No. 22-564

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

BRIEF OF AFFECTED PARTY SEEKING RECOVERY UNDER 18 U.S.C. § 1983 AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, Simon Dekerf, has a suit pending in the Northern District of Texas (Cause No. 3:22-cv-02667-D). *Amicus* has asserted a claim for excessive force. *Amicus*' petition alleges he fled the police through thorns and brush (which caused extensive cuts and scraping on his body) and escaped arrest. *Amicus* avoided the police for twelve hours. After twelve hours the police found *amicus*. When the police entered *amicus*' home, *amicus* was in bed wearing nothing but torn underpants; *amicus* immediately followed instructions, surrendered, and put his hands so they were visible.

[1] Under Rule 37, *amicus* confirms that he provided notice to counsel for Petitioner and Respondent on January 5, 2023, which is more than ten days before the brief is due.

Also, pursuant to Rule 37.6, *amicus* confirms that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief.

No officer drew a firearm, a taser, or even a baton. Yet the officer in charge of the dog instructed the dog to "get that man," referring to *amicus*. The dog then followed instructions and repeatedly bit *amicus*.

Petitioner's question presented asks this Court to resolve the existing circuit split on whether a suspect's flight from police—without more—permits the police to assume the suspect's surrender is a ruse and to justifiably use "intermediate force" such as a dog bite or a taser. Pet. Br. i. This question arose because of the Fifth Circuit's opinion in *Salazar v. Molina*.

Ultimately, flight must be a factor when considering the use of force, but it must remain only a component of the decision to use force. In deciding whether to use force, a police officer must look to the totality of the circumstances. *Salazar v. Molina* wrongly elevates flight to the only factor that courts in the Fifth Circuit evaluate. Petitioner writes to emphasize that this isolated focus on flight contradicts precedent from this Court and disregards *stare decisis*.

SUMMARY OF ARGUMENT

Salazar v. Molina created a circuit split because *Salazar* conflicts with this Court's precedent on how courts should evaluate claims of excessive force.

This Court issued *Graham v. Connor* in 1989 in an opinion by Chief Justice Rehnquist. Since 1989 the "*Graham* factors" have served as a universal metric for

the evaluation of the use of force. But *Graham* went further and clarified that claims of excessive force are evaluated under the Fourth Amendment's "reasonableness" standard. Chief Justice Rehnquist emphasized the test was whether the officer's actions were "objectively reasonable" "in light of the facts and circumstances confronting [the officer], without regard to their intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

The Fifth Circuit's opinion in *Salazar* conflicts with nearly forty years of precedent and renders the fact that a defendant fled from the police as the only factor for courts in the Fifth Circuit to consider. No longer does a district court in the Fifth Circuit look to the "facts and circumstances" the officer faced if a suspect fled; instead the question is did the suspect flee? Under *Salazar*, if the answer is "yes," then the Court need not consider the remaining *Graham* factors.

ARGUMENT

I. THE PRIMACY OF *STARE DECISIS* AND THE NECESSITY TO FOLLOW PRECEDENT

In 1807 this Court emphasized the requirement for *stare decisis* and wrote:

> Again let it be asked, is not the law to be considered as settled by these repeated decisions? Are we still, as to this most important point, afloat on the troubled ocean of opinion, of

> feeling, and of prejudice? If so, deplorable indeed is our condition.
>
> *Misera est servitus, ubi lex est vaga aut incerta*.
>
> This great principle, *stare decisis*, so fundamental in our law, and so congenial to liberty, is peculiarly important in popular governments, where the influence of the passions is strong, the struggles for power are violent, the fluctuations of party are frequent, and the desire of suppressing opposition, or of gratifying revenge under the forms of law, and by the agency of the courts, is constant and active.

Ex parte Bollman, 8 U.S. 75, 89, 2 L. Ed. 554 (1807). The Court's prescient concerns support the idea that precedent must be followed and should only be changed in extraordinary circumstances.

