No. 22-__

IN THE
Supreme Court of the United States

JEAN HENDERSON, as next friend and guardian of CHRISTOPHER HENDERSON,
Petitioner,

v.

ARTHUR SIMON GARDUNO; HARRIS COUNTY, TEXAS,
Respondents.

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 running from the police, a young man complied with an officer's order to surrender by halting and raising his hands. The officer nevertheless tased the man. The tasing caused the man's head to slam onto pavement and led to a traumatic brain injury. After officers subdued the man, the officer cycled the taser and tased him again. In this 42 U.S.C. § 1983 action, brought by the victim's grandmother, the Fifth Circuit held that the officer did not violate clearly established law because an individual cannot lead police on a chase "and then turn around, appear to surrender and receive the same Fourth Amendment protection" he would have received "in the first place." The question presented is:

Does qualified immunity shield an officer who uses unreasonable force against a fleeing misdemeanor suspect who complies with an officer's order to stop and raises his hands in surrender?

PARTIES TO THE PROCEEDING

Jean Henderson, as next friend and guardian of Christopher Henderson, petitioner on review, was the plaintiff-appellant below.

Arthur Garduno and Harris County, Texas, respondents on review, were the defendants-appellees below.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit:

Henderson v. *Harris County*, No. 21-20544 (5th Cir. Oct. 12, 2022) (reported at 51 F.4th 125)

U.S. District Court for the Southern District of Texas:

Henderson v. *Harris County*, No. 4:18-cv-02052 (S.D. Tex. Sept. 10, 2021) (unreported, available at 2021 WL 4708764)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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Jean Henderson, as next friend and guardian of Christopher Henderson, respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 51 F.4th 125. Pet. App. 1a-16a. The District Court's opinion is not reported but is available at 2021 WL 4708764. Pet. App. 17a-30a.

JURISDICTION

The Fifth Circuit entered judgment on October 12, 2022. Pet. App. 1a. The Fifth Circuit denied panel

rehearing and rehearing *en banc* on December 2, 2022. Pet. App. 32a. On February 7, 2023, this Court extended Petitioner's deadline to petition for a writ of certiorari to March 22, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides in relevant part:

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

42 U.S.C. § 1983 provides in relevant part:

> 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 * * * .

INTRODUCTION

Part-time deputy constable Arthur Garduno and two other officers drove their patrol cars through a crowded park because they suspected Christopher Henderson, a young Black man, of committing a low-level marijuana offense. Henderson was scared, like many would be at the sight of police cars barreling through a park, so he ran towards his nearby apartment. Garduno followed—first in his patrol car and then on foot. Garduno quickly caught up to Henderson and ordered him to stop running. With his back to Garduno, Henderson did so and raised his empty hands in the air. Garduno tased Henderson anyway. Henderson's body stiffened, he fell backward, and he hit his head so hard on the pavement that he was knocked briefly unconscious and suffered a traumatic brain injury. While Henderson lay on the ground, bleeding from his ears, nose, and mouth, and with other officers present, Garduno tased Henderson again.

These facts set out an obvious case of excessive force. But the Fifth Circuit concluded that Garduno was entitled to summary judgment on qualified-immunity grounds because Henderson had initially run from Garduno and despite Henderson's unequivocal surrender.

The Fifth Circuit evaded the obvious illegality of Garduno's conduct by warping the summary-judgment standard. The way the panel saw it, Henderson did not stop in reaction to Garduno's order—he stopped *suddenly*. The way the panel saw it, Henderson's hands were not in the air—they were reaching for his waistband. The way the panel saw it, Henderson's back was not to Garduno—he had turned to face

him. And the way the panel saw it, Henderson was not in agony after the first tasing—he was resisting arrest.

That is emphatically not Henderson's account—the only one that matters on summary judgment. But the Fifth Circuit adopted Garduno's story anyway, in clear defiance of bedrock rules of civil procedure. This Court has reversed the Fifth Circuit before for doing this very thing. *See Tolan* v. *Cotton*, 572 U.S. 650, 651 (2014) (per curiam).

There is more. Yet again, the Fifth Circuit refused to follow this Court's qualified-immunity precedents in a case involving egregious misconduct. Despite the obvious unconstitutionality of Garduno's conduct, the panel granted him qualified immunity on the theory that no factually identical case established the unlawfulness of his acts. As this Court recently reminded the Fifth Circuit, that is not the law. *See Taylor* v. *Riojas*, 141 S. Ct. 52 (2020) (per curiam). Doubling down, the panel concluded that Garduno's conduct was not "obviously" unconstitutional because Henderson had initially fled from the police. That *per se* rule—which is rapidly spreading across the Fifth Circuit[1]—cannot be reconciled with the context-dependent reasonableness analysis this Court adopted in *Graham* v. *Connor*, 490 U.S. 386 (1989), and *Tennessee* v. *Garner*, 471 U.S. 1 (1985).

Given the Fifth Circuit's obvious error, it comes as no surprise that its decision creates a circuit split. At

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[1] *See Salazar* v. *Molina*, 37 F.4th 278 (5th Cir. 2022), *pet. for writ of cert. filed*, No. 22-564 (U.S. Dec. 16, 2022); *Ramirez* v. *Martin*, No. 22-10011, 2022 WL 16548053 (5th Cir. Oct. 31, 2022); *Bernabe* v. *Rosenbaum*, No. 21-10396, 2023 WL 181099 (5th Cir. Jan. 13, 2023).

least five courts have considered whether qualified immunity protects officers who use gratuitous force on suspects who initially fled from the police but then surrendered. All have denied qualified immunity. And another five circuits have considered the similar question of whether qualified immunity protects officers who use gratuitous force on suspects who initially resisted arrest but then surrendered. All have denied qualified immunity. These courts correctly recognize that an individual's past flight or resistance does not license gratuitous force. That is the opposite of what the Fifth Circuit held in this case.

