically increased. *Id.* Although the accounts differ, it is undisputed that Roper quickly unholstered his pistol and aimed it at Crane. *Id.* at 144; Pl.'s MSJ App'x at 2. The other two officers scrambled around the car, trying to bust the windows so they could reach in and turn off the ignition. Def.'s MSJ App'x at 151. The scene was chaotic. Inside the car, Roper used his left arm to wrestle Crane, and his right hand had his gun pressed against Crane's side. *Id.* at 144; Pl.'s MSJ App'x at 2. Roper threatened

to kill Crane if he would not turn the car off. *Id.* During this struggle, Crane pressed the gas down, causing the car's engine to roar, tires to spin, and sending smoke up around the car. Def.'s MSJ App'x at 151.

The following events occurred very quickly. As Officer Bowden started to run around the back of the car, the car launched into reverse, plowing over Bowden, and smashing into her police car. *Id.* Crane's car then changed gears and took off forward. *Id.* As it moved forward, the back of Crane's car visibly rises and falls as it runs over Bowden a second time. *Id.* As Crane's car continues down the street, an officer radios out, "officer down!" *Id.* Somewhere amidst this chaos, Roper point-blank shot Crane in the ribs. *Id.* at 146; Pl.'s MSJ App'x at 3. The backseat passenger swears the shot occurred *before* the car started reversing. Pl.'s MSJ App'x at 3. The officers claim Roper fired his gun *after* the car ran over Bowden the second time. Def.'s MSJ App'x at 146. The gear shift was on the steering column. *Id.* at 144. Either way, as the car sped down the road, Roper—hanging partially out the open back door—shot Crane two more times. *Id.* at 146, 151. Roper then managed to put the car into neutral and guide it to a controlled stop into a curb. *Id.* at 146. Crane was later pronounced dead. *Id.* at 147.

Crane's mother, acting as administrator of his estate, sued Roper and the City of Arlington, seeking damages for Roper's use of excessive force. Pl.'s 2nd Amend. Comp't at 14, ECF No. 30. Roper asserted the defense of qualified immunity and moved for summary judgment on the issue. ECF No. 67. The issue is now briefed and ripe for review.

Appendix B

STANDARD

The Court must grant summary judgment when there is "no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine dispute of material fact exists "if the record, taken as a whole, could lead a rationale trier of fact to find for the non-moving party." *Malbrough v. Stelly*, 814 F. App'x 798, 802 (5th Cir. 2020). Thus, "the 'mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient' to defeat summary judgment; 'there must be evidence on which the jury could reasonably find for the plaintiff.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). When making these judgments, the Court must view the facts and draw reasonable inference in the light most favorable to the party opposing the summary-judgment motion. But when a "videotape quite clearly contradicts the version of the story told by" that party, the Court has no duty to accept it. *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (Scalia, J.). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 380.

ANALYSIS

"When a defendant claims qualified immunity as a defense, the burden shifts to the plaintiff, who must rebut the defense." *Goldston v. Anderson*, 775 F. App'x 772

(5th Cir. 2019). Therefore, in this case, Crane must show (1) that Roper violated a constitutional right and (2) that Roper's conduct was "objectively unreasonable in light of clearly established law at the time of the violation." *Id.* Crane alleges that Roper violated Crane's right to be free from excessive force. To satisfy the first element, Crane must show "(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Id.* at 773 (quoting *Tarver v. City of Edna*, 410 F.3d 745, 751 (5th Cir. 2005)). This case's outcome hinges on whether Roper's use of force was "clearly excessive" and "clearly unreasonable."

Binding precedent sharpens the meaning of these platitudes. To begin with, an "officer's use of deadly force is not excessive when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or others." *Id.* (quoting *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009)). Also, the "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). "Importantly, the inquiry focuses on the officer's decision to use deadly force, therefore 'any of the officer's actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in the Fifth Circuit.'" *Waller v. City of Fort Worth*, F. Supp. 3d , 2021 U.S. Dist. LEXIS 11904, 2021 WL 233571, *4 (N.D. Tex. Jan. 25, 2021) (Pittman, J.) (quoting *Harris*, 745 F.3d at 772). These precedents built qualified immunity into a nearly insurmountable obstacle. *See e.g., Ramirez v. Guadarrama*, 844 F. App'x 710 (5th

Cir. 2021) (holding qualified immunity barred suit when officers found suspect doused in gasoline, knew their tasers would ignite him, and quickly tased him, "causing him to burst into flames").

