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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This Court should grant the petition to resolve an important constitutional question that has divided the courts of appeals: whether the Fourth Amendment permits an officer to doubt the sincerity of a suspect's surrender based *solely* on the suspect's past flight, as the Fifth Circuit holds, or instead requires such doubt to arise from features of the surrender itself, as the Sixth and Seventh Circuits require.

In reversing the district court's fact-dispute-driven denial of qualified immunity, the Fifth Circuit used the past-flight-forfeits-surrender rule to bypass constraints on its limited interlocutory appellate jurisdiction, *see Johnson v. Jones*, 515 U.S. 304, 319-20 (1995), and to ignore inferences from the summary-judgment record that otherwise had to be drawn in petitioner's favor—including inferences from respondent's dashcam video that documented petitioner's exiting his car and lying face down in the dirt with outstretched, empty hands. *See Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014); *Scott v. Harris*, 550 U.S. 372, 378, 380-81 (2007).

Respondent argues about petitioner's surrender and respondent's taser deployment as if speaking to a jury. He ignores not only summary-judgment rules and interlocutory-jurisdictional constraints, but also the Fifth Circuit's *legal* interpretation of Fourth Amendment protections under *Graham v. Connor*, 490 U.S. 386 (1989), on which the decision below actually rests. Only by holding that officers may *assume* a

previously fleeing suspect's subsequent surrender is a "ploy," Pet. App. 7a, could the Fifth Circuit render immaterial the numerous, genuine, surrender-related factual disputes identified by the district court in denying qualified immunity at the summary-judgment stage. *See* Pet. 11-12, 23-24 (quoting district court's identified factual disputes regarding the surrender and number of tasings). And because the legal rule was therefore outcome determinative, petitioner's case provides an ideal vehicle to resolve the question presented.

If the Fifth Circuit is correct that a suspect's initial flight, alone, is enough for an officer to assume even a clear surrender is a ploy, the type of heightened force otherwise reserved for actively fleeing and immediately threatening suspects will appear reasonable when used on a surrendering suspect, as well. Indeed, the Fifth Circuit's rule makes it difficult to imagine any circumstances in which a suspect who previously fled could successfully surrender and avoid being tased or worse. The Court should grant the petition to resolve whether a suspect's past flight negates a subsequent surrender when analyzing the reasonableness of force under *Graham*, such that a previously fleeing suspect cannot "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.

ARGUMENT

I. THE COURTS OF APPEALS ARE SQUARELY DIVIDED ON A LEGAL RULE THAT ALTERS *GRAHAM* ANALYSIS, ERODES CLEARLY ESTABLISHED FOURTH AMENDMENT PROTECTIONS, AND EVADES JURISDICTIONAL CONSTRAINTS ON INTERLOCUTORY QUALIFIED-IMMUNITY APPEALS.

Respondent's fact-focused arguments are misguided. Excessive-force analysis under *Graham* requires consideration of the circumstances surrounding a use of force, but it does so through a legal framework over which the circuits conflict. 490 U.S. at 396. The Fifth Circuit's past-flight-forfeits-surrender rule is a legal alteration of *Graham* that inexorably skews the immediate-threat and active-resistance inquiries[1] in favor of an officer—even when, as in petitioner's case, a suspect prostrates himself on the ground in a universally recognizable position of surrender. And the rule has been quoted repeatedly by the Fifth Circuit in subsequent excessive-force cases, reaffirming that the court below did not merely conduct the case-bound factual analysis respondent posits but implemented a legal rule that categorically ratchets down Fourth Amendment protections for suspects who initially flee, *see* Pet. App. 8a—whether flight was by car, as in petitioner's case, or by foot. *See Henderson v. Harris County*, 51 F.4th 125, 135 (5th Cir.

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[1] *See Graham*, 490 U.S. at 396 (focusing on the severity of the crime at issue, whether the suspect posed an "immediate threat," and whether he was "actively resisting arrest or attempting to evade arrest by flight" when an officer used force).

2022) (per curiam), *petition for cert. filed*, No. 22-933 (U.S. Mar. 22, 2023) (quoting *Salazar* when affirming qualified immunity for force following foot flight); *Ramirez v. Martin*, No. 22-10011, 2022 WL 16548053, at *3-4 (5th Cir. Oct. 31, 2022) (per curiam) (same); *Bernabe v. Rosenbaum*, No. 21-10396, 2023 WL 181099, at *2, *4 (5th Cir. Jan. 13, 2023) (per curiam) (same).