The Fifth Circuit's error in this Section 1983 case is one in a long line of recent Fifth Circuit cases misapplying settled principles of law to shield officers accused of egregious misconduct from civil liability. *See Tolan*, 572 U.S. 650; *Taylor*, 141 S. Ct. 52; *McCoy* v. *Alamu*, 141 S. Ct. 1364 (2021); *Ramirez* v. *Guadarrama*, 142 S. Ct. 2571 (2022) (Sotomayor, J., dissenting from denial of cert.); *Cope* v. *Cogdill*, 142 S. Ct. 2573 (2022) (Sotomayor, J., dissenting from denial of cert.). This Court should grant certiorari and reverse.

STATEMENT

A. Factual Background

On a spring day in 2018, Christopher Henderson was one of the many people at Houston's Ingrando Park. So was Officer Arthur Garduno, a part-time deputy constable who, along with two other police officers, came to do a "park check" for drug activity. D. Ct. Dkt. 81-2, at 17 ("Garduno Depo.").

Garduno and the other officers approached the park in separate, marked patrol cars. Pet. App. 18a. According to Garduno, Henderson and two other young Black men were standing around a picnic table. *Id.* at

2a. "Garduno claims he smelled marijuana and saw one of the men"—other than Henderson—" 'breaking up marijuana' into a shoebox"; Garduno also claims he saw "a blunt tucked behind" Henderson's ear. *Id.*

Purportedly seeing this, Garduno jumped the curb with his car and drove through the crowded park towards the men. Garduno Depo. at 7. The officers in the other two cars did the same. *Id.* at 19. Garduno claims that at this point "Henderson threw a plastic bag containing a leafy green substance onto the ground" and "ran." Pet. App. 2a. Henderson lived with his grandmother in an apartment at the edge of the park; he ran towards home because he was scared. D. Ct. Dkt. 81-4, at 3 ("Henderson Depo."). Still in their cars, the three officers pursued Henderson. Garduno Depo. at 11.

Henderson soon entered his apartment complex. Henderson Depo. at 5. Officer Garduno at that point "jumped out of the car and continued the chase on foot." Pet. App. 2a. "Eventually, Garduno caught up to Henderson in the complex parking lot and ordered Henderson to stop running." *Id.* Henderson complied. *Id.*

At this point, Henderson had stopped moving and had his back to Garduno. *Id.* at 2a-3a. According to Henderson, he then turned his head slightly back to see Garduno while at the same time "rais[ing] his hands in the air as if to surrender." *Id.* at 3a (citation omitted). Multiple eyewitnesses agree with this account. *Id.* at 19a. Garduno tells a different story: Although all eyewitnesses saw otherwise, Garduno claims that Henderson "turned to face him[ ] and reached toward his waistband with both hands." *Id.* at 2a-3a.

Garduno then fired his taser. One prong lodged in the side of Henderson's face; the other missed. *Id.* at 3a. Because tasers require both prongs to hit the target, the circuit did not complete and Henderson was not electrocuted. *Id.* "So one second later, Garduno deployed his taser a second time. This time both prongs lodged in Henderson's back." *Id.* The shock immobilized Henderson, who fell backward and slammed his head on the pavement. *Id.* Henderson was knocked briefly unconscious. D. Ct. Dkt. 81-7, at 3 ("Pinon Aff."). When he came to, he was bleeding from his ears, nose, and mouth and began calling for his "mama." *Id*. at 4. One full minute later, while Henderson lay there and with other officers present, Garduno cycled his taser and tased Henderson again. Pet. App. 3a. Garduno says he did so because Henderson was resisting arrest. *Id.*

Henderson suffered a traumatic brain injury and was taken to the hospital, where he underwent an emergency craniectomy to reduce brain swelling. D. Ct. Dkt. 41, at 10. He spent nearly two months in the hospital, *id.*, and suffered seizures for months afterwards. He still takes medication to avoid seizures.

Henderson was unarmed. Pet. App. 3a. He did not threaten any officers or bystanders. He was not suspected of a serious crime; Garduno himself told bystanders that he only wanted to give Henderson a ticket. Pinon Aff. at 6-7. No drug paraphernalia was recovered from the location of the park where Garduno initially spotted Henderson. Pet. App. 20a. No other suspects were detained or questioned. Garduno Depo. at 11. The charges initially brought against Henderson—for possession of a small amount of marijuana—were dismissed on the prosecution's motion

because "[n]o probable cause exists at this time to believe the defendant committed the offense." D. Ct. Dkt. 81-8, at 1.

B. Procedural Background

Henderson, through his grandmother, sued Garduno under 42 U.S.C. § 1983, alleging that Garduno exercised excessive force and violated Henderson's clearly established Fourth Amendment rights.[2] Pet. App. 3a-4a. Garduno raised qualified immunity as a defense and moved for summary judgment. *Id.* at 20a.

The District Court granted Garduno's motion. The court first held that a genuine dispute existed as to whether Garduno used excessive force. *Id.* at 24a. The court noted that it was "undisputed" that the (lack of) "severity of the crime" weighed in Henderson's favor. *Id.* at 22a. The court highlighted that, despite Garduno's account, Garduno "conceded that he never saw Henderson actually reach into his waistband." *Id.* at 23a. The court also noted that Garduno's account was disputed by other witnesses. *Id*. at 19a. And the court recognized that, "even if Henderson had been previously evading arrest, he had abandoned

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[2] Henderson also sued Harris County, Texas, alleging that the county was liable under *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Pet. App. 4a. The county moved to dismiss, the District Court granted the motion, and the Fifth Circuit affirmed. Although Henderson does not seek certiorari on questions related to this *Monell* claim, the Fifth Circuit should revisit the *Monell* issue if this Court reverses and remands. The panel's conclusion that Garduno did not violate a clearly established right informed its *Monell* holding that the county did not fail to train employees "concerning a clear constitutional duty implicated in recurrent situations." *Id.* at 8a (quoting *Hutcheson* v. *Dallas Cnty.*, 994 F.3d 477, 483 (5th Cir. 2021)).

that effort and 'signaled that he was giving himself up as the deputy had instructed.' " *Id.* (citation omitted). A reasonable jury could thus conclude that Henderson "posed no serious, immediate threat," "made no threatening or aggressive gestures," and was not "resisting arrest" when Garduno tased him. *Id.* at 24a.

