No. 22-_____

In The
Supreme Court of the United States

JUAN CARLOS SALAZAR,

Petitioner,

v.

JUAN RENE MOLINA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

After initially fleeing from police who suspected him of speeding, petitioner encountered a roadblock, pulled his car over, exited, and lay face down on the ground with hands outstretched. Respondent then approached petitioner and tased him in the back.

Under *Graham v. Connor*, the reasonableness of force depends on the circumstances an officer faced, including the crime at issue, whether the suspect poses an immediate threat, and whether he is actively resisting or evading arrest. 490 U.S. 386, 396 (1989). The district court denied respondent's summary-judgment motion, citing disputes about the surrender that precluded qualified immunity. On interlocutory appeal, the Fifth Circuit reversed, holding that petitioner's high-speed initial flight, alone, permitted respondent to doubt the sincerity of petitioner's subsequent surrender and that the tasing was therefore a reasonable use of force.

The Fifth Circuit's past-flight-forfeits-surrender rule conflicts with Sixth and Seventh Circuit precedent holding that officers must identify aspects of a surrender suggesting it is fake and not assume so based on past flight alone. The question presented is:

Whether a suspect's dangerous past flight, without more, authorizes officers to doubt the sincerity of a subsequent surrender, as the Fifth Circuit holds, or whether courts must evaluate the reasonableness of force based on the actual features of the surrender itself and the circumstances an officer faces at the time force is used, as the Sixth and Seventh Circuits require.

PARTIES TO THE PROCEEDINGS

Petitioner Juan Carlos Salazar filed a complaint under 42 U.S.C. § 1983 in the Southern District of Texas, Laredo Division, against respondent, Deputy Juan Rene Molina, other law-enforcement officers, and Zapata County, Texas, alleging, *inter alia*, that respondent used excessive force in tasing petitioner after petitioner surrendered to police. Petitioner was the plaintiff in the district court and the appellee in the Fifth Circuit. Respondent was a defendant in the district court and the appellant in the Fifth Circuit.

The following defendants in the district court were not parties to the Fifth Circuit appeal: Zapata County, Texas; Zapata County Sheriff Alonso Lopez; Chief Deputy Raymundo Del Bosque, Jr.; Game Warden Steven Ramos; Deputy Adrian Lopez; Jesus Hinojosa; Erasmo Maldonado; Julian Delgado, Jr.; and Erica Saenz.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Salazar v. Zapata Cnty.*, No. 5:16-CV-292 (S.D. Tex.) (Memorandum & Order denying, in part, summary judgment, issued April 23, 2020, Pet. App. 23a; Final Judgment entered September 21, 2022);

RELATED PROCEEDINGS—Continued

- *Salazar v. Molina*, No. 20-40334 (5th Cir.) (Opinion reversing denial of summary judgment, Pet. App. 1a, and Judgment issued June 16, 2022; Order denying petition for rehearing en banc issued August 24, 2022, Pet. App. 91a).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

CONSTITUTION, STATUTES, AND RULES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

INTRODUCTION

Respondent tased petitioner while petitioner was lying face down on the ground with his hands stretched out in front of him. It is undisputed that an officer had tried to pull petitioner over for allegedly speeding and that petitioner had then tried to evade arrest, leading police on a car chase that lasted about five minutes. It is also undisputed that petitioner, upon encountering a roadblock, pulled over, got out of his vehicle, knelt down while raising his hands, and within four seconds of exiting the car was prone on the ground with his hands outstretched. Respondent does not deny that he then tased petitioner at least once while petitioner was face down on the ground.

This case presents a circuit split on an important Fourth Amendment question: whether a suspect's past flight, without more, authorizes officers to doubt the sincerity of a subsequent surrender, as the Fifth Circuit held below, or whether courts must evaluate the reasonableness of force based on the actual features of the surrender itself and the circumstances an officer faces at the time force is used, as the Sixth and Seventh Circuits require.

In petitioner's excessive-force suit under 42 U.S.C. § 1983, respondent sought summary judgment based on qualified immunity. The district court denied that motion after reviewing an evidentiary record that included conflicting testimony and the dashcam video from respondent's car, which had captured petitioner's surrender and respondent's subsequent deployment

of his taser while petitioner was prone on the ground.[1] The district court identified numerous genuine issues of material fact that would allow a jury to find that respondent violated clearly established law prohibiting the use of intermediate force—such as tasing—on a surrendered and non-resisting suspect. When respondent interlocutorily appealed, the Fifth Circuit reversed. It held that petitioner's high-speed past evasion of police—without more—made it reasonable for respondent to doubt the sincerity of petitioner's surrender and instead view it as a "ploy," Pet. App. 7a, leading that court to conclude that respondent's use of the taser was reasonable.

By contrast, the Sixth and Seventh Circuits do not focus on the past. They require officers to identify aspects present at the moment of surrender that raise doubts about its sincerity before an officer reasonably can use intermediate force on someone who purports to be submitting to the officer's authority. *See infra* Part I.B (discussing, *e.g.*, *Ortiz ex rel. Ortiz v. Kazimer*, 811 F.3d 848, 852 (6th Cir. 2016); *Alicea v. Thomas*, 815 F.3d 283, 289 (7th Cir. 2016)). These circuits determine the reasonableness of surrender-related uses of force in light of the *actual* "facts and circumstances of each particular case," consistent with this Court's directives in *Graham v. Connor*. 490 U.S. 386, 396 (1989) (stating that courts' reasonable-force assessments should include consideration of

[1] The dashcam footage is available online at https://www.youtube.com/watch?v=MLXr-lDRwXI&t=370s, and hyperlinks to cited timestamps are included in the petition for ease of reference.

the severity of the crime, whether the suspect poses an "*immediate* threat," and whether he is "*actively* resisting arrest or attempting to evade arrest by flight" (emphasis added)). In the Fifth Circuit, by contrast, the backward-looking ploy assumption obviates the need to consider whether a threat is "immediate" or whether a past evasion by flight is still "actively" ongoing. *Compare* Pet. App. 7a, *with Graham*, 490 U.S. at 396.

The Fifth Circuit's past-flight-forfeits-surrender approach has very real consequences for Fourth Amendment rights and courts' ability to redress Fourth Amendment violations. The Fifth Circuit openly acknowledged that its rule creates a lower tier of Fourth Amendment rights for persons who initially flee police before surrendering: "[A] suspect cannot refuse to surrender and instead lead police on a dangerous hot pursuit—and then turn around, appear to surrender, and receive the same Fourth Amendment protection from intermediate force he would have received had he promptly surrendered in the first place." Pet. App. 8a (footnote defining intermediate force omitted). By having reasonableness turn on a backward-looking assumption instead of the present realities of petitioner's surrender, the Fifth Circuit ratcheted down petitioner's Fourth Amendment rights and cast aside the genuine, material factual disputes about petitioner's surrender that caused the district court to deny qualified immunity and that would have been beyond the Fifth

Circuit's jurisdiction to second-guess[2] under a fully protective Fourth Amendment analysis under *Graham*.