The Fifth Circuit's entrenched legal rule squarely conflicts with the approaches of the Sixth and Seventh Circuits, which expressly prohibit inferences of dangerousness or continuing evasion from past flight alone. Pet. 15-21. Had petitioner's case been heard in those courts, the second and third *Graham* factors would have turned on features of petitioner's surrender—not on an always-permissible *assumption*, as in the Fifth Circuit, that post-flight surrenders are fake. *Compare, e.g.*, *Ortiz ex rel. Ortiz v. Kazimer*, 811 F.3d 848, 852 (6th Cir. 2016) (requiring an officer to identify a "feature of [the suspect's] surrender" itself that suggested the suspect was "fabricating his submission"), *and Alicea v. Thomas*, 815 F.3d 283, 288-89 (7th Cir. 2016) (rejecting officers' argument that suspect's "prior flight cast doubt on the genuineness of his surrender"), *with* Pet. App. 7a-8a. Without the Fifth Circuit's rule that it is always reasonable for an officer to *assume* a suspect's post-flight surrender is a ploy, multiple genuine issues of material fact concerning petitioner's and respondent's actions would have precluded an interlocutory holding that respondent was entitled to qualified immunity. *See* Pet. 11-12, 23-24 (quoting

genuine disputes found by district court at Pet. App. 59a-64a, 69a).

Respondent's fact-laden descriptions of cases in the Sixth and Seventh Circuits are fundamentally misplaced. It is the Sixth and Seventh Circuits' *legal* rules governing post-flight surrenders that conflict with the Fifth Circuit's ratcheted-down Fourth Amendment protections for suspects who initially flee. Cases may involve varying types of intermediate force and levels of injury (*see* Resp. 14-17), but those factual distinctions make no legal difference to the Fifth Circuit's ploy assumption. It is undisputed that the Sixth and Seventh Circuits reject that assumption and instead analyze the features of each surrender to determine whether a reasonable officer could view a surrender as a ploy.

Respondent's suggestion (Resp. 17) that the Seventh Circuit deviated from that rule in *Johnson v. Scott*, 576 F.3d 658 (7th Cir. 2009), is incorrect: The Seventh Circuit expressly clarified in *Alicea*, 815 F.3d at 289, that *Johnson* was a case involving active flight. *Id.* Nor does the split dissipate because petitioner's initial flight was vehicular rather than by foot. The Sixth Circuit requires consideration of the immediate circumstances surrounding a surrender even when it follows a "harrowing pursuit" by car that was unquestionably more dangerous than petitioner's flight. *See Tapp v. Banks*, 1 F. App'x 344, 346-47, 350-51 (6th Cir. 2001). And, as previously discussed, the Fifth Circuit has not limited its rule to cases involving dangerous vehicular flight. *See supra* at 3-4

(collecting cases quoting *Salazar*'s diminishment of Fourth Amendment protections for suspects alleging they surrendered after initial foot flights). Granting the petition would therefore allow this Court to clarify the scope of Fourth Amendment rights for suspects who surrender following an initial flight, whether by car or by foot.[2]

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[2] As the petition notes, the Eleventh Circuit has included past flight in *Graham* analyses without determining whether it alone suffices to doubt a surrender. *See* Pet. 21 n.8 (discussing *Crenshaw v. Lister*, 556 F.3d 1283 (11th Cir. 2009)); *see also Edwards v. Shanley*, 666 F.3d 1289, 1295-96 (11th Cir. 2012) (contemplating without deciding that past flight might raise dangerousness concerns but finding that an unambiguous surrender following the officer's use of intermediate force rendered additional force unreasonable); *Smith v. Mattox*, 127 F.3d 1416, 1419-20 (11th Cir. 1997) (similar analysis). Similarly, the Tenth Circuit has contemplated whether dangerousness concerns arising from a misdemeanant's initial foot flight made it reasonable for an officer who tackled and subdued the suspect to then tase him for noncompliance with verbal commands. *Emmett v. Armstrong*, 973 F.3d 1127, 1136 (10th Cir. 2020). But the court resolved the case without articulating a legal rule that initial flight suffices (Fifth Circuit) or does not alone suffice (Sixth and Seventh Circuits) for a reasonable officer to assume a surrender is fake. *See id.* at 1136-37.