The District Court nevertheless granted summary judgment to Garduno because Henderson's right to be free from unreasonable force in these circumstances was not clearly established. *Id.* at 29a-30a. "Simply put, Plaintiff has failed to meet her burden of showing that a prior case exists in which the court held that an officer acting under similar circumstances as [Garduno] had violated the Fourth Amendment." *Id.* at 29a.

The Fifth Circuit affirmed. *Id.* at 16a. The panel leapfrogged the question of whether Garduno used excessive force in tasing Henderson after he had surrendered, holding instead that any right Garduno may have violated was not clearly established at the time of the incident. *Id.* at 10a.

The panel first held that Henderson failed to "identify an on-point case" establishing that Garduno's conduct violated the Fourth Amendment. *Id.* at 10a. Some of Henderson's cases were "issued too late" (even though those cases did not establish new law but merely articulated well-established existing law). *Id.* at 11a. Others were unpublished and could not give "fair notice of the law." *Id.* Still others did not "involve tasing or fleeing" (even though Fifth Circuit precedent provides that "[l]awfulness of force * * * does not depend on the precise instrument used to apply it," *Newman* v. *Guedry*, 703 F.3d 757, 763 (5th Cir.

2012)). Pet. App. 13a (citation omitted). And Henderson's two cited tasing cases "involved 'far more force than was deployed here' " and did not "involve[ ] a suspect fleeing from police." *Id.* at 15a (citation omitted).

The panel then turned to what it called the "obvious-case exception." *Id.* at 15a-16a. In *Hope* v. *Pelzer*, 536 U.S. 730 (2002), this Court held that there can be "notable factual distinctions between the precedents relied on * * * so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 740 (citation omitted); *see also Taylor*, 141 S. Ct. at 53-54 (similar). The panel quoted this rule, but questioned "how much if any weight" these Eighth Amendment cases had in the Fourth Amendment context. Pet. App. 15a-16a.

Those questions notwithstanding, the panel held that, "[e]ven accepting Henderson's versions of the facts," "this case is not obvious." *Id.* at 16a. The way the panel saw it, Henderson had led Garduno "on a long chase by car and by foot." *Id.* And, also according to the panel, "Henderson admits he suddenly stopped running, turned towards Garduno, and moved his arms in a manner that suggested to Garduno that Henderson was reaching for a weapon." *Id.* Based on this narrative, the panel concluded that "[t]his is a far cry" from an obvious case. *Id.* Indeed, the panel continued, "the obviousness of this case points in the other direction" because " '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.* (quoting *Salazar*, 37 F.4th at 282-283).

The Fifth Circuit denied Henderson's motion for panel rehearing and rehearing *en banc*. *Id.* at 31a-32a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DISTORTS THIS COURT'S PRECEDENTS.

The Fifth Circuit's decision below badly distorts settled principles of civil procedure, qualified immunity, and the Fourth Amendment to protect an officer who obviously violated the law.

1. "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011). "Fair warning" is at the heart of the qualified-immunity doctrine: If "the state of the law at the time of an incident provided fair warning to the defendants that their alleged conduct was unconstitutional," *Tolan*, 572 U.S. at 656 (cleaned up), then the conduct was not merely "reasonable but mistaken," *al-Kidd*, 536 U.S. at 743. Defendants in those circumstances either are "plainly incompetent * * * or knowingly violate[d] the law." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). Either way, they are not entitled to qualified immunity. *Id.*

Officials are deemed to have "fair warning" when prior case law clearly establishes the unlawfulness of their conduct. *See Wilson* v. *Layne*, 526 U.S. 603, 621 (1999). But as this Court has explained—repeatedly—prior case law directly on point is not required to clearly establish that certain conduct is unconstitutional. *See Kisela* v. *Hughes*, 138 S. Ct. 1148, 1152 (2018); *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 590 (2018); *Hope*, 536 U.S. at 741; *Brosseau* v.

Haugen, 543 U.S. 194, 199 (2004) (per curiam); *United States* v. *Lanier*, 520 U.S. 259, 271 (1997); *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Instead, when the unconstitutionality of the challenged conduct is so "obvious" that "any reasonable officer should have [so] realized," qualified immunity does not apply. *Taylor*, 141 S. Ct. at 54 (citation omitted). There can thus be "notable factual distinctions between" the case at issue and prior cases, so long as those prior cases "gave reasonable warning that the conduct then at issue violated constitutional rights." *Hope*, 536 U.S. at 740 (citation omitted); *see also Wesby*, 138 S. Ct. at 590 (explaining that "unlawfulness of the officer's conduct" can be "sufficiently clear even though existing precedent does not address similar circumstances"). This means that officials can "still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741. That conclusion holds particularly true when novel facts are not "materially distinguishable" from facts in prior cases. *Rivas-Villegas* v. *Cortesluna*, 142 S. Ct. 4, 8 (2021).

In the excessive-force context, a defendant's conduct is obviously unconstitutional when even the general standards of *Graham* and *Garner* provide fair warning that the conduct is illegal. *Brosseau*, 543 U.S. at 199; *White* v. *Pauly*, 580 U.S. 73, 80 (2017); *Kisela*, 138 S. Ct. at 1153. Under those cases, the reasonableness of an officer's use of force turns on factors 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 he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396 (citing *Garner*, 471 U.S. at 8-9).

2. By any reasonable measure, Garduno used excessive force. Garduno suspected Henderson of committing a minor drug charge warranting (by Garduno's own telling) only a ticket. *See* Pinon Aff. at 6-7; Pet. App. 22a. At the time of the first tasing, Henderson did not pose an immediate threat to anyone. Pet. App. 19a. Nor was Henderson "actively resisting arrest or attempting to evade arrest by flight," *Graham*, 490 U.S. at 396: He had complied with Garduno's order to stop running, had his back to Garduno, and had raised his empty hands in a show of surrender. Pet. App. 19a.