Since 1807 this Court has written on the importance of *stare decisis* nearly five hundred times. *See*, *e.g.*, *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S. Ct. 444, 451, 84 L. Ed. 604 (1940) ("We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations"); *Dobbs v. Jackson Women's Health Org*., 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2261-2262 (2022) ("*Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends. It protects the interests of those who have taken action in reliance on a past decision. It 'reduces incentives for challenging settled precedents, saving parties

and courts the expense of endless relitigation.' It fosters 'evenhanded' decisionmaking by requiring that like cases be decided in a like manner. It 'contributes to the actual and perceived integrity of the judicial process.' And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. 'Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges.' "). (Internal citations removed). Every circuit has echoed these concerns. *See*, *e.g.*, *Payne v. Taslimi*, 998 F.3d 648, 654 (4th Cir. 2021), *cert. denied*, 211 L. Ed. 2d 403, 142 S. Ct. 716 (2021) (explaining *stare decisis*; also writing "[b]ut as an inferior court, the Supreme Court's precedents do constrain us"). Considering the Court was correct in 1807 because "the influence of the passions [remains] strong, the struggles for power [remain] violent, the fluctuations of party [remain] frequent, and the desire of suppressing opposition, or of gratifying revenge under the forms of law, and by the agency of the courts, [remains] constant and active," courts have done an admirable job adhering to the twin pillars of *stare decisis* and precedent. *Bollman*, 8 U.S. at 89.

This is a rare instance where a circuit court failed to follow precedent. Further, through *Salazar*, the Fifth Circuit changed Supreme Court precedent that otherwise had remained constant for almost forty years.

A. THE FIFTH CIRCUIT VIOLATED *STARE DECISIS* AND THE REQUIREMENT TO FOLLOW PRECEDENT FROM THIS COURT

While no jurist seriously questions the importance of *stare decisis* or the need to follow precedent, in *Salizar v. Molina* the Fifth Circuit rejected *stare decisis* by revolting against four decades of precedent from this Court. The Fifth Circuit created a new standard for cases in which a party flees. This standard conflicts with *Graham* by finding any use of "intermediate force" allowable as long as the officer *assumes* the surrender is a ruse. *Salazar v. Molina*, 37 F.4th 278, 282-283 (5th Cir. 2022).

In *Salazar*, the suspect led the police on a "high-speed chase through a residential neighborhood." *Id*. at 280. The speeds reached "in excess of 70 miles per hour." *Id*. After five minutes the suspect stopped the car, "quickly got out, dropped to his knees next to the car, and raised his hands. He then lay on the ground with arms above his head and legs crossed. Five seconds after stopping his car, Salazar was lying prone on the ground." *Id*. Eight seconds after Salazar had stopped his car, Molina fired his taser into Salazar's back as Salazar lay prone on the ground. *Id*.

The Fifth Circuit conducted a *Graham* analysis. *Id*. at 281-284. The Fifth Circuit's analysis of the second prong concluded "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 282-283. The Fifth Circuit defined "intermediate force" as "weapons such as police dogs and tasers." *Id*. at 283 n.1.

While the Fifth Circuit claimed to conduct a *Graham* analysis and purported to look to the circumstances in general, the opinion turns on the fact Salazar fled. *Id*. at 281-284. The opinion establishes Molina had no reason, other than the flight, to assume Salazar's surrender was disingenuous. *Id*. at 280-284. The only other factor the Fifth Circuit could have considered was the fact that Salazar crossed and uncrossed his feet while he was on the ground in surrender. *Id*. at 280. Thus, the Fifth Circuit allowed the arresting officer to go immediately to the use of "non-deadly intermediate force" in the form of a taser on the officer's unsupported *assumption* that the surrender was disingenuous. *Id*. at 280-284.

Allowing any officer's unsupported assumption to determine the second *Graham* factor ("whether the suspect poses an immediate threat to the safety of the officers or others") changes the entire *Graham* analysis. 490 U.S. at 396. If any officer can merely *assume* a suspect who has previously fled and has now surrendered "poses an immediate threat to the safety of the officers or others" then the *Graham* analysis is no longer required. No reasonable court would find that the use of "intermediate force" is constitutionally impermissible if a defendant "poses an immediate threat

to the safety of the officers or others." *See*, *e.g.*, *Pauly v. White*, 874 F.3d 1197, 1215-1216 (10th Cir. 2017) ("The second *Graham* factor, 'whether the suspect pose[ed] an immediate threat to the safety of the officers or others,' is undoubtedly the 'most important' and fact intensive factor in determining the objective reasonableness of an officer's use of force. Thus, like many of our excessive force cases, our analysis will focus mostly on it.") (internal citations removed). Therefore, the standard from *Salazar* must be wrong.