State high courts have not squarely adopted or rejected a past-flight-forfeits-surrender rule when analyzing Fourth Amendment claims under *Graham*, but to the extent they have discussed the matter, courts appear to align with the Sixth and Seventh Circuits. *See, e.g.*, *Russell ex rel. J.N. v. Virg-In*, 258 P.3d 795, 805 (Alaska 2011) (holding that factual disputes about whether a suspect "was fully compliant and had completely ceased her efforts to flee" needed to be resolved by a jury before a court could rule on qualified immunity). As the New Jersey Supreme Court has explained, albeit specifically in the deadly force context: "The law is also clear that a suspect's conduct

Respondent praises the Fifth Circuit's "fact-intensive analysis" (Resp. 7), but that is a bug not a feature. The Fifth Circuit lacked jurisdiction on interlocutory appeal to reassess the genuineness of factual disputes found by the district court. *See Johnson v. Jones*, 515 U.S. at 319-20. It had jurisdiction to determine only whether those genuine disputes were material, such that resolving them in petitioner's favor would preclude qualified immunity for respondent. *See id.* Given that the disputes concerned features of the surrender directly implicating *Graham*'s immediate-threat and active-evasion factors, they could be rendered immaterial only if the features of the surrender did not matter.[3] And those features would not matter under *Graham* only if it is always reasonable for an officer to *assume* a post-flight surrender is a ploy without identifying any suspicious features of the surrender itself, as the Sixth and Seventh Circuits would require.

Respondent's focus on surrender-related factual disputes only highlights the ways in which the Fifth Circuit's past-flight-forfeits-surrender rule disrupts

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leading up to his attempt to surrender cannot alone justify shooting the suspect—using deadly force against him—when his hands are above his head in an act of submission and he no longer poses a threat." *Baskin v. Martinez,* 233 A.3d 475, 485 (N.J. 2020).

[3] The district court identified factual disputes including whether petitioner shouted his intent to surrender, moved voluntarily or only in response to tasing, and received multiple tasings when no reasonable officer could perceive a threat or resistance. Pet. 11-12, 23-24 (quoting Pet. App. 59a-64a, 69a).

established *Graham* analysis, defies summary-judgment rules, and evades interlocutory-jurisdictional constraints. Respondent acknowledges that petitioner was lying on the ground, face down, when respondent tased him (*see* Resp. 2-3), yet also claims respondent was somehow "still in pursuit of Petitioner" (Resp. 3) and there was an "ongoing attempt by Petitioner to evade arrest" (Resp. 12) when petitioner prostrated himself with hands outstretched. But whether an officer could reasonably believe petitioner was still evading arrest is precisely where the district court found genuine disputes of material fact that precluded qualified immunity at the summary-judgment stage. *See* Pet. 11-12, 23-24 (quoting Pet. App. 59a-64a, 69a). And that question implicates exactly the type of genuineness inquiry the Fifth Circuit had no jurisdiction to revisit on interlocutory appeal.[4]

Under the Fourth Amendment and *Graham*, it is obvious and thereby clearly established that using more than *de minimis* force on a suspect who has surrendered is unconstitutional. *See* Pet. 26-28 (gathering authority). Respondent ignores this Court's

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[4] Respondent alludes to "unknown individuals" who possibly suggested a threat (Resp. 3; *but see* Video.6:10-6:39 (showing officers not reacting with concern)); and respondent, like the court below, claims petitioner may have glanced at an open field (Resp. 11; *but see* Video.6:08-6:12). Those disputed facts are for a jury to evaluate. Also like the court below, respondent suggests without a shred of evidentiary support that petitioner could have had a weapon; but if such pure speculation suffices, the potential presence of a weapon could be presumed in every *Graham* analysis. *See* Pet. 25.

obviousness precedent and petitioner's analysis of clearly established law, not even mentioning—much less engaging—the longstanding obviousness approach exemplified by *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020), and *Hope v. Pelzer*, 536 U.S. 730, 741, 745 (2002), on which petitioner relies. *See* Pet. 26-28. If the Fifth Circuit is wrong that officers may assume a surrender is fake based on past flight alone, respondent's tasing of petitioner while petitioner was flat on the ground violated clearly established law. The only way respondent could avoid that result would be to identify features of the surrender that would lead a reasonable officer to perceive a ploy. That has to be resolved by a jury, not an interlocutory appeal.

II. This Case Is An Ideal Vehicle To Resolve The Split Caused By The Fifth Circuit's Past-Flight-Forfeits-Surrender Rule.

The procedural posture of this case and the factual features of petitioner's dashcam-captured surrender create an ideal vehicle to address whether the Fifth Circuit may ratchet down Fourth Amendment protections for suspects who surrender after having initially fled. The district court denied qualified immunity on the ground that multiple, genuine, material fact disputes precluded a determination at summary judgment that respondent had not violated petitioner's clearly established constitutional rights. Pet. 11-12, 23-24 (quoting Pet. App. 59a-64a, 69a). Because respondent appealed that decision

interlocutorily, the Fifth Circuit could reverse only if those genuine fact disputes were not material—a holding that, as discussed above, necessarily depended on the past-flight-forfeits-surrender rule. By contrast, the Fifth Circuit's subsequent cases quoting *Salazar* were appeals from final judgments *awarding* qualified immunity—*Henderson*, 51 F. 4th at 128, *Ramirez*, 2022 WL 16548053, at *1, and *Bernabe*, 2023 WL 181099, at *1—giving the Fifth Circuit jurisdiction to review the genuineness of factual disputes and thereby making the impact of the past-flight-forfeits-surrender rule in each case less clear. The procedural posture of petitioner's case, therefore, is ideal for consideration of that rule.