Despite all this, Garduno fired his taser. When the first shot missed, he fired it again and immobilized Henderson, who fell backward and slammed his head on the pavement. A full minute later, while Henderson was lying on the ground and bleeding from his ears, nose, and mouth, Garduno tased Henderson again.

Garduno's conduct is manifestly unreasonable. All reasonable officers would have known that it would be excessive to tase someone suspected of committing a minor crime and who has complied with an order to stop running, has his back to the officer, and has his hands in the air in a show of surrender. And all reasonable officers would *definitely* know that it would be excessive to tase that same person *again*, when that person was sprawled out on his back, bleeding from his ears, and surrounded by officers. The obvious illegality of this conduct under *Graham* and *Garner* is enough to have provided "fair warning" to Garduno. *Brosseau*, 543 U.S. at 199. Garduno's decision to nonetheless use this level of force betrays him, at least

at this stage of litigation, as either "plainly incompetent" or "knowingly violat[ing] the law." *Malley*, 475 U.S. at 341.

Ample precedent confirms as much. "[A] constitutional violation occurs when an officer tases, strikes, or violently slams an arrestee who is not actively resisting arrest." *Darden* v. *City of Fort Worth*, 880 F.3d 722, 731 (5th Cir. 2018). The Fifth Circuit has accordingly denied qualified immunity to an officer who tased a man who had "his hands in the air, * * * complied with the officers' commands, and did not resist arrest," *id.*; an officer who tased a man who had "committed no crime, posed no threat to anyone's safety, and did not resist the officers or fail to comply with a command," *Newman*, 703 F.3d at 764; an officer who "forcefully slammed" a woman's "face into a nearby vehicle during her arrest," despite the fact that she was no longer "resisting arrest," *Bush* v. *Strain*, 513 F.3d 492, 502 (5th Cir. 2008); and an officer who ordered a dog to bite a suspect who had initially fled but was by that point "actively *complying*" with the officer's orders. *Cooper* v. *Brown*, 844 F.3d 517, 521, 523 (5th Cir. 2016). Garduno's conduct is of a piece, and the fact that he used a taser instead of his fists or a dog is immaterial. *See Newman*, 703 F.3d at 763 ("Lawfulness of force * * * does not depend on the precise instrument used to apply it.").

3. The panel excused this obvious case of police brutality by committing rudimentary errors of civil procedure, ignoring this Court's qualified-immunity precedents, and adopting a *per se* obviousness test that directly conflicts with this Court's precedents.

First, "the judge's function" at the summary-judgment stage is not to "determine the truth of the matter," but simply to determine "whether there is a genuine issue for trial." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). This Court has routinely enforced the "axiom" that "in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.' " *Tolan*, 572 U.S. at 651 (quoting *Anderson*, 477 U.S. at 255).

The panel flagrantly ignored this foundational civil-procedure principle. At the beginning of its opinion, the panel recognized that the circumstances of Henderson's surrender were "disputed." Pet. App. 2a. "Garduno says Henderson stopped, turned to face him, and reached towards his waistband with both hands." *Id.* at 2a-3a. "Henderson claims he stopped running, 'turned his head slightly toward the deputy, and raised his hands in the air.' " *Id.* at 3a. Despite this lip service, the panel wholeheartedly embraced Garduno's account—and then some.

At multiple points, the panel stressed that Henderson "suddenly stopped running." *Id.* at 15a, 16a. But the panel omitted that Henderson stopped running in response to Garduno's order *to stop running*. *Id.* at 2a-3a. The panel thus transformed a *compliant* act into a *threatening* act.

The panel asserted that Henderson "admits" that he "turned towards Garduno." *Id.* at 16a. Wrong. Henderson says that, with his back to Garduno, he turned his *head* slightly towards the officer, *id.* at 3a, 19a—as anyone would in response to an officer's order.

The panel said that Henderson "admits" that he "moved his arms in a manner that suggested to Garduno that Henderson was reaching for a weapon." *Id.* at 16a. Wrong again. According to Henderson, he was raising his hands in the air in surrender. *Id.* at 19a. Multiple eyewitnesses agree with that account. *Id.*

It gets worse. The panel fully adopted Garduno's explanation for why he tased Henderson a second time: that "Henderson continued to struggle while on the ground and resisted being placed in handcuffs." *Id.* at 3a. That is markedly different than the account offered by an eyewitness: that Henderson at this point was just regaining consciousness, bleeding from his ears, nose, and mouth, and had made no attempt to get up or run. *See* Pinon Aff. at 3-5.

The panel also amped up the chase preceding Henderson's surrender. According to the panel, Henderson led Garduno "on a long chase by car and by foot." Pet. App. 16a. The panel took it upon itself to describe this chase as "high-speed" and "dangerous." *Id.* at 11a, 16a. But Henderson was on foot the entire time, and Garduno caught up to him in only about a quarter of a mile. *Id.* at 26a. And the only reason the chase was "dangerous" was because Garduno and the other officers decided to drive their cars through a crowded park. *See* Garduno Depo. at 7.

In short, at every point it could, the panel either resolved disputed issues of fact in favor of Garduno, understood facts in the light most favorable to Garduno, or simply reinterpreted facts in a way that justified Garduno's conduct.

The Fifth Circuit has done this before. In *Tolan*, the Fifth Circuit held that an officer's "actions did not vi-

olate clearly established law"—but as this Court subsequently explained, only after "fail[ing] to view the evidence at summary judgment in the light most favorable to [the plaintiff] with respect to the central facts of this case." 572 U.S. at 657. As this Court explained, "[b]y failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party." *Id.* This Court summarily reversed the Fifth Circuit's "clear misapprehension of summary judgment standards." *Id.* at 659-660.

This is *Tolan* all over again. The panel viewed *all* the evidence in favor of Garduno: It accepted that Henderson was reaching for his waistband, that he had turned towards the officer, and that he was resisting arrest after being tased the first time. Indeed, the panel was so quick to view the facts favorably to the officer that it transformed Henderson's act of complying with Garduno's order to stop running into a "sudden" and threatening act. Just as in *Tolan*, the Fifth Circuit "clear[ly] misapprehen[ded]" its role on summary judgment. *Id.* at 659.