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. *See Goldston*, 775 F. App'x at 773 (holding reasonable for officer to use deadly force when he knew (1) other officer was behind suspect's car, (2) suspect had been disobeying commands, and (3) suspect had warrants for evading arrest).

However, a reasonable jury could not believe Crane's account of the shooting. Under Crane's account, after Roper shot Crane, Crane's "head [fell] backwards and then the car began to move backward until it ran into something. After the car ran into something, it started to go forward . . ." Pl.'s MSJ App'x at 3. Not only does this not make sense (how is the car shifting gears?), the video contradicts it. *See Scott*, 550 U.S. at 378. The car did not

merely "move" backward and forward, it accelerated—fast. These events require coordination between a foot on the accelerator and a hand shifting gears. Only Crane was in position to do this. And in Crane's account, his head was back and he was apparently unconscious while this occurred. Pl.'s MSJ App'x at 3. Thus, Crane's account excludes the possibility that *he* drove the car after being shot. But if he didn't drive the car, nobody else could have. Given the facts before the Court—including the dashboard video—the Court concludes that Crane's account is unbelievable and therefore adopts the officers' story. Under the officers' story, the reasonableness of Roper's use of force becomes even stronger. *See Malbrough*, 814 F. App'x 3d at 805 (holding officer's use of force reasonable when suspect drove car near officers and heard "officer down").

Crane's counter argument is reasonable but wrong. Crane argues that Roper escalated the situation. The Court agrees that a reasonable jury could conclude that Roper's acts intensified emotions and contributed to the dangerous situation. But that is irrelevant. Under Fifth Circuit precedent, the "excessive force inquiry zeros in on whether officers or others were 'in danger *at the moment of the threat* that resulted in the officer's use of deadly force.'" *Id.* at 803 (quoting *Harris*, 745 F.3d at 773 (emphasis in original)). In other circuits, an officer's "reckless and deliberate conduct" that creates the need to use deadly force must be considered. *Id.* (quoting *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997)). But in the Fifth Circuit, these facts are irrelevant—and not just irrelevant, their consideration is prohibited. *Id.* This

is well-settled law. *See Waller*, 2021 U.S. Dist. LEXIS 11904, 2021 WL 233571, at *4 n.2 (citing cases). As a result, Crane's argument is unpersuasive.

CONCLUSION

For these reasons, the Court concludes that Crane failed to show that Roper violated his right to be free from excessive force because Roper reasonably believed that Crane posed a threat of serious harm to himself, officers, or others. Since this conclusion disposes of Plaintiff's claim, analysis of the remaining issues is unnecessary. Accordingly, Roper's motion for summary judgment is **GRANTED**. As a result, Crane's claims against Roper are **DISMISSED with prejudice**.

Further, a municipality like the City of Arlington cannot be held liable when its employee did not violate the Constitution. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986). Since the Court has concluded that Roper did not violate Crane's right to be free of excessive force, the City cannot be liable. Accordingly, Crane's claims against the City of Arlington are also **DISMISSED with prejudice**.

SO ORDERED on this **8th day** of **June, 2021**.

/s/ Mark T. Pittman
Mark T. Pittman
UNITED STATES DISTRICT JUDGE

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED FEBRUARY 24, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-10644

DE'ON L. CRANE, INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF TAVIS M. CRANE AND ON BEHALF OF THE STATUTORY BENEFICIARIES, G. C., T. C., G. M., Z. C., AND A. C., THE SURVIVING CHILDREN OF TAVIS M. CRANE; ALPHONSE HOSTON; DWIGHT JEFFERSON; VALENCIA JOHNSON; Z. C., INDIVIDUALLY, BY AND THROUGH HER GUARDIAN ZAKIYA SPENCE,

Plaintiffs-Appellants,

versus

CITY OF ARLINGTON, TEXAS; CRAIG ROPER,

Defendants-Appellees.