Had petitioner's suit been brought in the Sixth or Seventh Circuits, instead of the Fifth, the same genuine fact disputes the district court identified regarding the circumstances surrounding petitioner's surrender would have been material to the reasonableness inquiry under *Graham*. *See infra* Part I.B. And they would have therefore precluded an award of qualified immunity on interlocutory appeal.

The Fifth Circuit's past-flight-forfeits-surrender rule not only diminishes Fourth Amendment rights, but also has serious safety implications for officers, the people officers pursue, and the communities where police encounters occur. By authorizing officers to assume that a post-flight surrender is a "ploy," Pet. App. 7a, the rule poses a real danger of *disincentivizing* surrender, signaling that an individual being pursued by police has little to gain from stopping flight, submitting to officers' control, and ceasing any resistance. The rule thus threatens to undermine emerging governmental and community efforts to encourage safe surrenders, promote de-escalation in police encounters, foster greater transparency about police procedures, and build trust between police and the communities they serve.

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[2] *See Johnson v. Jones*, 515 U.S. 304, 319-20 (1995).

This Court should grant the petition to resolve whether the Fourth Amendment permits the reasonableness of force used on a surrendering suspect to depend on the suspect's initial flight instead of the particular circumstances surrounding the surrender itself. The Fifth Circuit's past-flight-forfeits-surrender rule conflicts with the Sixth and Seventh Circuits' reasonable-force requirements, erodes core protections under the Fourth Amendment, and presents an issue of great societal importance with dangerous real-world implications for everyone impacted by police encounters.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 37 F.4th 278 (Pet. App. 1a). The Southern District of Texas's opinion is unreported (Pet. App. 23a).

JURISDICTION

The court of appeals entered its opinion and judgment on June 16, 2022, and denied petitioner's timely petition for rehearing en banc on August 24, 2022. *See* Pet. App. 1a, 91a. On November 9, 2022, Justice Alito granted petitioner's application to extend the time to file his petition for a writ of certiorari until

December 22, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

Section 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 . . . .

42 U.S.C. § 1983.

Federal Rule of Civil Procedure 56 provides, in relevant part:

> (a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the

part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment 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. The court should state on the record the reasons for granting or denying the motion.

. . . .

(c) PROCEDURES.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

FED. R. CIV. P. 56(a), (c).

STATEMENT

I. FACTUAL BACKGROUND

In the early hours of March 1, 2014, petitioner was driving away from a restaurant when a police officer tried to pull him over for speeding (although petitioner denies he was violating any traffic laws). Pet. App. 25a-26a & n.5. When the police vehicle pulled up behind him, petitioner "panicked" and "took off." *Id.* 26a-27a. The officer called for assistance, and respondent began to pursue petitioner's vehicle at high speed. *Id.* 27a. The record includes dashcam video from respondent's vehicle that captured the pursuit and the tasing incident that followed.

The dashcam video shows two vehicles converge to block petitioner's path, at which point petitioner stops his vehicle. *Id.* 2a, 27a; Video.6:05-07. He exits and, within two seconds, has knelt to the ground. Pet. App. 2a, 27a; Video.6:06-08. Within another two seconds, petitioner has raised his hands and lowered his body to the ground, lying prone with his hands outstretched. Pet. App. 2a, 27a; Video.6:10. Petitioner alleges that he cried out, "I'm not resisting. Please don't tase me! I have asthma!" Pet. App. 27a.[3] For the next four to five seconds, petitioner's body is in the frame of the video as he lay face down on the ground. Video.6:10-14. During this time, petitioner crosses then uncrosses

[3] The district court noted that the dashcam video lacks audio, so the video can neither confirm nor disprove any allegations about statements made by any party. Pet. App. 27a n.6, 69a.

his legs over the span of less than one second. Video. 6:10-11; Pet. App. 28a.

Also while petitioner is prone, respondent comes into view on the video from behind the camera and approaches petitioner. Video.6:09-13. When he reaches petitioner, respondent deploys his taser onto petitioner's back. Pet. App. 3a; Video.6:14. Petitioner's head flies back, his body shakes, and his legs jerk. Video.6:14-20; Pet. App. 3a. Another officer forces petitioner's body back down. Video.6:14-20.

Petitioner alleges respondent deployed his taser twice while shouting that this was "[f]or being stupid" and "[y]ou're not that slick, mother*****r" in Spanish. Pet. App. 28a & n.11. Respondent contends that "he deployed his taser just once, shocking Salazar for one five-second cycle." *Id.* 3a. The video shows petitioner's body jerking on the ground for roughly 10 seconds. Video.6:13-23. After those 10 seconds, respondent handcuffs petitioner as petitioner lies on the ground. Video.6:22-7:15.

Respondent later placed petitioner in another officer's car to be transported to the county jail, where petitioner was booked for evading arrest. Pet. App. 29a-30a. Officers searched petitioner's car and person but found no weapons and, apart from two open containers of beer, no contraband. *Id.* 30a.

II. PROCEDURAL BACKGROUND

Petitioner sued respondent and other county defendants under 42 U.S.C. § 1983, alleging, as relevant here, that respondent violated the Fourth Amendment by unreasonably tasing petitioner "while he was lying submissively on the ground, having clearly surrendered several moments earlier." Pet. App. 23a, 53a. Respondent moved for summary judgment, arguing that he was protected by qualified immunity. *Id.* 4a. After considering the parties' pleadings, deposition testimony, and the dashcam video from respondent's car, the District Court for the Southern District of Texas denied the motion on the ground that genuine disputes of material fact regarding the tasing incident existed that could overcome respondent's qualified-immunity defense. *See id.* 58a-69a, 90a.