Second, the panel disregarded this Court's qualified-immunity precedents. The panel recognized that, under *Hope*, "there can be 'notable factual distinctions between the precedents relied on * * * so long as the prior decision gave reasonable warning that the conduct then at issue violated constitutional rights." Pet. App. 15a (quoting *Hope*, 536 U.S. at 741). But it then ignored that precedent by nonetheless requiring Henderson to "identify an on-point case." *Id.* at 10a; *see also id.* at 16a (doubting whether *Hope* "could apply" in the Fourth Amendment context). And although it

purported to consider the obviousness of Garduno's conduct, the panel did not even gesture towards any of the Fifth Circuit cases cited by Henderson showing that Garduno had "reasonable warning that the conduct then at issue violated constitutional rights." *Hope*, 536 U.S. at 731 (citation omitted); *see supra* p. 14. Concluding that those cases' "factual distinctions" rendered them incapable of clearly establishing the law themselves, the panel did not consider—at all—whether those cases nonetheless "gave reasonable warning" to Garduno that his conduct was obviously unconstitutional, *Hope*, 536 U.S. at 740.

The Fifth Circuit was not at liberty to kneecap *Hope* in this way. The basic principles of *Graham* and *Garner*, buttressed by the mountain of Fifth Circuit case law clearly establishing that "a constitutional violation occurs when an officer tases, strikes, or violently slams an arrestee who is not actively resisting arrest," *Darden*, 880 F.3d at 731—even after the suspect initially runs from the police, *Cooper*, 844 F.3d at 521—was more than enough "reasonable warning that" Garduno's conduct violated Henderson's constitutional rights, *Hope*, 536 U.S. at 740. Factually identical precedent is not necessary. *See Taylor*, 141 S. Ct. at 53.

Third—as if all those errors were not enough—the panel applied a *per se* obviousness test that directly conflicts with this Court's precedent. The panel held that Garduno's conduct was not obviously unconstitutional because "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. 16a (quoting *Salazar*, 37 F.4th at 282-283).[3]

That is not how it works. The Fourth Amendment's reasonableness test "requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396. So does qualified immunity. *See Mullenix* v. *Luna*, 577 U.S. 7, 12 (2015) (explaining that the qualified-immunity analysis examines the "factual situation the officer confronts") (citation omitted). The standard is "reasonableness *at the moment*." *Graham*, 490 U.S. at 396 (emphasis added). Courts thus must consider 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.* (emphases added).

The Fifth Circuit's new test is irreconcilable with this context-dependent standard. The bare fact that a suspect *previously* ran from the police cannot answer the question of whether a subsequent seizure is

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[3] The panel's *per se* test is particularly inappropriate given that the facts of *Salazar*—the source of the panel's *per se* test—"are dramatically different from the facts here." *City of Tahlequah* v. *Bond*, 142 S. Ct. 9, 12 (2021). *Salazar* concerned a "high-speed car chase" that lasted "approximately five minutes" and that, according to the court, "put officers and bystanders in harm's way to try to evade capture." *Salazar*, 37 F.4th at 280-282. Here, in contrast, Henderson had jogged through a park and apartment complex for about a quarter of a mile before Garduno caught up to him. *See* Pet. App. 26a. Garduno also recognized the potential for deadly force in this situation. *See* Garduno Depo. at 47 (acknowledging that "falls even from ground level" after tasing "can cause serious injuries or death, especially on a hard surface"). "Suffice it to say, a reasonable officer could miss the connection between that case and this one." *City of Tahlequah*, 142 S. Ct. at 12.

constitutional—much less not obviously unconstitutional. This is especially true when one of those seizures was effected *after* the suspect was rendered immobile due to an initial tasing. And yet this is the approach the panel adopted. The panel ignored that Henderson was suspected of committing only a minor crime, that he had his hands in the air, and that he had complied with Garduno's orders. The panel instead held that because Henderson *had* run from Garduno, Garduno could not have obviously violated Henderson's constitutional rights by tasing him—even when Henderson was sprawled on his back and bleeding from his ears, nose, and mouth. That is exactly the sort of "mechanical application" of the Fourth Amendment this Court has rejected time and again. *Id.* (quoting *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979)). And focusing on one "fact" to the exclusion of all others is the opposite of anchoring the qualified-immunity analysis in the particular "factual situation the officer confronts." *Mullenix*, 577 U.S. at 12 (citation omitted).

* * *

This is not the first time the Fifth Circuit has contorted or ignored this Court's case law in a bid to grant qualified immunity for obviously unconstitutional behavior. In *Taylor*, this Court summarily reversed the Fifth Circuit's grant of qualified immunity to prison officials who confined a prisoner in a cell "teeming with human waste" for six days. 141 S. Ct. at 53-54 (citation omitted). And in *McCoy*, this Court vacated a Fifth Circuit decision granting qualified immunity to a prison guard who pepper-sprayed an inmate for no reason. 141 S. Ct. at 1364.

In both of those instances, the Fifth Circuit avoided the obvious unconstitutionality of officers' conduct by ignoring it. Here, the Fifth Circuit did so by impermissibly interpreting all inferences in favor of the summary-judgment movant and applying a *per se* rule alien to this Court's case law. But the end result is the same: a grant of qualified immunity to an officer who either is "plainly incompetent" or who "knowingly violate[d] the law." *Malley*, 475 U.S. at 341. As it has before, this Court should grant the petition and reverse.

II. THE DECISION BELOW CREATES A CIRCUIT SPLIT.

Given the obvious unconstitutionality of the conduct at issue, it should be no surprise that the decision below sharply breaks from other courts. The Sixth, Seventh, Tenth, and Eleventh Circuits, as well as the New Jersey Supreme Court, have refused to grant qualified immunity to officers who used gratuitous force against suspects who initially fled from the police but who had surrendered at the time force was used. Similarly, the First, Second, Fourth, Eighth, and Ninth Circuits have refused to grant qualified immunity to officers who used gratuitous force against a suspect who initially resisted arrest but who had ceased resisting at the time force was used. This Court should grant certiorari to restore uniformity across the federal and state courts.

