No. 23-1257

IN THE

Supreme Court of the United States

SANTOS ARGUETA, *et al.*,

Petitioners,

v.

DERRICK S. JARADI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* LAW PROFESSORS ROYCE BARONDES, JOSEPH OLSON, RODNEY J. UPHOFF, AND GLENN HARLAN REYNOLDS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are law professors who have teaching, scholarship, or other academic interests in the area of the Second Amendment or the Fourth Amendment. Specifically, they are: Royce Barondes (Emeritus Professor, University of Missouri School of Law); Joseph Olson (Emeritus Professor, Mitchell Hamline School of Law); Rodney J. Uphoff (Emeritus Professor, University of Missouri School of Law); and Glenn Harlan Reynolds (Professor, University of Tennessee College of Law).[1] Institutional affiliations are for identification purposes only.

SUMMARY OF THE ARGUMENT

This Court has been clear about the importance of the Second Amendment right to bear arms, and equally clear that it includes the right to bear arms in public. The Fifth Circuit's majority opinion in this case undermines that right because it implicitly holds that a person carrying a firearm, without any accompanying threatening behavior, is sufficient grounds for a police officer to use deadly force.

Most Circuits have concluded that mere possession of a firearm does not authorize officers to use deadly force. The Fifth Circuit relied on "furtive gesture" cases to justify qualified immunity for the officer who killed Santos

1. No counsel for any party authored any part of this brief, and no party or counsel or anyone else made any monetary contribution to fund the preparation or submission of this brief. Notice of intent to file this brief was timely provided to counsel of record as required by Supreme Court Rule 37.2.

Argueta. Those cases not only involved sudden moves suggesting that a suspect was reaching for a firearm, but also included aggravating factors such as a suspect who is intoxicated or abusive or verbally threatening. None of those aggravating circumstances is present in this case. Argueta was fatally shot in the back while running away from the officers and holding his right arm against his body. Finding this non-threatening conduct to be sufficient grounds for qualified immunity is inconsistent with almost every Circuit's Fourth Amendment jurisprudence.

Ordinarily, the exercise of one constitutional right cannot be conditioned on relinquishment of another constitutional right. Yet that is the implication of the Fifth Circuit's analysis, which requires a person to relinquish the Second Amendment right to carry a firearm in order to preserve the Fourth Amendment right to be free from being unjustifiably killed by a police officer. The Fifth Circuit reached that result without even mentioning the Second Amendment.

Before the middle of the nineteenth century, the right to bear arms was considered an impediment to governmental actors disarming private persons or treating them adversely because they were armed. The Fifth Circuit's opinion places a judicial imprimatur on the jeopardization of Second Amendment rights without even addressing the implications of the Second Amendment.

ARGUMENT

I. The Fifth Circuit majority's implied holding that mere possession of a firearm by a non-threatening person is grounds for the use of deadly force conflicts with most other Circuits.

A. The Court must assume that a reasonable jury could believe there was no threatening behavior by Argueta.

In this appeal from the denial of a summary judgment on qualified immunity grounds, the Court must view the evidence in the light most favorable to the non-movants, the Argueta family. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam). A dispute about a material fact is genuine, and therefore defeats summary judgment, if the summary judgment evidence is such that a reasonable jury could return a verdict in favor of the non-moving party. *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993) (cited at App.26).

"When an officer uses deadly force, that force is considered excessive and unreasonable 'unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others.'" *Roque v. Harvel*, 993 F.3d 325, 333 (5th Cir. 2021) (internal citation omitted); *see also Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Whether an officer's use of force was excessive is necessarily a fact-intensive endeavor; in each case the Court "must still slosh our way through the factbound morass of 'reasonableness.'" *Scott v. Harris*, 550 U.S. 372, 383 (2007) (internal citation omitted).

1. A reasonable jury could believe that Argueta never threatened or engaged with the officers.

The Fifth Circuit and the district court both found that a reasonable jury could conclude that Officer Jaradi did not see Argueta carrying a firearm before fatally shooting him. App.9, 10-11, 32. Both courts also found that a reasonable jury could find that no officer verbally warned Argueta before shooting him. App.10, 17, 36.

The district court made two other findings about what a reasonable jury could conclude, which the Fifth Circuit did not dispute or address: (1) that Argueta was running away from Officer Jaradi when he was shot in the back, App.33-34, and (2) that Argueta did not ever point his weapon at Jaradi. App.35.

