No. 22-933

IN THE
Supreme Court of the United States

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

v.

HARRIS COUNTY, TEXAS; ARTHUR SIMON GARDUNO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

T. DEAN MALONE
LAW OFFICES OF DEAN MALONE, P.C.
900 Jackson Street
Suite 730
Dallas, TX 75202

BRUCE K. THOMAS
LAW OFFICE OF BRUCE K. THOMAS
12900 Preston Road
Suite 590
Dallas, TX 75230

CATHERINE E. STETSON
Counsel of Record
WILLIAM E. HAVEMANN
MICHAEL J. WEST
EZRA P. LOUVIS
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
cate.stetson@hoganlovells.com

Counsel for Petitioner

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INTRODUCTION

The panel below granted summary judgment to an officer who tased a young Black man multiple times after he surrendered, leaving the victim with a traumatic brain injury. The panel reached this result by applying the Fifth Circuit's *per se* rule that a victim who initially flees from the police is not entitled to "the same Fourth Amendment protection" as other suspects, even after he surrenders. Pet. App. 16a. That rule flouts this Court's qualified-immunity precedent, splits from other courts, and exacerbates a destructive feedback loop by making civilians even more likely to

seek to avoid police encounters, and thus even more likely to be victims of excessive force.

Garduno defends the decision below by repeating the panel's errors, paying lip service to the summary-judgment standard while recounting the facts in the light most favorable to himself. Garduno does not dispute that Christopher Henderson was unarmed, was not suspected of a serious crime, and posed no threat to anyone. Garduno instead insists that the use of force was justified because Henderson suddenly stopped running—even though Henderson did so in response to Garduno's order. Garduno also insists that Henderson moved his arms—even though Henderson raised his arms to surrender. And Garduno claims that Henderson resisted being handcuffed—even though Henderson emphatically disputes that characterization and witnesses agree that he was not resisting, but instead "was on the ground, bleeding from his ears, nose, and mouth, and saying 'Mama, mama.' " D. Ct. Dkt. 81-7, at 4 ("Pinon Aff.").

Given the factual dispute about whether Henderson had surrendered when Garduno tased him, the panel could grant summary judgment for Garduno only by applying a *per se* rule that suspects who initially flee are entitled to lower protection against excessive force. Garduno does not attempt to defend that rule. Instead he maintains that that pivotal portion of the panel's ruling was "dicta." But the panel acknowledged and directly applied its *per se* rule, which the Fifth Circuit announced in a prior published decision and has applied in numerous decisions since.

Garduno barely attempts to dispute that the decision below splits from the many other courts that have rejected the Fifth Circuit's *per se* rule. Other courts

recognize that officers are not entitled to qualified immunity when they use excessive force against victims who have surrendered, even if the victim initially fled or otherwise resisted arrest. Garduno attempts to distinguish these cases on the ground that the suspects in each case had "unquestionably" surrendered when excessive force was used, Opp. 16, but that is demonstrably false. Indeed, in every other case in the split, the court identified a factual dispute about whether the victim had surrendered.

The question presented is important. As this case demonstrates, citizens may have justifiable reasons for wishing to avoid fraught police encounters. Henderson was suspected at most of a low-level marijuana offense, and Garduno concedes that he simply wanted to give Henderson a ticket. Garduno nonetheless used force resulting in a traumatic brain injury and two-month hospital stay. The panel's decision incentivizes excessive force. It also is the most recent example of numerous Fifth Circuit decisions creating special qualified-immunity rules that result in reflexive victories in favor of officials charged with egregious misconduct. This Court should grant the petition and reverse.

ARGUMENT

I. GARDUNO REPEATS THE PANEL'S ERRORS OF LAW.

It is manifestly unreasonable to tase a person who has stopped running and has raised their empty hands to surrender. Pet. 13-14. The panel could protect such egregious misconduct only by adopting a *per se* test that sanctions the use of force on people who initially flee from the police before attempting to surrender.

Garduno's defense of the decision below only highlights its errors.