1.a. The Sixth, Seventh, Tenth, and Eleventh Circuits, as well as the New Jersey Supreme Court, have held that qualified immunity does not protect officers who use excessive force on a suspect who initially fled from the police before surrendering.

In *Ortiz ex rel. Ortiz* v. *Kazimer*, 811 F.3d 848 (6th Cir. 2016), the Sixth Circuit held that it is "clearly established" that "the gratuitous use of force against a suspect who has 'surrendered' is 'excessive as a matter of law,' * * * * even when the suspect had originally * * * run[ ] from the police." *Id.* at 852 (citing *Baker* v. *City of Hamilton*, 471 F.3d 601, 603, 608 (6th Cir. 2006)). In that case, the officer had chased a suspect down to an "apartment building's parking lot," where the suspect "stopped running." *Id.* at 851. The officer saw the suspect "surrendering" but "tackled" him into a car and then kept the suspect's face pinned against the vehicle. *Id.* Writing for a unanimous panel, Judge Sutton explained that the suspect's initial flight did not give the officer license to use this level of force because there was no indication that the suspect "was fabricating his submission to the officer's authority." *Id.* at 852. The court accordingly held that the officer was not entitled to qualified immunity at the summary-judgment stage.

The Seventh Circuit agrees. In *Alicea* v. *Thomas*, 815 F.3d 283 (7th Cir. 2016), the Seventh Circuit denied qualified immunity at the summary-judgment stage to an officer who ordered his dog to attack a suspect who, although he had previously fled from the police, "was standing still" and had "immediately complied with [the officer's] orders to put his hands in the air." *Id.* at 289, 292. The court rejected the argument that the plaintiff's "prior flight cast doubt on the genuineness of his surrender." *Id.* at 289. Citing circuit precedent, the court explained 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." *Id.* at 289

(quoting *Miller* v. *Gonzalez*, 761 F.3d 822, 829 (7th Cir. 2014)). As the court explained, "[t]he sole fact a suspect has resisted arrest before cannot justify disregarding his surrender in deciding whether and how to use force." *Id.* Applying this rule, the court concluded that "[c]ommanding a dog to attack a suspect who is already complying with orders clearly violates" the Fourth Amendment. *Id.* at 292; *see also Miller*, 761 F.3d at 829-830 (denying qualified immunity to officer who used gratuitous force on suspect who led police on chase but then surrendered).

The Tenth Circuit reached a similar conclusion in *Emmett* v. *Armstrong*, 973 F.3d 1127 (10th Cir. 2020). That case concerned a plaintiff who "began running" as police approached him while investigating reports of a fight. *Id.* at 1131. One officer caught up with the plaintiff and tackled him, at which point the plaintiff "became visibly relaxed[ ] and * * * made no further movements indicating an attempt to run or fight back." *Id.* When the plaintiff did not respond to commands to turn over onto his stomach, the officer tased him. *Id.* Looking "at the facts and circumstances as they existed at the moment the force was used," the Tenth Circuit held that the tasing violated the Fourth Amendment. *Id.* at 1135. The court rejected the claim that the plaintiff's initial "run from" the officer rendered the plaintiff an immediate threat or meant that he was actively fleeing; the court instead concluded that the officer had "effectively neutralized any safety concerns arising from [the plaintiff's] flight" by the time the officer tased him. *Id.* at 1136. "In the precise moment that" the officer tased the plaintiff, the Tenth Circuit explained, the plaintiff "was no longer fleeing." *Id.* The court ultimately held that the officer was not

entitled to qualified immunity at the summary-judgment stage because the officer "was on notice that using a taser without providing an adequate warning against a misdemeanant who had ceased actively resisting was unconstitutional." *Id.* at 1139.

The Eleventh Circuit is in accord. *Edwards* v. *Shanley*, 666 F.3d 1289 (11th Cir. 2012), concerned a plaintiff who fled from an officer on foot after the officer saw the plaintiff run a stop sign. *Id.* at 1293. The officer "chased [the plaintiff] on foot" until the plaintiff reached the woods, at which point the officer waited for a canine unit. *Id.* The dog quickly found the plaintiff and, pursuant to the officer's order, bit the plaintiff. *Id.* In response, the plaintiff laid "prone with his hands exposed and begg[ed] to surrender." *Id.* at 1295. The officer nonetheless "allowed the dog to bite [the plaintiff] for five to seven minutes." *Id.* at 1294. The Eleventh Circuit held that the officer was not entitled to qualified immunity at summary judgment for allowing the dog to continue biting the plaintiff. *Id.* at 1295-98. The court recognized that the plaintiff's initial flight "raises doubt about the danger" he posed, but stressed that the plaintiff "mitigated that doubt" by unambiguously surrendering. *Id.* at 1296. And as the court explained, it is "plain[ly] * * * unconstitutional to subject a * * * compliant suspect to a[n] * * * attack of five to seven minutes, especially where that suspect is pleading for surrender." *Id.* at 1298; *see also Smith* v. *Mattox*, 127 F.3d 1416, 1419-20 (11th Cir. 1997) (finding it obviously unreasonable for an officer to break a plaintiff's arm during an arrest when that plaintiff had surrendered after initially trying to flee).

The New Jersey Supreme Court followed suit in *Baskin* v. *Martinez*, 233 A.3d 475 (N.J. 2020). That case concerned a Section 1983 action against an officer who shot a suspect who had initially "crashed his car into an unmarked patrol vehicle" and then "fled on foot," but who, when cornered, had raised "his empty hands above his head in a sign of surrender." *Id.* at 477, 487. The court concluded that "the law prohibiting the use of deadly force against a surrendering suspect—one with empty hands in the air and posing no imminent threat—was clearly established at the time of the events." *Id.* at 487. "The law is also clear," the court explained, "that a suspect's conduct leading up to surrender cannot alone justify shooting the suspect * * * when his hands are above his head in an act of submission and he no longer poses a threat." *Id.* at 485. The court accordingly held that the officer was not entitled to qualified immunity on summary judgment. *Id.* at 487.

b. These courts are in accord with the First, Second, Fourth, Eighth, and Ninth Circuits, all of which have held that an officer who uses excessive force on a nonresisting suspect, even if that suspect had initially resisted arrest, is not entitled to qualified immunity.