In reaching this conclusion, the district court considered factors this Court highlighted in *Graham v. Connor*, 490 U.S. 386 (1989), to determine whether respondent had used excessive force. Pet. App. 58a-64a (quoting *Graham*'s requirement to analyze "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation," 490 U.S. at 396, including consideration of three factors: "(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight," Pet. App. 58a). As to the first factor,

the district court found that the severity of petitioner's offense—evasion of police—weighed in favor of respondent, a point petitioner did not dispute. Pet. App. 59a. But as to the second and third *Graham* factors—whether petitioner posed an immediate threat and whether he was actively resisting or evading arrest by flight—the district court found several genuine issues of material fact that precluded summary judgment for respondent. *Id.* 59a-64a. The disputed facts it identified as to these factors included:

- "whether [petitioner] was repeatedly verbalizing his intent to surrender," *id.* 61a, shouting "I'm not resisting. Please don't tase me! I have asthma!" *id.* 27a, 69a;
- whether petitioner's "voice was audible to [respondent]," *id.* 61a;
- "whether [respondent] could see the placement of [petitioner's] hands," *id.* 61a;
- "whether [respondent] gave any instructions to [petitioner]" and whether petitioner complied, *id.* 63a;
- "whether [petitioner] made any threatening movements," *id.* 61a-62a;
- "whether [petitioner] began to 'raise up' before the tasing," *id.* 62a;
- whether the supposed upward movement was a "reaction to being tased, rather than an attempt to flee or resist," *id.* 62a;

- whether petitioner's "uncrossing of his legs and 'raising up' triggered [respondent's] 'split-second decision' to deploy his taser," despite respondent's testimony that "he did not remember the tasing at all" and could not "confirm upon reviewing the video that [petitioner] threatened him in any way," *id.* 62a;

- whether, "[e]ven if [respondent's] initial tasing of [petitioner] was reasonable," respondent "discharged the taser multiple times," such that "a jury could conclude that no reasonable officer would have perceived [petitioner] as posing an immediate threat to the officers' safety or thought that he was resisting arrest after he was tased," *id.* 63a-64a.

Given all of these identified fact disputes, the court concluded that "a jury could reasonably find that 'the *degree* of force . . . [respondent] used in this case was not justifiable under the circumstances.'" *Id.* 64a (emphasis and alteration in original) (quoting *Deville v. Marcantel*, 567 F.3d 156, 167-68 (5th Cir. 2009)). The court also held that it was clearly established law that "a suspect, who was initially evading officers but subsequently attempts to surrender, has a right not to be tased when he is lying on the ground with his arms over his head and not actively resisting arrest." *Id.* 66a. Therefore, the district court denied qualified immunity for respondent. *Id.* 69a.

On appeal, the Fifth Circuit reversed. *Id.* 22a.[4] Concluding that it would be reasonable for any officer to doubt the credibility of the surrender of a suspect who had previously evaded police in a dangerous manner, the Fifth Circuit held that respondent had not violated petitioner's Fourth Amendment rights and that petitioner could not show a violation of clearly established law. *Id.* 7a, 11a-12a.

The court rejected the district court's determination that genuine issues of material fact precluded summary judgment. *Id.* 6a-7a. It moved the analysis away from disputes about the parties' respective actions during the surrender, adopting a rule that did not depend on the circumstances facing respondent at the moment he tased petitioner but looked instead to petitioner's past flight: "[W]hen a suspect has put officers and bystanders in harm's way to try to evade capture, it is reasonable for officers to question whether the now-cornered suspect's purported surrender is a ploy." *Id.* 7a.[5]

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[4] On September 21, 2022, the district court entered a Final Judgment on remand from the Fifth Circuit, dismissing the case with prejudice because the court of appeals had rendered judgment for respondent, the only party for whom the district court had not already granted summary judgment. *Salazar v. Zapata Cnty.*, No. 5:16-CV-292 (S.D. Tex.) (Final Judgment entered Sept. 21, 2022).

[5] The Fifth Circuit did not mention petitioner's allegations that petitioner vocalized his intent to surrender and that respondent made seemingly retaliatory statements to petitioner while tasing him. *See* Pet. App. 28a & n.11, 61a. Nor did the Fifth Circuit engage the district court's observation that the lack

Because the Fifth Circuit held that it was reasonable for respondent to doubt petitioner's surrender based solely on the preceding high-speed flight, the court bypassed the fact disputes the district court identified regarding whether a reasonable officer could conclude that petitioner still posed an immediate threat or was still attempting to flee when he was lying face down on the ground with outstretched arms. Nor did the Fifth Circuit acknowledge the district court's determination that a reasonable jury could find that respondent tased petitioner a second time after the first deployment incapacitated him, *id.* 63-64a, rendering the "degree" of force excessive. *Id.* 64a (emphasis and citation omitted). The Fifth Circuit reframed the degree of force as involving "a 10-second tasing" overall that was "not grossly disproportionate to the threat [respondent] could have reasonably perceived." *Id.* 11a. The court also held that prior Fifth Circuit precedent would not have "made it clear to every reasonable officer that he could not tase [petitioner] in the specific circumstances [respondent] confronted." *Id.* 18a, 21a.

Summarizing its rule, the Fifth Circuit stated: "[A] suspect cannot refuse to surrender and instead lead police on a dangerous hot pursuit—and then turn around, appear to surrender, and receive the same Fourth Amendment protection from intermediate force he would have received had he promptly surrendered

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of audio in the dashcam video meant the video could not contradict petitioner's allegations. *See* Pet. App. 27a n.6, 69a.

in the first place." *Id.* 8a (footnote defining intermediate force omitted).

REASONS TO GRANT THE PETITION

I. THE COURTS OF APPEALS DISAGREE WHETHER PAST FLIGHT IS SUFFICIENT FOR AN OFFICER TO REASONABLY DOUBT A SUSPECT'S SURRENDER.

This Court has directed lower courts to determine whether force used during a seizure is unreasonable by giving "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. If, as the Fifth Circuit held below, an officer may *assume* that a suspect's surrender is fake whenever the suspect initially fled, Pet. App. 7a, two of the three *Graham* factors will almost always support the reasonableness of more than a *de minimis* use of force: A suspect using surrender as a "ploy" will, absent unusual circumstances, both pose an immediate threat to officers and be attempting to evade arrest.[6]

[6] An example of an unusual circumstance that might overcome the ploy assumption would be if a suspect were to be injured and visibly incapacitated during the supposedly fake surrender.

By contrast, in the Sixth and Seventh Circuits, police officers may not assume that a suspect's surrender is fake based solely on past flight. *See infra* Part I.B. Instead, the immediate-threat and evasion factors under *Graham* will point in different directions depending on the circumstances surrounding a purported surrender and subsequent use of force. In these circuits, a suspect who initially flees from police can change course, cease flight, submit to officers' authority, and thereby reduce the degree of force an officer reasonably could use in making the arrest. Not so in the Fifth Circuit. Pet. App. 8a ("[A] suspect cannot refuse to surrender and instead lead police on a dangerous hot pursuit—and then turn around, appear to surrender, and receive the same Fourth Amendment protection from intermediate force he would have received had he promptly surrendered in the first place.").