1. Garduno's narrative (Opp. 10-14) bears no resemblance to the evidence viewed in the light most favorable to Henderson. Henderson's evidence is as follows: Garduno chased Christopher Henderson through a crowded park, with Garduno in his car and Henderson on foot. Pet. App. 18a. When Garduno ordered Henderson to stop, Henderson complied and turned his head slightly towards Garduno. *Id.* at 18a-19a. With his back to Garduno, Henderson raised his empty hands in surrender. *Id.* at 19a. Garduno fired his taser, with one barb lodging in the side of Henderson's face and the other missing. *Id.* Garduno fired his taser again, this time hitting Henderson in the back. *Id.* The shock immobilized Henderson, causing him to fall backwards, slam his head on the pavement, and lose consciousness. *Id.*; Pinon Aff. 3. A minute later, while Henderson was lying on the ground, bleeding from his face, and not resisting, Garduno tased Henderson again. Pinon Aff. 4. Multiple eyewitnesses corroborate this account. *Id.* at 4, 5; Pet. App. 19a.[1]

Garduno does not dispute that these facts, if proven to a jury, would state an obvious Fourth Amendment

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[1] Crediting Henderson's account does not, as Garduno claims, require the Court to accept Henderson's "subjective thoughts and motives as fact," Opp. 12—apparently as opposed to adopting *Garduno*'s subjective thoughts and motives as fact, which the panel freely did. Every fact Garduno disputes is supported by record evidence. *See* Pet. App. 19a (citing record documents).

violation and preclude the grant of summary judgment. As the Fifth Circuit has held, an officer violates the Fourth Amendment when he "tases * * * an arrestee who is not actively resisting arrest." *Darden* v. *City of Fort Worth*, 880 F.3d 722, 731 (5th Cir. 2018); *see also, e.g.*, *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). He thus had "reasonable warning" that his misconduct was unconstitutional. *Hope* v. *Pelzer*, 536 U.S. 730, 740 (2002) (citation omitted); Pet. 12.

Garduno can defend the panel's grant of summary judgment only by first changing the narrative, and then applying a different legal test. Garduno, for example, repeats the panel's loaded assertion that Henderson "suddenly stopped running." Opp. 11. But Garduno has no response to Henderson's account that he stopped running *in response to Garduno's command*. Garduno similarly declares that Henderson "moved his hands without provocation." *Id.* at 11. But Henderson moved his hands because he was *raising his arms in surrender*. Pet. App. 19a; *see also* Pinon Aff. 2 (witness stating that although Henderson's "arms weren't all the way fully extended," "they were up in the air with the palms of his hands open"). Garduno at least acknowledges the factual dispute over whether Henderson turned his entire body toward Garduno or only turned "his head slightly," Opp. 11 (internal quotation marks and emphasis omitted), but then, like the panel, ignores it in favor of his own account, *id.* (insisting that firing his taser was reasonable because he "had no way of knowing why Henderson suddenly turned toward him").

Garduno defends the panel's statement that Henderson "admits" he moved "his arms in a manner that suggested to Garduno that Henderson was reaching

for a weapon." Opp. 12. But this statement plainly resolves a factual dispute about whether Henderson was moving his hands threateningly by laundering it through Garduno's perspective. Garduno maintains that the panel "was clear" that this was "Garduno's perception." *Id*. *But that is the problem*. "[T]he 'reasonableness' inquiry in an excessive force case is an objective one." *Graham*, 490 U.S. at 397. A court cannot grant summary judgment for the defendant by adopting the defendant's subjective perception of disputed facts. That is for the jury to consider.

As for the final tasing, Garduno maintains that the parties merely "dispute the degree of resistance Henderson showed on the ground" and claims it is undisputed that Henderson "resisted being handcuffed." Opp. 13. That is again false. Henderson has always maintained that he did not resist arrest, an account corroborated by a witness. *See* Pinon Aff. 4 (agreeing that Henderson "was on the ground, bleeding," and not "about to get up and do any running"). And yet the panel stated as fact that "Henderson continued to struggle while on the ground and resisted being placed in handcuffs." Pet. App. 3a.

2. The panel's coup de grâce was the legal standard it applied to Henderson's allegations. "Even accepting Henderson's versions of the facts," the panel stated (while not accepting them), Henderson's complaint did not present an "obvious" case trumping Garduno's immunity from civil suit. Pet. App. 16a. Why? Because under Fifth Circuit precedent, it is not obviously unconstitutional to use excessive force on a suspect who "refuse[s] to surrender and instead lead[s] police on a dangerous hot pursuit." *Id.* (quoting *Salazar* v. *Molina*, 37 F.4th 278, 282-283 (5th Cir.

