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 THE TEXAS CIVIL RIGHTS PROJECT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LINDA T. COBERLY
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

DUSTIN RYNDERS
TRAVIS FIFE
Texas Civil Rights Project
2100 Travis, Suite 360
Houston, TX 77002

MOLLY PETCHENIK
Texas Civil Rights Project
1405 Montopolis Drive
Austin, TX 78741

BRANDON DUKE
Counsel of Record
Winston & Strawn LLP
800 Capitol Street,
Suite 2400
Houston, TX 77002
(713) 651-2600
BDuke@winston.com

BROOKE C. WILSON
EMILY WILKINSON
Winston & Strawn LLP
2121 N. Pearl Street
Dallas, TX 75201
(214) 453-6500

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[*]

Amicus submits this brief to offer the perspective of practitioners and legal advocates whose work focuses on the most harmful practices in the criminal legal system. The Texas Civil Rights Project is a nonprofit organization that advocates for the civil rights of Texans. Using litigation and other advocacy tools, the Texas Civil Rights Project's Criminal Injustice Reform Program works to remedy injustices in Texas's criminal legal system for those suffering inside and outside of jails and prisons, particularly from the state's most vulnerable populations.

The issue presented in this case—whether the Fourth Amendment's protection from excessive force is reduced at the time a person surrenders if that person initially fled from the police—is of the utmost importance to the work *Amicus* does to ensure the fair and equitable administration of justice. By allowing past flight to override all circumstances, the Fifth Circuit's decision departs from this Court's precedents and conflicts with decisions from the Sixth and Seventh Circuits. The consequences of this troubling decision are far-reaching, ignoring many non-dangerous and even innocuous reasons why a person might run from the police. And by allowing an officer to assume automatically that the person poses an

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* Consistent with Rule 37.2, counsel for the Texas Civil Rights Project provided proper notice of its intention to file this brief. Counsel also certifies that no counsel for any party authored this brief in whole or in part, and no person or entity has made a monetary contribution intended to fund the preparation or submission of this brief. See R. 37.6.

immediate threat and will continue to resist—even in the face of overwhelming evidence to the contrary—the decision will actually discourage safe surrenders in future cases.

The Texas Civil Rights Project urges the Court to grant certiorari and reverse the decision below.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision creates a new *per se* rule authorizing an officer's use of force based solely on a suspect's past flight. In doing so, the Fifth Circuit acknowledges that its rule means that a person who initially flees does not "receive the same Fourth Amendment protection" as those who "promptly surrender[]." *Salazar v. Molina*, 37 F.4th 278, 282–83 (5th Cir. 2022). Thus, even if the suspect later and unambiguously surrenders, is fully compliant, and is lying prone on the ground, he or she can always be tased by an officer, or subjected to other intermediate force, before being arrested. In short, if you flee from the police, they have complete license to use force, even if they face no danger at all.

By making past behavior determinative, the Fifth Circuit's decision departs from this Court's instruction in *Graham v. Connor* that courts must give "careful attention to the facts and circumstances" that an officer confronts at the time the force is used, including any change in circumstances when a suspect subsequently surrenders. 490 U.S. 386, 396 (1989). And though force may be justified earlier in a sequence of "rapidly evolving" events, later events might eliminate the need for force. *Id.* at 397. Indeed, several circuits, including the Fifth Circuit, have recognized that "an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased." *Lytle v. Bexar Cnty., Tex.*, 560 F.3d 404, 413 (5th Cir. 2009) (citing cases from the Third, Fourth, Seventh Circuits).

The Fifth Circuit's new rule also conflicts with decisions from Sixth and Seventh Circuits, which

expressly reject reliance on a suspect's prior flight alone to justify the use of force after the suspect has surrendered. *Ortiz ex rel. Ortiz v. Kazimer*, 811 F.3d 848, 852 (6th Cir. 2016) (citing *Baker v. City of Hamilton*, 471 F.3d 601, 607–08 (6th Cir. 2006)); *Alicea v. Thomas*, 815 F.3d 283, 289 (7th Cir. 2016) (citing *Miller v. Gonzalez*, 761 F.3d 822, 829 (7th Cir. 2014)). Rather, both circuits require some feature present during the surrender suggesting it is false. *Ortiz*, 811 F.3d at 852; *Alicea*, 815 F.3d at 289.