This Court should grant the petition to resolve whether a suspect's past flight, without more, authorizes officers to doubt the sincerity of a subsequent surrender, as the Fifth Circuit holds, or whether courts must evaluate the reasonableness of uses of force based on the actual features of the surrender itself and the circumstances an officer faces at the time force is used, as the Sixth and Seventh Circuits require.

A. The Fifth Circuit Holds That Past Flight Is Sufficient For An Officer To Doubt The Sincerity Of An Apparent Surrender.

The Fifth Circuit's holding that petitioner was not subjected to excessive force rests on its stated rule that "when a suspect has put officers and bystanders in harm's way to try to evade capture, it is reasonable for officers to question whether the now-cornered suspect's purported surrender is a ploy." Pet. App. 7a. That reasonableness rule focuses on the surrendering suspect's past conduct rather than the immediate circumstances of the surrender itself. Once a suspect has fled in a dangerous fashion, no aspect of the actual surrender—including lying prone on the ground, showing empty hands, and announcing intent to surrender, as petitioner did here—can prevent a finding that officers reasonably could assume the surrender was in fact a ploy. And once an attempted surrender is judged to be fake, it leads inexorably to the conclusion that the suspect is both an immediate threat and attempting to flee—causing two of the three *Graham* factors to lean in favor of finding that the force used was reasonable. *See* 490 U.S. at 396.

The result of the Fifth Circuit's holding is a "past-flight-forfeits-surrender" rule, under which people who have previously evaded arrest cannot expect protection from gratuitous force. And this rule already has spread beyond petitioner's case. For example, the Fifth Circuit applied the rule in affirming a grant of qualified immunity at summary judgment to an officer

who deployed his taser three times on a suspect who was attempting to surrender after initially evading arrest. *Henderson v. Harris Cnty.*, 51 F.4th 125, 129, 134-35 (5th Cir. 2022) (per curiam), *reh'g en banc denied*, No. 21-20544 (5th Cir. Dec. 2, 2022). The court quoted the opinion below to reiterate that "a suspect cannot refuse to surrender and instead lead police on a dangerous hot pursuit—and then turn around, appear to surrender, and receive the same Fourth Amendment protection from intermediate force he would have received had he promptly surrendered in the first place." *Id.* at 135 (quoting Pet. App. 8a).

B. The Sixth And Seventh Circuits Hold That Past Flight Is Not Sufficient For An Officer To Doubt The Sincerity Of An Apparent Surrender.

In contrast to the Fifth Circuit, the Sixth and Seventh Circuits look to the circumstances of an attempted surrender rather than authorizing officers to doubt a surrender's authenticity based solely on a suspect's prior action. This will lead to different results in cases that involve post-flight surrenders with no additional indicators that the surrender is fake. If officers cannot automatically doubt a surrender's sincerity based on the surrendering suspect's past evasion of police—as they can in the Fifth Circuit—there will be cases in the Sixth and Seventh Circuits in which a suspect who ceases flight and attempts to surrender cannot be subjected to more than *de*

minimis force after the surrender occurs.[7] Under *Graham*, the suspect could be determined not to be an immediate threat and not to be attempting to flee, pointing *against* a finding that use of post-surrender force was reasonable.

As Judge Sutton explained for the Sixth Circuit, "gratuitous use of force against a suspect who has 'surrendered' is 'excessive as a matter of law,'" and "that's the case even when the suspect had originally resisted arrest," including "by running from the police." *Ortiz ex rel. Ortiz v. Kazimer*, 811 F.3d 848, 852 (6th Cir. 2016) (quoting *Baker v. City of Hamilton*, 471 F.3d 601, 607 (6th Cir. 2006)). Before doubting a surrender as disingenuous, an officer must be able to "identify any feature of [the suspect's] surrender that would give a reasonable officer pause that [the suspect] was fabricating his submission to the officer's authority." *Ortiz*, 811 F.3d at 852.

The Sixth Circuit has applied this rule even while acknowledging the possibility that "some suspects fake their surrenders," *id.*, and even in a case that involved a very dangerous evasion of police. In *Tapp v. Banks*, the suspect: led police on a car chase that lasted more than thirty minutes and reached speeds over one-hundred miles per hour; drove through a road block

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[7] As this Court recognized in *Graham*, a constitutionally permissible arrest "carries with it the right to use some degree of physical coercion or threat thereof to effect it," 490 U.S. at 396, but anything more than the minimum force needed to effect the arrest must be reasonable in light of the surrounding circumstances. *See id.*

and road flares; "used both sides of the highway to maintain control of his truck as he made turns at high speeds"; and at one point "rammed a police cruiser." 1 F. App'x 344, 346 (6th Cir. 2001). The suspect then "suddenly pulled over to the side of the road" and attempted to surrender. *Id.* In light of conflicting accounts of what happened next (the suspect claimed to have knelt down with his hands on his head, while the officer claimed the suspect attempted to strike him), the Sixth Circuit denied qualified immunity because a reasonable juror could find that the suspect "suddenly decided to 'surrender' after giving up the chase and was thereupon" subjected to excessive force. *Id.* at 346-47, 350-51. In the Fifth Circuit, by contrast, *Tapp*'s "harrowing pursuit," *id.* at 346, would have been sufficient grounds for officers to doubt the suspect's surrender and reasonably use more than *de minimis* force. *See* Pet. App. 6a-7a.

The Seventh Circuit also rejects the Fifth Circuit's past-flight-forfeits-surrender approach and holds that the Fourth Amendment forbids an officer from assuming a surrender is fake simply because the suspect evaded or resisted police before surrendering. Much like the Sixth Circuit, the Seventh Circuit has affirmed that the "prohibition against significant force against a subdued suspect applies notwithstanding a suspect's previous behavior—including resisting arrest, threatening officer safety, or potentially carrying a weapon." *Miller v. Gonzalez*, 761 F.3d 822, 829 (7th Cir. 2014).