2022)). That rule replaces *Graham*'s totality-of-the-circumstances test with a *per se* rule that a suspect who initially fled is entitled to less protection.

This Court explained in *Graham* that the Fourth Amendment's reasonableness test requires considering "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." 490 U.S. at 396. As the words "immediate," "*actively* resisting arrest," and "attempting" indicate, this is a present-tense inquiry; the question is whether the use of force was reasonable "at th[at] moment," *Plumhoff* v. *Rickard*, 572 U.S. 765, 777 (2014). Every factor of that test favors Henderson. Garduno suspected Henderson of committing a minor drug offense. Pinon Aff. 6-7; Pet. App. 22a. Henderson did not pose a threat to anyone. *See* Pet. App. 19a; Pinon Aff. 4. And at the time Garduno used force, Henderson was no longer "attempting to evade arrest by flight," *Graham*, 490 U.S. at 396; he had stopped running, Pet. App. 19a.

The panel ignored all that, however, and concluded that because Henderson *had* run from Garduno, Garduno's use of force was not obviously unconstitutional.

Garduno does not defend the panel's *per se* test. Instead, he claims that the test was "only *dicta*." Opp. 16. That is plainly incorrect. After "accepting Henderson's versions of the facts," the panel stated: "as we explained in *Salazar*, '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.' " Pet. App. 16a. Thus, the

panel applied *Salazar* to hold that because Henderson had initially fled, Garduno could not have obviously violated Henderson's rights by tasing him. Pet. 20. The panel's reliance on *Salazar* is typical; the Fifth Circuit has applied that case to grant qualified immunity in at least two other cases since. *See Ramirez* v. *Martin*, No. 22-10011, 2022 WL 16548053 (5th Cir. Oct. 31, 2022) (per curiam), *pet. for writ of cert. filed*, No. 22-1003 (U.S. Apr. 14, 2023); *Bernabe* v. *Rosenbaum*, No. 21-10396, 2023 WL 181099 (5th Cir. Jan. 13, 2023).

II. COURTS ARE SPLIT.

Garduno agrees that an officer would obviously violate the Fourth Amendment by using "excessive force to punish people who initially resisted arrest, but then surrendered." Opp. 16. He also concedes that other courts reject qualified immunity for officers who "use gratuitous force against suspects who initially fled from the police but who had surrendered at the time force was used." *Id.* (internal quotation marks omitted). But Garduno claims that these other cases differ from the decision below, because in these cases "the suspects had fully and unquestionably surrendered" before the officers used force. *Id.*

That is unquestionably wrong. In every case the petition cited to support the split, questions of fact remained for the jury about whether the suspect had in fact surrendered, whether after initially fleeing from the police or initially resisting arrest. But every other court to confront the issue correctly recognized that those questions could not be resolved in the defendant's favor at summary judgment.

In *Ortiz ex rel. Ortiz* v. *Kazimer*, 811 F.3d 848, 853 (6th Cir. 2016), Judge Sutton explained for a unanimous panel that there was a factual dispute about whether the victim "posed a threat" to the arresting officer after initially fleeing, but explained that "the plaintiffs' version of the events" must be accepted at summary judgment. In *Alicea* v. *Thomas*, 815 F.3d 283, 289 (7th Cir. 2016), the Seventh Circuit recognized a factual dispute about whether the victim had surrendered, but explained that qualified immunity was improper under the victim's "version of the facts, which we accept as true for summary judgment purposes." And in *Emmett* v. *Armstrong*, 973 F.3d 1127, 1135 (10th Cir. 2020), the Tenth Circuit noted a factual dispute about whether the victim "was no longer attempting to flee or actively resisting," and held that it had to construe the evidence in the victim's favor "because this matter is presented on a summary judgment."

Every other case supporting the split involves a similar factual dispute. *See Jackson* v. *Stair*, 944 F.3d 704, 712 (8th Cir. 2019) (noting "dispute as to whether Jackson was resisting the officers or posing a threat at the time of the second tasing"); *Edwards* v. *Shanley*, 666 F.3d 1289, 1292 (11th Cir. 2012) (recognizing that the "facts, as accepted at the summary judgment stage of the proceedings, may not be the actual facts"); *Valladares* v. *Cordero*, 552 F.3d 384, 387-391 (4th Cir. 2009) ("[T]he facts that [plaintiff] asserts and the facts that the officers assert differ greatly."); *Jennings* v. *Jones*, 499 F.3d 2, 7 (1st Cir. 2007) (faulting district court for resolving "critical factual dispute"); *LaLonde* v. *County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000) (noting "direct contradictory testimony" on whether victim had surrendered when excessive force

was used); *Baskin* v. *Martinez*, 233 A.3d 475, 487 (N.J. 2020) ("The two conflicting accounts of what occurred at the time of the shooting, and any other disputed issues of material fact, must be submitted to a jury for resolution.").