By contrast, the Fifth Circuit's decision improperly imports a "could perceive" standard into the *Graham* analysis to allow an officer to escape liability because of the possibility that the suspect poses a threat of harm based on the past flight alone. *Salazar*, 37 F.4th at 283. Past behavior now becomes determinative, putting a presumptive thumb on the scale against any suspect who flees for any reason. But flight can happen for many reasons, including reasons that do not support a presumption of continued danger. And the Fifth Circuit's presumption results in dangers of its own, as fleeing suspects may now face an increased degree of force even if they surrender. As the Seventh Circuit explained, surrender "should not be futile as a means to deescalate a confrontation with law enforcement." *Alicea*, 815 F.3d at 289.

The Court should grant the petition to resolve the circuit split and reject the Fifth Circuit's new *per se* rule, which disregards *Graham*'s requirement to evaluate the circumstances facing the officer at the moment an officer decided to use force and ignores the many reasons a person might initially flee from the police.

ARGUMENT

I. The Fifth Circuit's *per se* rule improperly permits the use of force after a suspect flees, even when they surrender and pose no objective threat of harm.

The sweeping language of the Fifth Circuit's decision creates a new *per se* rule for excessive force cases: when a fleeing suspect stops and surrenders, force is permissible simply because of the prior flight. In other words, police officers have automatic justification to use force and disregard a surrender based solely on the fact that suspect initially fled—nothing else. This new rule suffers from the "considerable overgeneralization" this Court has refused to tolerate when core Fourth Amendment interests are at stake. *Richards v. Wisconsin*, 520 U.S. 385, 393 & n.4 (1997). And the decision curtails the required assessment of the actual circumstances faced when force is used under *Graham*. It should be reversed.

A. The Fifth Circuit's rule departs from *Graham*'s requirement that a change of circumstances, including the particular circumstances of a surrender, are critical to evaluating excessive force.

When assessing whether an officer's use of force is objectively reasonable under the Fourth Amendment, courts must pay "careful attention to the facts and circumstances of each particular case" and consider the following 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." *Graham*, 490 U.S. at 396.

Integral to these *Graham* factors is a moment-by-moment analysis as to the circumstances facing the officer. *Id.* at 396–97 (requiring courts to assess "the amount of force that is necessary in a *particular situation*" and "reasonableness *at the moment*" (emphasis added)); *see also Lamont v. New Jersey*, 637 F.3d 177, 184 (3d Cir. 2011) ("Even where an officer is initially justified in using force, he may not continue to use such force after it has become evident that the threat justifying the force has vanished."); *Alicea*, 815 F.3d at 288 ("If an officer's threat perception changes, so too should her force calculus."); *Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005) ("[F]orce justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." (compiling cases)). Here, then, the court was required to consider whether there was an "*immediate* threat" to the officer's or others' safety and whether Salazar was "*actively* . . . attempting to evade arrest by flight" at the moment the officer tased Salazar. *Graham*, 490 U.S. at 396.

Instead, the Fifth Circuit adopted a new general rule based on what it viewed as "common sense." *See Salazar*, 37 F.4th at 282. Notably, the Fifth Circuit fails to cite any precedent for its pronouncement 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." *Id.* at 282. Now, every flight casts doubt on every surrender. And no surrender can be authentic if the suspect fled.