In a case involving a burglary suspect who fled from police and claimed that he attempted to surrender once he was cornered, the court of appeals expressly rejected the officers' argument that the suspect's "prior flight cast doubt on the genuineness of his surrender." *Alicea v. Thomas*, 815 F.3d 283, 288-89 (7th Cir. 2016). Noting that, "[w]hile surrender is not always genuine, it should not be futile as a means to de-escalate a confrontation with law enforcement," the court held: "The sole fact a suspect has resisted arrest before cannot justify disregarding his surrender in deciding whether and how to use force." *Id.* at 289. This approach—assessing the circumstances at the time of the attempted surrender—differs greatly from the Fifth Circuit's backward-looking flight-forfeits-surrender rule.[8]

[8] The Eleventh Circuit also has considered the reasonableness of force used on a suspect who purportedly surrenders following an initial flight from police. That circuit has not spoken directly to whether past flight could ever be enough, without more, for an officer to doubt a suspect's attempted surrender. But, in a case involving an attempted surrender following flight from police, the Eleventh Circuit looked not only to past flight but also to the circumstances surrounding the surrender to determine whether officers reasonably could have doubted its sincerity. *See Crenshaw v. Lister*, 556 F.3d 1283, 1291-93 (11th Cir. 2009) (accounting for the fact of prior flight by foot when analyzing reasonableness of officer's suspicion that surrender was fake, but also emphasizing circumstances surrounding the surrender, including darkness, heavy underbrush, and information that the fleeing person was armed).

II. THE FIFTH CIRCUIT'S PAST-FLIGHT-FORFEITS-SURRENDER RULE IS WRONG, AND A JURY SHOULD RESOLVE THE GENUINE, MATERIAL FACT DISPUTES THE DISTRICT COURT IDENTIFIED IN DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY.

The Fifth Circuit's creation of a less-protective tier of Fourth Amendment rights for suspects who initially flee before surrendering, Pet. App. 8a, is a dramatic departure from this Court's excessive-force jurisprudence. It automatically authorizes an assumption of fake surrender whenever a suspect has previously evaded arrest, *id.* 7a, contravening longstanding precedent that the Fourth Amendment's "proper application requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396. As such, it puts a result-oriented skew on two of the three *Graham* factors, elevating assumptions rooted in past behavior over the actual circumstances surrounding a surrender-related use of force, including "whether the suspect poses an *immediate* threat to the safety of the officers or others, and whether he is *actively* resisting arrest or attempting to evade arrest by flight." *Id.* (emphasis added).

In petitioner's case, the Fifth Circuit used its past-flight-forfeits-surrender rule to dodge the genuine, material fact disputes the district court found regarding the reasonableness of the force respondent used *at the time he used it*. *See* Pet. App. 6a-7a (disagreeing with the district court's denial of qualified

immunity that identified "genuine factual disputes as to whether [petitioner] posed an immediate threat to the safety of anyone at the scene" and instead citing petitioner's previous evasion of police as a sufficient reason to doubt his "purported surrender"). But, under *Graham*, the reasonableness of respondent's use of force turns on the actual "facts and circumstances" surrounding the tasing, 490 U.S. at 396, not an assumed "ploy" of fake surrender. Pet. App. 7a. And genuine, material fact disputes regarding respondent's taser use preclude awarding him qualified immunity at the summary-judgment stage.

The district court conducted a detailed evidentiary analysis of the summary-judgment record, including extensive discussion of the parties' filings, deposition testimony, and the dashcam video from respondent's vehicle that captured the tasing incident. *See id.* 58a-64a, 68a-69a. The district court identified at least eight genuine disputes, all of which materially affect whether a reasonable officer would have perceived that petitioner posed an immediate threat to others, *id.* 60a-62a, or was still evading arrest at the time respondent tased him, *id.* 62a-64a, 69a:

- "whether [petitioner] was repeatedly verbalizing his intent to surrender," *id.* 61a, shouting "I'm not resisting. Please don't tase me! I have asthma!" *id.* 27a, 69a;
- whether petitioner's "voice was audible to [respondent]," *id.* 61a;

- "whether [respondent] could see the placement of [petitioner's] hands," *id.* 61a;
- "whether [respondent] gave any instructions to [petitioner]" and whether petitioner complied, *id.* 63a;
- "whether [petitioner] made any threatening movements," *id.* 61a-62a;
- "whether [petitioner] began to 'raise up' before the tasing," *id.* 62a;
- whether the supposed upward movement was a "reaction to being tased, rather than an attempt to flee or resist," *id.* 62a;
- whether, "[e]ven if [respondent's] initial tasing of [petitioner] was reasonable," respondent "discharged the taser multiple times," such that "a jury could conclude that no reasonable officer would have perceived [petitioner] as posing an immediate threat to the officers' safety or thought that he was resisting arrest after he was tased," *id.* 63a-64a.

The Fifth Circuit's opinion contrasts sharply with the district court's record-driven denial of qualified immunity. The court of appeals let petitioner's past flight do the lion's share of work in determining the reasonableness of respondent's use of force, essentially recasting the factual disputes found by the district court as immaterial: Because petitioner initially fled, respondent could *assume* petitioner's subsequent surrender was fake and hypothesize dangers without needing to root an immediate threat in evidence.

For example, the Fifth Circuit loosely theorized that petitioner could have had a weapon, *see id.* 7a, but it did so based on pure speculation, not any evidence that petitioner actually had a weapon, might have had a weapon, was near an object that might have been a weapon, or moved in a way consistent with possibly having a concealed weapon (for example, reaching suddenly for his waistband). By contrast, the district court analyzed the actual summary-judgment evidence, including the dashcam video of the tasing incident, noting that petitioner "did not have a confirmed weapon within reach, and [respondent] did not have any information about potentially violent behavior," so "factual disputes remain as to whether a reasonable officer would have believed [petitioner] to be an 'immediate threat.'" *Id.* 60a.

The Fifth Circuit's fake-surrender presumption also let it sidestep evidence that petitioner "announced multiple times, 'I'm not resisting.'" *Id.* 69a. Conversely, the district court: noted that "the video does not have audio to disprove [petitioner's] allegations," *id.*; observed that respondent "testified that he does not remember the tasing itself," *id.* 28a n.10, 68a-69a; and, citing its obligation to construe facts in favor of petitioner, found that petitioner's alleged announcements of surrender helped create "a genuine dispute of material fact as to whether plaintiff was surrendering to law enforcement and not actively resisting." *Id.* 69a.

A proper summary-judgment analysis—one that considers undisputed facts and construes disputed

facts in the light most favorable to petitioner, *see Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014); FED. R. CIV. P. 56—yields the following premise that a reasonable jury could accept: respondent tased petitioner "[f]or being stupid," Pet. App. 28a & n.11, after petitioner announced that he was surrendering and then in fact surrendered by lying face down with hands spread out on the ground, posing no immediate threat to respondent or anyone else at the scene. *See also id.* 66a ("Here, the constitutional question should be framed as whether a suspect, who was initially evading officers but subsequently attempts to surrender, has a right not to be tased when he is lying on the ground with his arms over his head and not actively resisting arrest."). Such a gratuitous use of force is an obvious violation of the Fourth Amendment's protection against unreasonable seizures. *See, e.g.*, *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (reiterating that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question," providing officers "some notice that their alleged conduct violate[s]" constitutional rights (quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 745 (2002) (alteration in orginal) (quoting in part *United States v. Lanier*, 520 U.S. 259, 271 (1997)))).