Appeal from the United States District Court
Northern District of Texas
USDC No. 4:19-CV-91

ON PETITION FOR REHEARING EN BANC

Appendix C

Before HIGGINBOTHAM, DENNIS, and GRAVES, *Circuit Judges*.

PER CURIAM:

The petitions for rehearing en banc are DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P. 35 and 5TH CIR. R. 35).

In the en banc poll, six judges voted in favor of rehearing (Richman, Jones, Smith, Duncan, Oldham, and Wilson), and ten voted against rehearing (Stewart, Elrod, Southwick, Haynes, Graves, Higginson, Willett, Ho, Engelhardt, and Douglas).

Appendix C

JAMES C. HO, *Circuit Judge*, concurring in denial of rehearing en banc:

The dissent persuasively argues why the panel should've affirmed. And that's what I would've done had I been a member of the panel.

That's because I firmly agree that it's not the job of the judiciary to second-guess split-second, life-and-death decisions made by police officers who act in a reasonable, good faith manner to protect innocent law-abiding citizens from violent criminals. These same themes have been sounded in our recent cases like *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc), *Winzer v. Kaufman County*, 940 F.3d 900 (5th Cir. 2019) (denying rehearing en banc), and (again) *Cole v. Carson*, 957 F.3d 484 (5th Cir. 2020) (en banc). *See also Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020).

But here's the problem: These themes appeared in our *dissenting* opinions (which I either joined or authored). The majority of the en banc court rejected those concerns in case after case.

Meanwhile, en banc majorities on our court have also committed a second category of error. It *should* be the job of the judiciary to hold police officers and public officials accountable for violating a citizen's established or obvious constitutional rights. But once again, the majority of the en banc court has rejected that view in case after case. *See, e.g.*, *Gonzalez v. Trevino*, F.4th , (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing en banc) (collecting cases).

To be sure, that's the opposite problem of the one presented in this case—instead of subjecting officers to trial who shouldn't be on trial, we immunize officers from trial who shouldn't be immune. But both problems plague our en banc court, and illustrate the futility of granting rehearing en banc today. "We grant qualified immunity to officials who trample on basic First Amendment rights—but deny qualified immunity to officers who act in good faith to stop mass shooters and other violent criminals." *Id.* at _. As a result, "officers who punish innocent citizens are immune—but officers who protect innocent citizens are forced to stand trial. Officers who deliberately target citizens who hold disfavored political views face no accountability—but officers who make split-second, life-and-death decisions to stop violent criminals must put their careers on the line for their heroism." *Id.* at _.

In short, "we grant immunity when we should deny—and we deny immunity when we should grant." *Id.* at _.

It's a disturbing and dangerous pattern. And it's confusing to citizens and police officers in our circuit. As the dissent here rightly observes, "we sow the seeds of uncertainty in our precedents—which grow into a briar patch of conflicting rules, ensnaring district courts and litigants alike." *Post*, at (Oldham, J., dissenting from denial of rehearing en banc). The dissent expresses further exasperation because this should've been a straightforward case—after all, "[i]t's all on video. And if a picture is worth 1,000 words, query how much this video is worth." *Id.* at _.

I agree. In fact, I would say (and I *did* say) the exact same things last year in *Edwards v. Oliver*, 31 F.4th 925 (5th Cir. 2022). Like this case, *Edwards* involved a police officer shooting at a driver in an effort to prevent serious or fatal injury to innocent bystanders. In my panel dissent in *Edwards*, I explained that that case was factually indistinguishable from an earlier case that our court had just decided the previous year. I noted that video evidence in the two cases confirmed the similarities in the two police actions. The officers in the two cases took similar action in response to a similar threat. A panel of our court granted immunity to the officer in the earlier case. Yet the panel majority denied immunity to the officer in *Edwards*.

So *Edwards* presented the exact same problems of "uncertainty" and "conflicting rules" that rightly concern the dissent today. Yet our court denied the officer's petition for rehearing en banc in *Edwards*—no doubt making the same judgment call about the futility of rehearing en banc in that case that I do in this case.

* * *

I have no desire to tilt at windmills. En banc rehearing can be taxing on our court, but well worth the effort—so long as there's a genuine opportunity to advance the rule of law.