In doing so, the Fifth Circuit split with at least two other circuits that have expressly rejected similar categorical determinations based on a suspect's prior flight. *Ortiz*, 811 F.3d 852 ("[T]he gratuitous use of force against a suspect who has 'surrendered' is excessive as a matter of law . . . even when the suspect has originally resisted arrest (say by running from the police, as here).") (cleaned up); *Baker*, 471 F.3d at 607–08 ("[That Baker had attempted to evade arrest does not preclude his claim of excessive force against Officer Taylor or render Officer Taylor's use of his asp reasonable."); *Alicea*, 815 F.3d at 289 ("The sole fact a suspect has resisted arrest before cannot justify disregarding his surrender in deciding whether and how to use force."); *Miller*, 761 F.3d at 829 ("This 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." (compiling cases)).

The Fifth Circuit acknowledges that this new rule categorically gives less Fourth Amendment protection to suspects who flee 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 immediate force he would have received had he promptly surrendered in the first place." *Salazar*, 37 F.4th at 282–83. This allows force as punishment, plain and simple.

The Fifth Circuit pays lip service to the moment-by-moment consideration required by *Graham*, acknowledging that officers are "forced to make split-second judgments—in circumstances that are tense,

uncertain, and rapidly evolving" *Salazar*, 37 F.4th at 281 (quoting *Graham*, 490 U.S. at 396–97). Yet, in applying its new rule, the Fifth Circuit's analysis looks past the specific facts surrounding Salazar's surrender and the "particular circumstances" Molina faced when he rushed in to tase Salazar immediately following his surrender—the critical moment to assess the situation from the officer's reasonable perspective. *Compare Ortiz*, 811 at 852 (noting the officer "fail[ed] 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" and that "generalized speculation about the force required in other situations (say, where a suspect is actually faking) is immaterial" when the suspect "gave no signs of faking" (cleaned up)).

Indeed, though Salazar had previously fled, at the time of his surrender, his hands were raised, and he lay face down on the ground yelling, "I'm not resisting. Please don't tase me! I have asthma!" *Salazar v. Zapata Cnty, Tex., et al.*, No. 5:16-CV-292, 2020 WL 13609390, at *2 (S.D. Tex. Apr. 23, 2020). Thus, the circumstances at the moment of Salazar's surrender—as judged from the perspective of a reasonable officer on the scene—did not necessitate or justify deploying a Taser. But because of the Fifth Circuit's generalized assumptions about Salazar's past flight alone, it found the tasing reasonable. *Salazar*, 37 F. 4th at 284.

When a fleeing suspect stops and raises his hands in surrender, the act of surrendering necessarily changes the circumstances. Force that was perhaps justified seconds before may no longer be if there is no indication that the suspect remains dangerous. *See Lytle*, 560 F.3d at 413; *Lamont*, 637 F.3d at 184;

Headwaters Forest Def. v. Cnty. of Humboldt, 276 F.3d 1125, 1130 (9th Cir. 2002) ("[I]n a situation in which an arrestee surrenders and is rendered helpless, any reasonable officer would know that a continued use of the weapon . . . constitutes excessive force.") (emphasis removed and citations omitted). The Fifth Circuit's rule allows officers to ignore these changed circumstances. Moreover, the decision dangerously renders a fleeing suspect's attempt to surrender futile, hindering any attempt by the suspect to de-escalate the situation. *Compare Alicea*, 815 F.3d at 289 ("While surrender is not always genuine, it should not be futile as a means to de-escalate a confrontation with law enforcement.")

The importance of assessing the particular facts at the moment the officer decides to use force is a deeply embedded feature of the *Graham* analysis. Even when an officer deploys a taser multiple times, the first, and even the second tasing, could be held reasonable while a third tasing could held excessive. *See, e.g.*, *Wate v. Kubler*, 839 F.3d 1012, 1021 (11th Cir. 2016) (third tasing held excessive where suspect, who was resisting during the first and second tasing, became immobile, still, and handcuffed at the point of the third tasing, such that he was no longer a flight risk or danger to the officers or public). In *Wate*, the Eleventh Circuit noted that while the full altercation between the police officers and the suspect was around twenty minutes, "the critical time period for purposes of determining whether [the officer's] use of the Taser on [the suspect] constituted excessive force span[ed] two minutes . . . just before the first activation [of the Taser] . . . and the time of the fifth Taser deployment." *Id.* at 1020–21 (holding that because the suspect "was

no longer resisting after the first two tasings" the officer's "further use of the Taser was wholly unnecessary").