The Fourth Amendment's readily apparent prohibition against gratuitous post-surrender force is not lost on the Sixth and Seventh Circuits, which, as previously discussed, reject the premise that a surrender can be presumed fake just because a

suspect previously fled or initially resisted arrest. *See supra* Part I.B (highlighting, *inter alia*, Judge Sutton's observation that "the gratuitous use of force against a suspect who has 'surrendered' is 'excessive as a matter of law,'" *Ortiz*, 811 F.3d at 852 (quoting *Baker*, 471 F.3d at 607); *see also Thomas v. Plummer*, 489 F. App'x 116, 127 (6th Cir. 2012) (observing, when analyzing excessive-force claim of initially disobedient suspect who then "surrendered, putting herself at the officers' mercy by falling to her knees and placing her hands above her head," that "[e]very reasonable officer would have understood that tasing a suspect in such a position was excessive in August 2009").

Unsurprisingly, other circuits also have long recognized the impermissibility of gratuitous uses of force against suspects who surrender or cease resistance. *See, e.g.*, *Jennings v. Jones*, 499 F.3d 2, 16-17 (1st Cir. 2007) (determining that it was an obvious violation of the Fourth Amendment to use additional force against a suspect no longer resisting arrest); *Jones v. Treubig*, 963 F.3d 214, 226-27 (2d Cir. 2020) (tracing back clearly established law as of at least 2010, if not earlier, that "an officer's significant use of force against an arrestee who was no longer resisting and who posed no threat to the safety of officers or others—whether such force was by pepper spray, taser, or any other similar use of significant force—violates the Fourth Amendment"); *Valladares v. Cordero*, 552 F.3d 384, 390-91 (4th Cir. 2009) (holding that using gratuitous force on a previously resisting suspect after the suspect surrendered violated clearly

established Fourth Amendment rights); *Barnard v. Las Vegas Metro. Police Dep't*, 310 F. App'x 990, 993 (9th Cir. 2009) (holding that substantial non-lethal force used on a "non-resisting arrestee who had surrendered" violated clearly established law); *Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016) (stating, in considering a 2011 incident, that "repeated use of the taser against a subdued offender is clearly unreasonable" and violated clearly established Fourth Amendment rights).

The Fifth Circuit's past-flight-forfeits-surrender rule dodges factual disputes that, if construed in petitioner's favor, would establish an obvious Fourth Amendment violation. Unless the Fifth Circuit is correct that suspects who initially flee before surrendering do not "receive the same Fourth Amendment protection from intermediate force" as those who "promptly surrender[] in the first place," and officers may therefore *assume* any surrender by a suspect who previously fled is a "ploy," Pet. App. 7a-8a, respondent should face trial so that a jury can resolve the numerous factual disputes that are material to petitioner's claim that respondent violated petitioner's clearly established Fourth Amendment rights.

III. This Case Provides An Excellent Vehicle To Resolve The Split Over Fake Surrender Assumed From Past Flight—An Important Issue With Significant Safety Implications For Police And The Public.

The Fifth Circuit's past-flight-forfeits-surrender rule not only skews the Fourth Amendment analysis under *Graham*, *see supra* Part II, but also has serious safety implications for officers, the people officers pursue, and the communities where police encounters occur. By authorizing officers to assume that a post-flight surrender is a "ploy," Pet. App. 7a, the rule poses a very real danger of *disincentivizing* surrender by signaling that an individual being pursued by police has little to gain from stopping flight, submitting to officers' control, and ceasing any resistance. The rule thus threatens to undermine emerging governmental and community efforts to encourage safe surrenders, promote de-escalation in police encounters, and foster greater transparency about police procedures. *See* Off. of Cmty. Oriented Policing Servs., U.S. Dep't of Just., Final Report of the President's Task Force on 21st Century Policing 1 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf ("Trust between law enforcement agencies and the people they protect and serve is essential in a democracy. It is key to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services.").

The rule does so, moreover, in an era in which uses of force captured on video—like the tasing incident

here—are common, may be posted online, and can fuel perceptions that police encounters carry risks of injury or death even when someone tries to surrender. Under the Fifth Circuit's past-flight-forfeits-surrender rule, courts can bypass video documentation of a surrender and just *assume* that an officer faced an immediate threat and ongoing evasion whenever the suspect previously fled. Further, courts can make that assumption without having to ask whether video or testimonial summary-judgment evidence would permit a reasonable juror to reach a different conclusion. The assumed-ploy rule therefore dramatically distorts not only *Graham*, but also the requirements of Federal Rule of Civil Procedure 56; and the video and other summary-judgment evidence here make petitioner's case an excellent vehicle to evaluate the legal and practical consequences of the Fifth Circuit's past-flight-forfeits-surrender rule.

A. The Fifth Circuit's Rule Disincentivizes Surrender And Threatens To Undermine Efforts To Make Police Encounters Safer For Officers, Suspects, And Affected Communities.

The Fifth Circuit's rule puts a thumb on the scale in favor of reasonableness whenever officers use more than *de minimis* force against a surrendering suspect who previously fled. That skew signals that surrender may be futile as a means to avoid a tasing or other gratuitous uses of force—an outcome that runs counter to evolving law-enforcement efforts to

encourage surrenders as a means to promote safer outcomes and build trust between police and the public.

Efforts to reduce deployments of force in police encounters are evolving from diverse sources pursuing a wide array of safety goals. For example, the federal Fugitive Safe Surrender program, which was designed to "reduce the risk to law enforcement officers who pursue fugitives, to the neighborhoods in which they hide, and to the fugitives themselves," became a national success story by allowing individuals with arrest warrants to peacefully turn themselves in at local public events. *Safe Surrender*, U.S. MARSHALS SERV., https://www.usmarshals.gov/who-we-are/about-us/history/historical-reading-room/safe-surrender (last visited Dec. 12, 2022); *see also* Press Release, Metro. Nashville Police Dep't, *Plans Being Made for a Nashville Safe Surrender Event on December 10 and 11* (Nov. 21, 2021), https://www.nashville.gov/departments/police/news/plans-being-made-nashville-safe-surrender-event-december-10-and-11 (announcing surrender events in Nashville based on the U.S. Marshals' program's success).[9]

[9] The U.S. Marshals' program ceased operating when its congressional funding expired in 2011, but other programs, like Nashville's continuing safe-surrender program cited above, continue to draw on it as a model. *See* John Caniglia, *U.S. Marshal Service Ends Fugitive Safe Surrender Program, Citing Costs*, CLEVELAND.COM (Mar. 6, 2011, 10:15 AM), https://www.cleveland.com/metro/2011/03/us_marshal_service_ends_fugiti.html (describing the U.S. Marshals' program's national success and need for local implementation in light of federal defunding).