In *Jennings* v. *Jones*, 499 F.3d 2 (1st Cir. 2007), the First Circuit denied qualified immunity to an officer who increased the use of force on a subdued arrestee "after the arrestee ha[d] ceased resisting for several seconds." *Id.* at 16. The court could think of no "basis for increasing the force used" in this situation "to such a degree that a broken ankle results." *Id.* at 18. The court compared the case to the Eleventh Circuit's decision in *Smith*, *see supra* p. 24, but ultimately concluded that the officer's "conduct was such an obvious

violation of the Fourth Amendment's general prohibition on unreasonable force that a reasonable officer would not have required prior case law on point to be on notice that his conduct was unlawful." 499 F.3d at 17.

So too in the Second Circuit, which in *Jones* v. *Treubig*, 963 F.3d 214 (2d Cir. 2020), squarely held that it is "clearly established in this Circuit that it is a Fourth Amendment violation for a police officer to use significant force against an arrestee who is no longer resisting and poses no threat to the safety of officers or others." *Id.* at 225. Based on this clearly established law, the court concluded that "no reasonable officer could believe that" tasing an arrestee "a second time," after the arrestee "was no longer trying to get off the ground, no longer actively resisting arrest, and no longer posing a threat to the police officers," "was lawful." *Id.* at 230. The court accordingly denied the officer the protection of qualified immunity. *Id.* at 239.

The Fourth Circuit took the same approach in *Valladores* v. *Cordero*, 552 F.3d 384 (4th Cir. 2009). In that case, the teenaged plaintiff tried to push a police officer who was arresting the plaintiff's brother. *Id.* at 386-387. The officer responded by "grabb[ing]" the plaintiff and swinging "him headfirst into his mother's car several times." *Id.* at 387. The plaintiff eventually "fell to the ground" and the officer "had him under full control." *Id.* The Fourth Circuit explained that "[t]his signifie[d] a point of surrender." *Id.* at 390. However, "[t]he officer then slammed the teenager's face into the car, at which point [the plaintiff] heard his jaw snap." *Id.* at 387. Citing *Graham*, the court held that,

in breaking the plaintiff's jaw after he had surrendered, the officer "knowingly violated [the plaintiff's] clearly established right," and was thus not entitled to qualified immunity. *Id.* at 391. Central to the court's analysis was that the plaintiff had "stopped resisting the arrest before the alleged excessive force occurred." *Id.* at 390-391.

In *Jackson* v. *Stair*, 944 F.3d 704 (8th Cir. 2019), the Eighth Circuit followed suit. In that case, the officer tased the plaintiff three times: once after the plaintiff was "aggressive and noncompliant in response to" the officer's orders; once after that first tasing, when "he was on his back, writhing on the ground"; and once when "he rose to his knee in an apparent attempt to get off the ground" in contravention of the officer's orders. *Id.* at 711-713. Concluding that each tasing stood "on its own," the Eighth Circuit considered each "as a separate use of force." *Id.* at 712. The court held that the first and third tasings were "objectively reasonable" because the plaintiff was resisting arrest. *Id.* at 711, 713. But "[a]t the time of this second tasing, [the plaintiff] did not appear to pose a threat to law enforcement." *Id.* at 711-712. According to the court, "it is axiomatic that" the plaintiff—who appeared to be "non-threatening, non-fleeing, [and] non-resisting" at that point—"had a clearly established right against excessive force at the time of the second tasing." *Id.* at 713. The court so held despite the fact that the plaintiff later resumed resisting arrest. *Id.* The court ultimately remanded to the district court to consider whether the "second tasing amounted to excessive force," but held that if it did, the officer "is not entitled to qualified immunity." *Id.* at 714. Under *Jackson*, then, both *earlier* and *later* acts of resistance cannot

make an officer's use of force automatically objectively reasonable.

Finally, in *LaLonde* v. *County of Riverside*, 204 F.3d 947 (9th Cir. 2000), a police officer responded to a noise complaint and, when the plaintiff refused to cooperate, told the plaintiff "he was going to be placed under arrest for obstructing a police investigation." *Id.* at 951-952. The plaintiff told the officer he would not submit to being arrested, and so the officer "knocked [the plaintiff] backwards to the ground." *Id.* at 952. The plaintiff "resisted and the two men got into a scuffle." *Id.* The officer then pepper-sprayed the plaintiff, at which point the plaintiff's "resistance ceased." *Id.* After handcuffing the plaintiff, the officer did not wash the pepper spray off the plaintiff's face or out of his eyes "for twenty to thirty minutes after he had already surrendered and was under control." *Id.* at 960. The Ninth Circuit framed the officer's decision to leave the pepper spray in the plaintiff's eyes as a "continued use" of pepper spray—a use that was obviously unconstitutional. *Id.* at 961. "[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 or a refusal without cause to alleviate its harmful effects constitutes excessive force." *Id.* The court accordingly held that the officer was not entitled to qualified immunity for this conduct. *Id.* at 962.

2. Compare all these to the decision below. The Fifth Circuit departed from this consensus by granting qualified immunity to an officer who used excessive force against a suspect because that suspect had initially run from the officer. Henderson's claims would have survived summary judgment had they

been brought in the Sixth, Seventh, Tenth, and Eleventh Circuits or in New Jersey state court. They also would have survived had they been brought in the First, Second, Fourth, Eighth, and Ninth Circuits. But Henderson's claims arose in the Fifth Circuit, and that led to a starkly different outcome.

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT.

The Fifth Circuit's decision feeds into a vicious cycle of force and flight. There may be entirely innocent reasons to initially avoid a police encounter—chief among them the crisis of trust between police and the communities they serve.