Circuit courts across the country are consistent with *Wate*. *See Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016) (holding it unreasonable to repeatedly use Taser in "'stun mode' within the span of two minutes" because "[e]ven if [the suspect] initially posed a threat to the officers that justified tasering him, the justification disappeared when [the suspect] was under the officers' control"); *Meyers v. Baltimore Cnty., Md.*, 713 F.3d 723, 733 (4th Cir. 2013) (Although first three uses of the Taser were objectively reasonable, the additional seven Taser shocks were considered unreasonable, because he had "relinquished the baseball bat and fell to the floor . . . no longer was actively resisting arrest, and did not pose a continuing threat to the officers' safety").

By failing to consider the particular situation that an officer faced "at the moment" he decided to use force, the Fifth Circuit's decision departs from well-established application of *Graham*.

B. The Fifth Circuit's new "could perceive" standard is also contrary to *Graham*.

Before the decision below, the Fifth Circuit also recognized that a moment-by-moment analysis is necessary, noting "an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased." *Lytle*, 560 F.3d at 413. But the Fifth Circuit has now sidestepped its prior precedent (along with *Graham*), holding that the justification for a use of

force "does not always require that a suspect be actively resisting, fleeing, or attacking an officer at the precise moment force is used." *Salazar*, 37 F.4th at 283 (cleaned up). Rather, "the relevant inquiry is whether the officer used a justifiable level of force in light of the continuing threat of harm that a reasonable officer *could perceive*." *Id.* (emphasis added).

The Fifth Circuit's "*could perceive*" standard undermines *Graham* where "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances *confronting them*." 490 U.S. at 397 (emphasis added) (quoting *Scott v. United States*, 436 U.S. 128, 137–39 (1978)). *Graham* does not allow for some potential threat that an officer *could perceive*. As detailed above, *Graham* requires a court to consider the moment that the force is used and whether the facts and circumstances warrant such force from the perspective of a reasonable officer.

Furthermore, a "could perceive" standard erodes the objective reasonableness requirement under *Graham*. It allows an officer to escape liability because of the mere *possibility* that the suspect poses a threat of harm. *See Ortiz*, 811 F.3d at 852 (the officer's "generalized speculation about the force required in other situations (say, where a suspect is actually faking) is immaterial to this case—where eyewitnesses say Juan gave no signs of faking" (quoting *Malory v. Whiting*, 489 Fed. Appx. 78, 84 (6th Cir. 2012)) (cleaned up)). This would allow courts to ignore conflicting evidence showing that the suspect was not posing a risk of harm to the officer or others in the particular situation the officer was facing.

Here, the generalized possibility that Salazar was a threat under the court's analysis was based on

nothing more than the flight itself. The Fifth Circuit acknowledges as much: "[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." *Salazar*, 37 F.4th at 282.

Mere possibilities—without nothing more than flight—is not objectively reasonable. Should the decision stand, every police pursuit of a fleeing vehicle could give rise to use of intermediate force even without any objective evidence of a threat to the officer. This is not and cannot be the law.

This Court should grant review and reverse the Fifth Circuit's decision to restore the Fourth Amendment right from excessive force of those in this circuit who seek to safely surrender to the police.

II. The Fifth Circuit's new rule fails to account for the many non-dangerous reasons why a person might flee.

By allowing officers to assume that a suspect's surrender may not be genuine based on past flight alone, *Salazar* tips two of the three "fact-intensive" *Graham* factors to the same outcome every time: force becomes always reasonable. In the Fifth Circuit, then, there can no longer be a safe and authentic surrender.

This Court has long cautioned that past flight alone should not preclude a safe surrender:

> In modern times more correct views have prevailed, and the evasion of or flight from justice seems now nearly reduced to its true place in the administration of the criminal law, namely, that of a

> circumstance—a fact which it is always of importance to take into consideration, and combined with others may afford strong evidence of guilt, but which, like any other piece of presumptive evidence, it is equally absurd and dangerous to invest with infallibility.