Law-enforcement organizations also make surrender a safer option by emphasizing, through policies and trainings, that "officers should use only the amount of force necessary to mitigate an incident, make an arrest, or protect themselves or others from harm." *Overview of Police Use of Force*, NAT'L INST. OF JUST., U.S. DEP'T OF JUST. (Mar. 5, 2020), https://nij.ojp.gov/topics/articles/overview-police-use-force. As the Department of Justice recognizes, "[s]ituational awareness is essential," and officers must "tailor a response" to an encounter with a suspect that evolves over time, using only the degree of force needed "to regain control of a situation." *Id.*; INT'L ASS'N OF CHIEFS OF POLICE, NATIONAL CONSENSUS POLICY AND DISCUSSION PAPER ON USE OF FORCE 11 (rev. July 2020), https://www.theiacp.org/resources/document/national-consensus-policy-and-discussion-paper-on-use-of-force ("[O]fficers must continually reassess the situation, where possible" and "where the subject either ceases to resist or the incident has been effectively brought under control, the use of physical force should be reduced accordingly.").

Those guiding principles play no role, however, under the Fifth Circuit's assumed-ploy rule. Once a suspect flees, officers are no longer required to tailor a use of force as the situation evolves—even if a suspect ceases flight and lies face down on the ground with outstretched arms, as petitioner did here. Instead, officers can apply the degree of force that would be needed to control a non-surrendering suspect who poses an ongoing threat. Suspects will have less incentive to cease flight if officers have no obligation to

maintain "[s]ituational awareness" of reality at the time of surrender. *Compare Overview of Police Use of Force*, *supra*, *with* Pet. App. 7a-8a.

Authorizing officers to assume surrendering suspects are engaged in a dangerous "ploy" also runs counter to de-escalation-training trends. De-escalation techniques are now prevalent in officer-training programs, offering a tool for decreasing tensions in police encounters and improving safety for everyone involved. *See, e.g.*, NATIONAL CONSENSUS POLICY, *supra*, at 12 ("Procedurally, whenever possible and appropriate, officers should utilize de-escalation techniques consistent with their training before resorting to using force or to reduce the need for force."); LEADERSHIP CONF. EDUC. FUND, NEW ERA OF PUBLIC SAFETY: A GUIDE TO FAIR, SAFE, AND EFFECTIVE COMMUNITY POLICING 122-24 (2019), https://civilrights.org/wp-content/uploads/Policing_Full_Report.pdf (documenting states' widespread de-escalation-training requirements and highlighting their benefits to police and communities they serve).

The Department of Justice not only trains officers on de-escalation strategies, but also recently confronted some officers' reluctance to embrace the practice, distributing a podcast to help officers understand how de-escalation "can dramatically reduce injuries among civilians and law enforcement officers alike." OFF. OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUST., *Community Policing Development: De-Escalation Training Solicitation*, https://cops.usdoj.gov/de-escalation (last visited Dec. 12,

2022); *De-Escalation Training: Safer Communities and Safer Law Enforcement Officers*, OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST.: OJP BLOGS (Sept. 6, 2022), https://www.ojp.gov/news/ojp-blogs/de-escalation-training-safer-communities-and-safer-law-enforcement-officers. While de-escalation training often focuses on encounters with suspects experiencing a mental-health crisis, those same conflict-reduction skills are useful in improving safer outcomes more broadly.[10] But rather than reducing conflict in police encounters, the Fifth Circuit's assumed-ploy rule threatens to escalate tensions unnecessarily by authorizing officers to view post-flight surrenders as fake and thereby inherently threatening. That superimposed skew increases the likelihood that officers will use more force than necessary to control a situation that a *suspect* has attempted to de-escalate by surrendering.

Moreover, there is no indication that police need an *assumed*-ploy rule, as a practical matter, to protect them. Police already "are trained not only to be able to distinguish real from illusory threats but also to defuse dangerous situations without resort to violence." Mitch Zamoff, *Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal*, 65 VILL. L. REV. 585, 588 (2020); *see also*

[10] For example, a 2019 study of the practical impact of de-escalation training in a Louisville, Kentucky police department showed a 28% reduction in uses of force, a 36% reduction in officer injuries, and a 26% reduction in civilian injuries. Robin S. Engel et al., *De-Escalation Training Receptivity and First-Line Police Supervision: Findings from the Louisville Metro Police Study*, 25 POLICE Q. 201, 205 (2022).

Ortiz, 811 F.3d at 852 (requiring officer-defendant who claimed suspect could have been faking surrender to identify actual features of the surrender that suggested a ruse); *Alicea*, 815 F.3d at 289 (observing that surrender "should not be futile as a means to de-escalate a confrontation with law enforcement").

By relieving officers of the obligation to assess the realities of a post-flight surrender, the assumed-ploy rule sends the counterproductive message that surrender may indeed be "futile." *See Alicea*, 815 F.3d at 289. As such, the rule will only exacerbate existing fears that surrender is not a safe option. It is well documented that fleeing suspects may prolong evasion of police because they fear that they will be unable to peacefully surrender and instead be subjected to excessive force. *See, e.g.*, Jim Mustian, *'I'm Scared': AP Obtains Video of Deadly Arrest of Black Man*, ASSOCIATED PRESS (May 19, 2021), https://apnews.com/article/louisiana-arrests-monroe-eca021d8a54ec73598dd72b269826f7a (reporting that an unarmed man tased and beaten to death by police had apologized to them for starting a high-speed chase and explained, after he attempted to surrender, that "I'm your brother! I'm scared! I'm scared!"); Adam Ferrise, *Why Do People Run From East Cleveland Police? Fear, They Say*, CLEVELAND.COM (Oct. 1, 2021, 7:57 AM), https://www.cleveland.com/metro/2021/10/why-do-people-run-from-east-cleveland-police-fear-they-say.html (reporting East Cleveland residents' statements that they may lead local police on vehicular pursuits rather than pull over because of fear based on the police

department's violent reputation). Indeed, in one survey of individuals who had led police on high-speed chases, 21% of respondents reported that they fled out of fear of police beatings. Roger G. Dunham et al., *High-Speed Pursuit: The Offenders' Perspective*, 25 CRIM. JUST. & BEHAV. 30, 37 (1998).