1. Individuals "do not pose an imminent risk of danger simply by taking flight." Robert Leider, *Taming Self-Defense: Using Deadly Force to Prevent Escapes*, 70 Fla. L. Rev. 971, 1017 (2019). In fact, individuals frequently avoid police encounters because they fear exposure to precisely the sort of force used against Henderson. Stories of police brutality cause individuals, and young Black men like Henderson in particular, to experience "hypervigilance" in police encounters. Jocelyn R. Smith Lee & Michael 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*, 45(3) J. Black Psych. 143-184 (2019). Such hypervigilance often leads individuals to "run[ ]from police," not out of a desire to harm anyone, but out of a "legitimate fear" of violence and a "desire to avoid it." *Id.* at 172-173; *Commonwealth* v. *Warren*, 58 N.E.3d 333, 342 (Mass. 2016) (finding flight "might just as easily be motivated by the desire to avoid the

recurring indignity of being racially profiled as by the desire to hide criminal activity").

After the decision below, individuals in Texas, Mississippi, and Louisiana now not only have a reason to run from the police—they have a reason to *keep running*, even when they would rather peacefully surrender. It is common sense that individuals are less likely to surrender if they know that any attempt to do so will be met with gratuitous force. *Cf.* Roger G. Dunham et al., *High-Speed Pursuit: The Offenders' Perspective*, 25 Crim. Just. & Behav. 30, 38 (1998) (explaining research showing that most fleeing suspects would slow down "only when they felt safe"). The Fifth Circuit's rule is thus not only wrong, it is perverse: It actively discourages individuals from complying with a reasonable officer's legitimate attempt to de-escalate the situation, a dynamic which will inevitably lead to tragedies among both civilians and law enforcement. *See* Off. of Cmty. Oriented Policing Servs., U.S. Dep't of Just., *De-Escalation Training: Safer Communities and Safer Law Enforcement Officers* (Sept. 6, 2022)[4] (explaining that de-escalation tactics that encourage surrender "can dramatically reduce injuries" among both groups).

The Fifth Circuit's new rule—that it is not obviously unconstitutional to use excessive force on a person who is perceived to have initially fled from the police but then surrenders—will not be lost on officers. Excessive force "spreads among officers in the same network, as officers learn from each other how and when to use excessive force." Daria Roithmayr, *The Dynamics of Excessive Force*, 2016 U. Chi. Legal F. 407, 409

[4] *Available at* https://bit.ly/40lR76z.

(2016). Police officers are more likely to employ excessive force when they see others use it and suffer no consequences. *Id.* at 429; *see also* George Wood et al., *The Network Structure of Police Misconduct*, 5 Socius: Socio. Rsch. for a Dynamic World 1, 13 (2019) ("police misconduct appears to be a networked phenomenon"); Marie Ouellet et al., *Network Exposure and Excessive Use of Force: Investigating the Social Transmission of Police Misconduct*, 18 Criminology & Pub. Pol'y 675, 689 (2019) ("[E]xposure to colleagues with a history of use of force is positively and significantly associated with use of force complaints."). Put another way: Excessive force breeds excessive force. But the decision below removes a crucial check on the spread of excessive force—personal liability.

Building on those network effects, "use of force policies rely upon the vagueness and ambiguity of Fourth Amendment case law" to give officers "wide latitude to use * * * force." Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 Cornell L. Rev. 1281, 1287 (2019). "[L]egal gray area[s]" thus "function as creating *before the fact* justifications for police force." *Id.* This is particularly true with regard to policies on the "escalation and de-escalation" of force; jurisdictions often "reproduce ambiguous judicial interpretations" to "limit[ ] the development of rules that might restrict force usage." *Id.* at 1304.[5] By

[5] Garduno's testimony reveals that his use-of-force training was particularly wanting. He did not recall any training concerning the constitutional use of force during his employment with the

applying a broad, fact-agnostic *per se* rule to hold that an officer's use of force is not obviously unreasonable, the decision below hinders the development of clear limitations on force.

Together, these dynamics will worsen the crisis of trust between the police and communities they serve.

Police violence—particularly against unarmed individuals—"rattles the foundation of trust between residents and police." Ouellet, *supra*, at 676. Both police and citizens perceive those effects. For their part, community members develop a "fear of police," leading them to be "suspicious" and at times "defiant." Collin M. Calvert et al., *Perceptions of Violent Encounters between Police and Young Black Men across Stakeholder Groups*, 97 J. Urban Health 279, 292 (2020). This dynamic feeds itself: "[C]ivilian resistance and defiance increase the likelihood of excessive force, and in turn, police use of excessive force increases the likelihood of civilian resistance and defiance." Roithmayr, *supra*, at 419.

The decision below supercharges this feedback loop. According to the Fifth Circuit, *compliance*—not just *defiance*—with an officer's order can be met with excessive force. That cannot be right. This Court's intervention is needed to ensure that the Fourth Amendment protects individuals in the Fifth Circuit from the use of excessive force after having surrendered to the police.

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county. Garduno Depo. at 56-57. Nor was he familiar with *Graham*. Asked to explain his understanding of the "reasonable use of force," he stated, "If someone is trying to hurt you, don't let them hurt you. * * * [I]f somebody is trying to pull a gun on me, I pull a gun on them basically." *Id.* at 57.

2. The decision below is not an isolated case. The Fifth Circuit first articulated the *per se* rule it applied here in *Salazar*. *See* 37 F.4th at 282-283, *pet. for writ of cert. filed*, No. 22-564 (U.S. Dec. 2, 2022). The Fifth Circuit has since applied it in at least three other cases, including this one. *See Ramirez* v. *Martin*, No. 22-10011, 2022 WL 16548053 (5th Cir. Oct. 31, 2022); *Bernabe* v. *Rosenbaum*, No. 21-10396, 2023 WL 181099, at *2 (5th Cir. Jan. 13, 2023). In each instance, the Fifth Circuit reflexively excused an officer's use of force on a surrendering victim because that victim had previously fled from the authorities. This Court's intervention is needed before this perverse rule metastasizes any further.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision reversed.

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