These cases cannot be reconciled with the decision below, where Henderson initially ran from the police, but the parties disputed whether Henderson surrendered before Garduno repeatedly tased him. Garduno's suggestion that Henderson was required to prove at summary judgment that he had "unquestionably" surrendered, Opp. 16, reflects a fundamental misunderstanding of the summary-judgment standard.

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT.

Individuals may seek to avoid police encounters for entirely innocent reasons. Many people, and young Black men in particular, avoid encounters out of a legitimate fear of injuries like Henderson's and a desire to avoid them. 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). And chases like this one happen with extraordinary frequency. Bureau of Just. Stat., U.S. Dep't of Just., *Police Vehicle Pursuits, 2012-2013* at 1 (May 2017) (finding state and local law enforcement initiate over 68,000 vehicle and foot pursuits per year). Using gratuitous force to terminate those chases jeopardizes both "the officer's and the public's safety." Elias Rodriguez, Stanford Ctr. for Racial Just., *The Dangers of Police Foot Pursuits* (Oct. 4, 2022).

By granting qualified immunity to an officer who tased a person who had surrendered solely because he had initially fled, the decision below incentivizes the use of excessive force in circumstances where restraint and moderation are most crucial. That incentive is exactly why many individuals fear police encounters in the first place. Civilians will be even more likely to try to avoid police encounters, which in turn will give police still more ground to use excessive force. *See* Pet. App. 16a. This feedback loop will increase the risk of force and supercharge community members' distrust of the officers there to protect them.

The question presented here is similar to the one presented in *Salazar* v. *Molina*, No. 22-564, a petition this Court denied in April. This petition is a better vehicle to address this important question. *Salazar* involved a dangerous high-speed car chase through a residential neighborhood, raising serious questions under *Graham* about whether force was reasonable despite an attempted surrender. *Salazar*, 37 F.4th at 282. Here, by contrast, Henderson was not a danger to anyone, and the *Graham* factors all weigh in his favor. *See supra* p. 7.

Garduno suggests that this case is not "compelling" because this Court denied certiorari in other qualified-immunity cases with "more severe consequences" for the victim. Opp. 17. Those denials only underscore the need for this Court's intervention. In recent years the Fifth Circuit has refused to abide by this Court's qualified-immunity precedents, and has transformed the judge-made doctrine of qualified immunity into a basis for effectively nullifying Section 1983. *See Taylor* v. *Riojas*, 141 S. Ct. 52 (2020);

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.); *cf. Rogers* v. *Jarrett*, 63 F.4th 971, 979-981 (5th Cir. 2023) (Willett, J., concurring) (discussing new research suggesting that qualified immunity is antithetical to Section 1983's text). The decision below is yet another in a pattern of Fifth Circuit decisions distorting the law to protect officials who commit indefensible misconduct. Similar petitions will continue to arrive at the Court until this Court intervenes.

* * *

Qualified immunity yields when officers engage in misconduct as obvious as Garduno's. Given the renewed uncertainty about the doctrine's underpinnings, *see* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023), this Court should ensure that if qualified immunity is applied at all, it is applied correctly. This Court's intervention is needed to make that clear to the Fifth Circuit once again.

CONCLUSION

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

Respectfully submitted,

T. DEAN MALONE
LAW OFFICES OF DEAN MALONE, P.C.
900 Jackson Street
Suite 730
Dallas, TX 75202

BRUCE K. THOMAS
LAW OFFICE OF BRUCE K. THOMAS
12900 Preston Road
Suite 590
Dallas, TX 75230

CATHERINE E. STETSON
Counsel of Record
WILLIAM E. HAVEMANN
MICHAEL J. WEST
EZRA P. LOUVIS
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
cate.stetson@hoganlovells.com

Counsel for Petitioner

JUNE 6, 2023