Hickory v. United States, 160 U.S. 408, 420 (1896) (cleaned up).

Justice Stevens also recognized that categorical rules should not be automatically inferred based on a suspect's flight alone: "Given the diversity and frequency of possible motivations for flight, it would be profoundly unwise to endorse [a] *per se* rule." *Illinois v. Wardlow*, 528 U.S. 119, 129 (U.S. 2000) (Stephens, J.) (concurring in part, dissenting in part). He explained that "[t]he probative force of the inferences to be drawn from flight is a function of the varied circumstances in which it occurs. . . lead[ing] us to avoid categorical rules concerning a person's flight and the presumptions to be drawn therefrom." *Id.* at 135.

The Fifth Circuit's recognition of a less-protective tier of Fourth Amendment rights based on unsupported assumptions of prior flight alone is flawed because it ignores the innocent—or plainly innocuous—reasons why someone might flee.

The Court has historically held that flight to escape police detention may have an entirely innocent motivation:

> [I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the

> guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.' Innocent men sometimes hesitate to confront a jury—not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves.

Alberty v. United States, 162 U.S. 499, 511 (1896).

Putting aside guilt or innocence, fear alone can often lead to initial flight. *See, e.g.*, *Com. v. Warren*, 475 Mass. 530, 540 (2016) (noting that a study conducted by the Boston Police Department found that "black males in Boston are disproportionately and repeatedly targeted for [field interrogation and observation] encounters," which "suggests a reason for flight totally unrelated to consciousness of guilt"). Indeed, in a recent study, some Black civilians indicated that fear of the police is their "number one fear in life." J.R. Smith Lee & M. A. Robinson, *That's My Number One Fear in Life. It's The Police: Examining Young Black Men's Exposures to Trauma and Loss Resulting from Police Violence and Police Killings*, J. OF BLACK PSYCH. 143, 156 (2019). Moreover, in another recent study, approximately half of the Black respondents preferred to be robbed or burglarized than have unprovoked contact with

officers. Justin T. Pickett, Amanda Graham & Francis T. Cullen, *The American Racial Divide in Fear of the Police*, 60 CRIMINOLOGY 291, 291 (2002)

Unfortunately, studies show that these fears are not overblown—police violence is a leading cause of death for young Black men, killing them at a rate twice as high as it kills young White men. Amina Khan, *Getting Killed by Police is a Leading Cause of Death for Young Black Men in America*, L.A. TIMES (Aug. 19, 2019), https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men. The recent protests following the murder of George Floyd demonstrate the public's widespread awareness of this phenomenon. And as images of police violence are photographed and videotaped regularly and shown to viewers at home, the secondhand exposure has further fueled police distrust. Edith Perez, *Don't Make a Run for It: Rethinking* Illinois v. Wardlow *in Light of Police Shootings and the Nature of Reasonable Suspicion*, 31 U. FLA. J.L. & PUB. POL'Y 137, 148 (2020).

Aside from fear, there are countless other motivations for flight. For example, Justice Stevens noted in *Wardlaw* that "[a] pedestrian may break into a run for a variety of reasons—to catch up with a friend a block or two away, to seek shelter from an impending storm, to arrive at a bus stop before the bus leaves, to get home in time for dinner, to resume jogging after a pause for rest, to avoid contact with a bore or a bully, or simply to answer the call of nature—any of which might coincide with the arrival of an officer in the vicinity." *Wardlow*, 528 U.S. at 128–29 (Stevens, J., concurring in part and dissenting in part).

Recent circuit court decisions also demonstrate the non-dangerous reasons for flight. *See, e.g.*, *Ortiz*, 811 F.3d at 851; *Carroll v. Ellington*, 800 F.3d 154, 162–63 (5th Cir. 2015). In *Ortiz*, a 16-year-old boy with Down syndrome was considered fleeing because he ran to his parents in an apartment complex. 811 F.3d at 850–51. Although the boy surrendered when he met his family by hugging his mother, *id.* at 851, the Fifth Circuit rule would have authorized force because of the flight alone.