The dissenting opinion in the Fifth Circuit also notes that, "Argueta did not verbally threaten the Officers, did not shout obscenities, did not make any *sudden* movements toward an apparent weapon, was not visibly agitated and aggressive, nor was there any suspicion that he was intoxicated." App.19 (emphasis in original).

There is either no evidence, or disputed evidence that must be viewed in favor of the Argueta family, that Argueta ever looked at or moved toward the officers, ever spoke to them, or ever pointed his gun at them or displayed it to them. The evidence, taken as a whole, demonstrates no threatening behavior by Argueta.

2. A reasonable jury could believe that Argueta never engaged in the threatening behavior described in the "furtive gesture" cases.

The Fifth Circuit majority opinion grounds its analysis in cases involving the use of deadly force in response to "furtive gestures." *See* App.11-12. Yet the actions constituting furtive gestures in those cases were fundamentally more threatening than Argueta running away with his arm at his side, and each of the cases also involved adjacent threatening conduct that was absent in this case.

In *Salazar-Limon v. City of Houston*, 826 F.3d 272 (5th Cir. 2016), an officer's use of deadly force was found to be reasonable because of the plaintiff's threatening conduct. The plaintiff was pulled over, exited his car, and was talking to the officer in a 4-foot space between two cars, adjacent to a retaining wall. *Id.* at 275. Salazar resisted an attempt to handcuff him, engaged in a brief struggle with the officer, ignored the officer's instructions, and then turned toward the officer and suddenly reached for his waistband in a manner "consistent with a suspect retrieving a weapon." *Id.* This combative, resistant behavior, combined with the suspect's intoxication and being accompanied by three unrestrained companions, and the sudden movement that appeared to be reaching for a weapon, created in the officer a reasonable fear for his safety.

Here, there was no intoxication, no struggle, and no sudden movement directed toward the officer or a firearm. Argueta was at all times "running away from the officers

and towards an abandoned lot," and the autopsy report demonstrated that "both shots struck Argueta in the back." App.33, 46. "Common sense, and the law, tells us that a suspect is less of a threat when he is turning or moving away from the officer." App.20 (citing *Poole v. City of Shreveport*, 13 F.4th 420, 425 (5th Cir. 2021)); *see also* App.33, 46-47.

The second furtive gesture case cited by the Fifth Circuit is *Batyukova v. Doege*, 994 F.3d 717 (5th Cir. 2021). That case affirmed a grant of qualified immunity to an officer who used deadly force. The officer encountered the suspect's car "stopped in the left-hand lane of the highway." *Id*. at 722. After getting out of the car, the suspect "gave [the officer] the middle finger," and "continued to shout expletives," including "you're going to f**king die tonight." *Id.* "After ignoring almost every command [the officer] gave," including "get down now," and "let me see your hands," the suspect "began to walk toward [the officer]'s vehicle." *Id.* Finally, the suspect "reached her ... hand towards the waistband of her pants" and her hand "went behind her back and disappeared from [the officer]'s view." *Id.* at 722-23. Only then did the officer fire shots.

Again, none of those factors is present here. Argueta said nothing, ignored no commands, moved away from instead of towards the officers, and made no sudden move that suggested reaching for a firearm. Rather, he merely held his right arm by his side, in a manner that Officer Jaradi conceded "was not consistent with how he would raise his arm to shoot a gun." App.35.

The Fifth Circuit cites *Manis v. Lawson*, 585 F.3d 839 (5th Cir. 2009), as the final case in which an officer's use of

deadly force was found to be reasonable in response to a furtive gesture. In that case the suspect's car was stopped at a highway intersection, while the driver was asleep and under the influence of alcohol, cocaine, and barbiturates. *Id.* at 842. After the officers aroused the driver, he "began shouting obscenities and flailing his arms aggressively at them." *Id.* He then "began to repeatedly reach underneath the front seat," and ignored commands to "show his hands." *Id.* "When Manis appeared to retrieve some object and began to straighten up, [the officer] fired four rounds, killing Manis." *Id.*

Again, there is no comparable conduct here.