B. *AMICUS*' CASE ILLUSTRATES THE FALLACY IN *SALAZAR*

Amicus fled the police through briars, thorns, bushes, and forest. *Amicus* escaped police detention, but was covered in scratches and cuts from the thorns and vines. *Amicus*' good fortune ended twelve hours later when the police found *amicus* in his home. When the police found *amicus*, he was in bed wearing nothing but torn underpants; *amicus* immediately complied with police instructions and put his hands up in surrender. Yet the police used "intermediate force" by ordering a dog to attack.

Based on *Salazar*, the officer who used the dog will assuredly argue he believed that because *amicus* had fled previously (twelve hours before) that *amicus* "posed an immediate threat to the safety of the officers" and the rest of the *Graham* analysis fails.

C. HYPOTHETICALS ESTABLISH THE FALLACY IN *SALAZAR*

Consider the application of *Salazar* to a modified set of facts from *Graham*. In *Graham*, the suspect/plaintiff suffered a diabetic crisis. *Graham*, 490 U.S. at 388. A friend went into a store to get orange juice but the line was too long. *Id*. The friend left the orange juice and tried to take Graham to a private home. *Id*. A police officer saw Graham's friend enter and leave the store quickly, followed the car Graham was in, and eventually made an "investigative stop." *Id*. at 389. The driver of the car Graham was in stopped promptly. When the car stopped, "Graham got out of the car, ran around it twice, and finally sat down on the curb, where he passed out briefly." *Id*. Assume, instead of running around the car, Graham ran from the car and then passed out. Under these hypothetical facts, the reasoning from *Salazar* would have justified the use of "intermediate force" (such as a dog or a taser) on Graham who was incapacitated due to a diabetic emergency. Specifically, by getting out of the car and running from it (under the hypothetical facts), the police could have inferred Graham was fleeing and that his surrender in the form of passing out due to a diabetic episode justified the use of a dog, a taser, or some other form of "intermediate force" as long as some officer *assumed* that the surrender was not genuine.

Also consider the possibility that a suspect with a warrant for a hot check (a non-violent misdemeanor) fled the police and escaped. But sometime later—a week, a month, or six months—the suspect tried to

renew his driver's license at the police station and the clerk received an alert for the warrant. Then the dutiful clerk alerted a nearby officer and the nearby officer was aware that Appellant had fled previously. Assume further the officer is a canine officer and he had his dog. Assuming the suspect did not attempt to flee, immediately surrendered, and was compliant with police instructions, would the use (or as in *Salazar* the immediate use) of the dog or a taser on the suspect be constitutionally permissible simply because the officer *assumed* the suspect was surrendering in an effort to lure the officer closer and then to attack? Plainly the answer must be "no," but under the reasoning from *Salazar*, the use of the dog (or other "intermediate force") on this suspect would be permissible.

These examples illustrate that the use of force must turn on the totality of the circumstances an officer faces and not an unsubstantiated assumption stemming from a prior flight.

D. THE CORRECT STANDARD IS THE FOURTH AMENDMENT "REASONABLENESS" STANDARD

Flight deserves to be a factor in determining whether the use of force is necessary. But this determination must look to the *entirety* of the circumstances then facing the police officer and not merely one factor that occurred in the past. *Graham*, 490 U.S. at 396. ("[T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or

mechanical application."). Instead, the question must be whether the circumstances facing the police officer justify the use of force ("intermediate" or otherwise). The question cannot be: Did the suspect flee in the past?

CONCLUSION

Flight is a factor that should be considered when an officer is deciding whether to use force. *Salazar*, however, elevates flight to the determinative issue in whether an officer's use of force is justified after a suspect flees. *Salazar* allows any police officer to *assume* the suspect who fled has surrendered disingenuously and to use "intermediate" force such as a dog attack or a taser.

The primacy of flight over all other factors dismantles the *Graham* factors that have governed decisions on the use of force since 1989. The question must remain whether the use of force was "reasonable" under the then existing circumstances.

Amicus asks this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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