The assumed-ploy rule will exacerbate fears of police violence and increase instincts to flee by expanding the circumstances in which use of significant force, like a taser, will be deemed reasonable. Although the Fifth Circuit seemed to minimize the dangers tasers pose, deploying one on a surrendering suspect is far from a *de minimis* use of force. It can inflict great pain and lasting damage. *See, e.g.*, *Masters v. City of Indep.*, 998 F.3d 827, 832-33 (8th Cir. 2021) (concluding that excessive use of taser against a non-resisting suspect caused hypoxia, cardiac arrest, and anoxic brain injury); *Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 902 (4th Cir. 2016) ("Deploying a taser is a serious use of force."). If tasing is almost always a reasonable response to a post-flight surrender, as the Fifth Circuit's rule suggests, that prospect could lead someone to continue to flee police when the person otherwise would have surrendered. *See* FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra*, at 1 ("Decades of research and practice support the premise that people are more likely to obey the law when they believe that those who are enforcing it have authority that is perceived as legitimate by those subject to the authority."). And

that result will impede evolving efforts to de-escalate police encounters, encourage surrenders, and promote safer outcomes for officers, pursued persons, and surrounding communities. *See id.* ("Building trust and nurturing legitimacy on both sides of the police/citizen divide is the foundational principle underlying the nature of relations between law enforcement agencies and the communities they serve.").

B. This Case Provides An Excellent Vehicle For Assessing The Impact Of The Fifth Circuit's Assumed-Ploy Rule Not Only On The *Graham* Inquiry, But Also On Traditional Summary-Judgment Requirements.

The Fifth Circuit's assumed-ploy rule skewed the result in petitioner's case regarding both the *Graham* analysis and factual disputes about petitioner's surrender rooted in the summary-judgment record, which included respondent's dashcam video that captured the pivotal moments surrounding petitioner's surrender and tasing. The Fifth Circuit bypassed consideration of the surrender in light of that record, using the assumed-ploy rule to displace the evidentiary analysis the district court conducted (*see, e.g.*, Pet. App. 63a-64a) to determine what *a jury* could conclude about the events surrounding petitioner's surrender. Absent its assumption that respondent could doubt petitioner's surrender due to petitioner's past flight alone, the Fifth Circuit would have had to confront the factual disputes the district court

concluded would permit a reasonable juror to find that respondent gratuitously tased petitioner when petitioner was surrendering and posed no threat. And traditional summary-judgment rules, along with the Fifth Circuit's limited jurisdiction on interlocutory appeal, *see Johnson v. Jones*, 515 U.S. 304, 319-20 (1995), would have prohibited the court of appeals from second-guessing the genuineness of the fact disputes the district court found in denying qualified immunity.

As this Court explained in *Scott v. Harris*, a court's obligation to draw inferences from summary-judgment evidence in the nonmovant's favor is not excused when the evidence is a video and the motion asserts qualified immunity. *See* 550 U.S. 372, 378 (2007). That means a court will adopt the plaintiff's version of facts unless they are "blatantly contradicted by the record, so that no reasonable jury could believe it." *Id.* at 380. The Fifth Circuit nodded at this standard in the abstract, Pet. App. 2a, but it did not actually apply it to assess whether the video, or the rest of the record, blatantly contradicted petitioner's version of events—that he surrendered and posed no threat when respondent first tased him, and he was fully subdued when respondent tased him a second time. The district court properly conducted that inquiry and reasoned that the parties' summary-judgment evidence created material fact disputes that only a jury could resolve. *Id.* 63a-64a. The Fifth Circuit instead shifted the inquiry to petitioner's pre-surrender flight and used the assumed-ploy rule to render the summary-judgment record largely irrelevant,

obviating the need to consider whether a jury could believe petitioner's surrender terminated any flight-based threat to respondent or anyone else. *Id.* 6a-8a.

A rule that causes courts to bypass reasonable inferences from summary-judgment evidence in the non-movant's favor is particularly pernicious in an era when police encounters increasingly are captured on video, viewable by the public online, and introduced as evidence in excessive-force litigation. To avoid damaging public trust when adjudicating excessive-force lawsuits, courts should more faithfully apply summary-judgment standards, including to video evidence, before awarding qualified immunity and removing the prospect of a jury from the litigation equation. *See* Zamoff, *supra*, at 591-92 (contending that "the lack of evidentiary support for most excessive force decisions is contributing to a crisis of confidence regarding the use of force by the police," and "[e]ven if a significant majority of excessive force decisions end up favoring the police, the legitimacy of those decisions will be enhanced if there is a demonstrable evidentiary basis for them").[11]

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[11] In the 15 years since this Court decided *Scott*, the courts of appeals have inconsistently applied and misapplied its video directives over dissents and requests for renewed guidance from this Court. *See, e.g.*, *Estate of Taylor v. Salt Lake City*, 16 F.4th 744, 779 (10th Cir. 2021) (Lucero, J., dissenting) (stating that "[t]he majority seizes on *Scott* to discount Plaintiffs' version of events by pointing to available body camera footage" and that the court "impermissibly utilizes subjective testimony from responding officers to interpret the footage, drawing conclusions that are not plainly established by the evidence"), *cert. denied*,

The Court should grant the petition to resolve whether the reasonableness of post-surrender force can be assessed based on a fake-surrender assumption triggered by previous evasion of police, as the Fifth Circuit holds, or must be based on facts and circumstances related to the surrender itself, as the Sixth and Seventh Circuits have concluded. This question has significant real-world implications for officers, communities, and public confidence in law enforcement, presenting an issue of great societal importance that warrants the Court's review.

143 S. Ct. 83 (2022); *Hughes v. Rodriguez*, 31 F.4th 1211, 1226 (9th Cir. 2022) (Vitaliano, J., concurring in part) (asserting that the majority "effectively raise[d] the bar" higher than *Scott* by moving the summary-judgment standard "from the realm of 'genuine dispute' into that of metaphysical impossibility"); *Gambrel v. Knox Cnty.*, 25 F.4th 391, 396, 405 (6th Cir. 2022) (observing that "[c]ircuit courts have debated *Scott's* scope" and the case required "decid[ing] how far *Scott* goes"); *see also* Tobias Barrington Wolff, Scott v. Harris *and the Future of Summary Judgment*, 15 NEV. L.J. 1351, 1353 (2015) ("[D]evelopments in the lower federal courts reveal that the uncertainty introduced by the opinion [in *Scott*] is already eroding this core feature of the summary judgment standard.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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