Similarly, in *Carroll*, an unarmed man walked quickly into the garage of a house after failing to stop upon an officer's command. 800 F.3d at 162–63. After the officer pursued the man into the house, the officer pulled out his Taser and immediately ordered the man to get on the ground. *Id.* at 163. Under the new Fifth Circuit rule, the officer would have been able to deploy the Taser as soon as he encountered the man, rather than the moment following the man's non-compliance with the officer's order to get on the ground.

Finally, psychological and cognitive responses in a person's body can result in flight. Numerous studies show that flight is an automatic response triggered by past trauma; the body responds before the brain triggers a cognitive response about what to do. *See* Rebecca Jacoby et al., *Individual Stress Response Patterns: Preliminary Findings and Possible Implications*, 18 PLOS ONE 255889, 255890 (2021); *see also* Carmit Katz et al., *Beyond Fight, Flight, and Freeze: Towards a New Conceptualization of Peritraumatic Responses to Child Sexual Abuse Based on Retrospective Accounts of Adult Survivors*, 112 CHILD ABUSE & NEGLECT 104904, 104905 (2021); C. Katz & Z. Barnetz, *The Behavior Patterns of Abused*

Children as Described in their Testimonies, 38 CHILD ABUSE & NEGLECT 1033, 1036 (2014).

Indeed, the notion that people have an "instinctive attempt to eliminate or escape a threat" has existed since 1925 and it is now the "predominant theoretical framework informing stress and trauma studies." Carmit Katz & Racheli Nicolet, "*If Only I Could Have Stopped It": Reflections of Adult Child Sexual Abuse Survivors on Their Responses During the Abuse*, 37 J. OF INTERPERSONAL VIOLENCE NP2076, NP2077 (2020) (indicating that W.B Cannon first described the concept in 1925); Katz et al., *supra*, at 104905. The response occurs so quickly that "people aren't aware of [it] . . . even before the brain's visual centers have had a chance to fully process what is happening. Harvard Health Publ'g, Harvard Med. Sch., *Understanding the Stress Response* (July 6, 2020), https://www.health.harvard.edu/staying-healthy/understanding-the-stress-response.

The Fifth's Circuit's rule fails to consider these other non-dangerous motivations for flight and instead makes flight a determinative factor. Not only are the Fifth Circuit's assumptions about prior flight unsupported by *Graham*, but the ramifications of this rule are also far-reaching, impacting individuals who may flee for countless non-dangerous reasons.

The logical result of the Fifth Circuit's *per se* rule casting doubt on every surrender will be to raise the stakes for any person who initially flees, no matter the reason. Because their surrender will be subject to question and support the use of intermediate force—including the use of a taser, police dogs, or other weapons—a fleeing suspect will have little reason to stop even if they would otherwise want to surrender.

De-escalation by all involved should be encouraged in this context, and attempts to reduce ongoing dangers through surrender should never be rendered futile.

CONCLUSION

For all these reasons, and for those stated by the petitioner, this Court should grant the petition for a writ of certiorari.

Respectfully submitted.

LINDA T. COBERLY
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

DUSTIN RYNDERS
TRAVIS FIFE
Texas Civil Rights Project
2100 Travis, Suite 360
Houston, TX 77002

MOLLY PETCHENIK
Texas Civil Rights Project
1405 Montopolis Drive
Austin, TX 78741

BRANDON DUKE
Counsel of Record
Winston & Strawn LLP
800 Capitol Street,
Suite 2400
Houston, TX 77002
(713) 651-2600
BDuke@winston.com

BROOKE C. WILSON
EMILY WILKINSON
Winston & Strawn LLP
2121 N. Pearl Street
Dallas, TX 75201
(214) 453-6500

Counsel for Amicus Curiae

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