In addition, the factual posture of this case is ideal for determining the parameters of any permissible rule concerning the role of past flight when evaluating the reasonableness of force used after a suspect surrenders. Petitioner's flight resulted in a felony charge (evading arrest, the only crime charged); so if this Court ultimately were to hold that an officer cannot doubt the sincerity of a suspected felon's surrender based on past flight alone, it follows that an officer similarly could not doubt the surrender of someone suspected of a lesser, misdemeanor crime based solely on past flight. Similarly, petitioner's case involves vehicular flight, and a holding precluding a flight-based fake-surrender inference in petitioner's

case would logically also apply to cases involving potentially less-dangerous flights by foot.[5]

Finally, this case is an excellent vehicle because there is video evidence of the surrender and tasing, which indisputably shows petitioner flat on the ground with empty hands outstretched when respondent tased him. Pet. 1; Resp. 2-3 (conceding this fact). Respondent suggests that the existence of the video altered the summary-judgment standard and allowed the court of appeals to determine the facts of the case for itself. *See* Resp. 5 (quoting the court below applying its precedent that "we assign greater weight even at the summary judgment stage, to the video recording taken at the scene" and "need not rely on the plaintiff's description of the facts where the record discredits that description, but should instead consider the facts in the light depicted by the videotape"); *id.* 15. That gets the law backwards.

As this Court held in *Scott*, even when a record includes video evidence, a court must still adopt the plaintiff's version of facts on summary judgment unless they are "*blatantly* contradicted by the record, *so that no reasonable jury could believe it*." 550 U.S. at

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[5] Additionally, because the reasonableness of deadly force is far more limited than the reasonableness of intermediate force, *see Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985), a holding that it is unreasonable to tase a fully surrendered suspect like petitioner based on past flight alone would necessarily also apply to a use of deadly force on a suspect who surrenders following initial flight. *Cf. Baskin*, 233 A.3d at 485 (applying a rule similar to the Sixth and Seventh Circuit rules to use of deadly force).

378, 380 (emphasis added) (reiterating that courts must draw "reasonable inferences" in favor of the nonmovant); *see also Tolan*, 572 U.S. at 656-57. The video in this case does not blatantly contradict petitioner's version of the facts. To the contrary, when viewed properly in the light most favorable to petitioner, the video shows an unambiguous surrender or, at a minimum, supports the multiple, genuine, surrender-related fact disputes the district court determined must be resolved by a jury.

As the petition notes (at 38-39 & 39 n.11), confusion over *Scott* has grown in the past decade, leading to inconsistent applications of summary-judgment rules to records that include video evidence. The video evidence in petitioner's case gives this Court an opportunity to clarify whether traditional summary-judgment rules govern video evidence or some different standard applies. As videos of violent police encounters become more prevalent, and demands for police transparency and accountability escalate,[6] lower courts navigating excessive-force litigation need this Court's guidance. Petitioner's case

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[6] *See, e.g.*, U.S. DEP'T OF JUST. CIV. RTS. DIV., U.S. ATT'Y OFF. W. DIST. OF KY. CIV. DIV., INVESTIGATION OF THE LOUISVILLE METRO POLICE DEPARTMENT AND LOUISVILLE METRO GOVERNMENT 19 (2023), https://www.justice.gov/opa/press-release/file/1573011/download [https://perma.cc/3JH2-5QPW]; Jennifer Calfas & Cameron McWhirter, *Tyre Nichols Body-Camera Footage Released After Former Officers Charged with Murder*, WALL ST. J. (Jan. 27, 2023, 9:04 PM), https://www.wsj.com/articles/tyre-nichols-memphis-authorities-to-release-video-footage-of-encounter-with-police-11674819846 [https://perma.cc/997Z-MKWY].

provides an excellent vehicle to clarify *Scott*, reaffirm the limited scope of interlocutory jurisdiction in qualified-immunity appeals, and resolve whether the Fourth Amendment permits officers to assume a post-flight surrender is a ploy or requires officers to identify features of a surrender that reasonably suggest its insincerity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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