But I see no hope of advancing the cause here. Rehearing this case en banc would be futile. *See, e.g.*, *Cole*, 935 F.3d 444 (en banc majority reaching same result as panel majority). It doesn't matter that I fully agree with

the dissent. Seven votes (the six dissenters and me) do not a majority make on our en banc court. We had seven votes in *Cole*, too—and it wasn't enough there, either. *See id.*

I share the frustration of my dissenting colleagues today—as well as my dissenting colleagues in *Cole* and *Winzer*, those who voted (in the minority) for rehearing en banc in *Gonzalez*, and my colleagues in futility in still other cases. That frustration is what leads me to vote to deny rehearing en banc today.

Appendix C

ANDREW S. OLDHAM, *Circuit Judge*, joined by JONES, SMITH, DUNCAN, and WILSON, *Circuit Judges*, dissenting from the denial of rehearing en banc:

Our refusal to take this case en banc is revelatory of a general reluctance (at best) or refusal (at worst) to devote the full court's resources to qualified-immunity cases. That's imprudent.

Officer Roper made a split-second decision to shoot a noncompliant driver (Crane) in the heat of a wrestling match just before Crane *twice ran over* another officer with his car. For several minutes, Crane (who had five outstanding warrants) repeatedly ignored commands to turn off and exit the car. Crane then pressed the accelerator causing the tires to spin and smoke and the engine to rev. At this point, Officer Roper sensibly concluded that Crane was going to kill or seriously injure someone using a three-ton projectile—so he shot Crane. It's all on video. And if a picture is worth 1,000 words, query how much this video is worth.

So why did the panel deny qualified immunity? The opinion begins by explaining why (in its view) *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), was wrongly decided. Never mind that *Whren* is a unanimous, landmark Supreme Court decision that has nothing to do with excessive force. Then the panel holds that the obvious-case exception vitiates the officer's qualified immunity. Never mind that neither our court nor the Supreme Court has applied that exception in a split-second excessive-force case. And never mind that the panel's theory of events—that Crane was shot in the chest at point-blank range and only then somehow managed to

drive over a police officer twice—is belied by the video and common sense.

In split-second excessive-force cases, it's "especially important" to define clearly established law with specificity and not at a "high level of generality." *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam) (quotation omitted). The panel decision instead uses the obvious-case exception to swallow the *Mullenix* rule. *But see District of Columbia v. Wesby*, 138 S. Ct. 577, 590, 199 L. Ed. 2d 453 (2018) (emphasizing the obvious case should be "rare").

So why did we deny rehearing en banc? True, qualified-immunity cases are fact-dependent. But so are, say, criminal-procedure cases. That doesn't make either unimportant—as evidenced by the fact that the Supreme Court takes at least one case from one or both categories every Term. If fact-sensitive cases like these warrant the Supreme Court's discretionary jurisdiction, they certainly warrant ours. And by refusing to rehear this case and others like it, we sow the seeds of uncertainty in our precedents—which grow into a briar patch of conflicting rules, ensnaring district courts and litigants alike.

To paraphrase Justice Thomas's view in a different context, some judges' disagreement with qualified immunity "has found its natural complement in other judges' distaste for correcting errors en banc, no matter how blatant, repetitive, or corrosive of circuit law." *Shoop v. Cunningham*, 143 S. Ct. 37, 44-45, 214 L. Ed. 2d 241 (2022) (Thomas, J., dissenting from denial of certiorari).

I respectfully dissent.

APPENDIX D — DENIAL OF PANEL REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED FEBRUARY 24, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-10644

DE'ON L. CRANE, INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF TAVIS M. CRANE AND ON BEHALF OF THE STATUTORY BENEFICIARIES, G. C., T. C., G. M., Z. C., AND A. C., THE SURVIVING CHILDREN OF TAVIS M. CRANE; ALPHONSE HOSTON; DWIGHT JEFFERSON; VALENCIA JOHNSON; Z. C., INDIVIDUALLY, BY AND THROUGH HER GUARDIAN ZAKIYA SPENCE,

Plaintiffs-Appellants,

versus

CITY OF ARLINGTON, TEXAS; CRAIG ROPER,

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CV-91

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, DENNIS, and GRAVES, *Circuit Judges.*

Appendix D

PER CURIAM:

IT IS ORDERED that the petition of the City of Arlington, for panel rehearing is DENIED.