In summary, the Fifth Circuit's attempt to analogize this case to the "furtive gesture" cases is factually insupportable. Argueta's alleged furtive gesture was not a sudden movement to a concealed area while engaging with an officer that reasonably increased the officer's risk of being confronted with a firearm. Instead, it was Argueta's continued running away from the officer with his arm at his side, which Jaradi admitted "was not consistent with how he would raise his arm to shoot a gun." App.35. And this alleged "gesture" was neither preceded nor accompanied by hostile behavior that included intoxication, abusive language and gestures, or the failure to follow commands. This case is nothing like the furtive gesture cases and should not be governed by their holdings. *See* App.18-19, 41-42, 48. As Judge Elrod observed in her opinion dissenting from denial of rehearing en banc, this represents "a sweeping expansion of our furtive gesture case law." App.42-43.

B. In the absence of threatening behavior or furtive gestures, the officer's use of deadly force can only be based on Argueta's possession of a firearm.

Because the record and the standard of review compel the presumption that Argueta exhibited no threatening behavior and made no true furtive gesture, the only remaining justification for Jaradi's use of deadly force is his suspicion that Argueta was carrying a firearm.

First, the Fifth Circuit majority repeatedly highlights the fact that Argueta was armed—even though it conceded that it must assume that Jaradi never saw the firearm before using lethal force. The first line of the Fifth Circuit majority opinion identifies Argueta as a man who was "armed with a handgun equipped with a high-capacity ammunition extension." App.1-2. This introductory characterization is made despite the majority's admission that it must assume that Jaradi never saw a firearm before he used deadly force against Argueta, App.9, and that "[t]he reasonableness of the use of deadly force 'must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" App.6; *see also* App.49 ("We only consider the facts 'knowable to the defendant officers' at the time the officers used force.") (citing *White v. Pauley*, 580 U.S. 73, 76-77 (2017); *Kingsley v. Hendrickson*, 576 U.S. 389, 399 (2015)).

Nevertheless, the firearm discovered after the shooting undoubtedly colors the majority's analysis, not only in its initial characterization of Argueta, but later in the opinion. The majority noted: "Here, Argueta was armed with a high-capacity semiautomatic weapon, which

he kept out of view as he fled, and needed only a slight turn to begin firing on the officers from close range." App.14. The majority also observed, "Here, no reasonable jury could conclude that Argueta was visibly unarmed—because he was armed. At most, a jury could conclude that Argueta was *apparently* unarmed." App.15 (emphasis in original). In short, the subsequent discovery that Argueta was in possession of a firearm is a driving force in the majority's analysis.

Second, the majority opinion focuses on the way Argueta was holding his arm at his side as he ran away from the officers, suggesting not only that it created reasonable suspicion that he was carrying a firearm, but that he could use it in a dangerous manner. That carriage is articulated in a variety of ways:

- "Argueta kept his right arm pressed against his side and ran in a direction where only his left side was visible to the officers ... Argueta's apparent concealment of his right hand from Officer Jaradi's view—by pressing his right hand near his right hip with the core of his body between him and Jaradi—made Jaradi concerned that he could not, if necessary, react with his handgun in time to stop an attack." App.3.

- "Rather than swing both of his arms, as one naturally does when running, Argueta swung only his left arm, keeping his right arm purposefully and unnaturally pressed along his right side and out of sight as he ran away.... Argueta's clutching his right arm to his side as he fled at top speed was tantamount to 'mov[ing his arm] out of the

officer's line of sight such that the officer could reasonably believe the suspect was reaching for a weapon.'" App.14.

- "Argueta clutched his right arm to his side as he fled, which created 'reasonabl[e] fear that [Argueta] was about to pull a gun from a ... hidden location.'" App.15.

- "[B]y suspiciously concealing his right arm as he fled in a way that objectively suggested he was armed and dangerous, he engaged in a furtive gesture justifying deadly force." App.16-17.

Though these statements articulate the reasons to suspect Argueta was armed, they also demonstrate, either expressly or impliedly, that Argueta never showed his firearm during flight, App.9, that he did not make any sudden movements for his firearm, App.14, and that he did not raise or show his firearm or make any threatening gestures toward the officers. App.16-17. They simply do not support the majority's conclusion that Argueta made any furtive gesture or that he was both armed and dangerous.

Although the majority concludes that the failure to display or raise the firearm or otherwise make threatening gestures is immaterial, that conclusion misses the mark. Without displaying the firearm or using it in a threatening way, holding his arm at his side only justifies an assumption that Argueta was trying to stabilize a heavy object—perhaps a firearm—at his side as he ran. That might entitle the officer to a reasonable belief that Argueta was carrying a firearm, but not the belief that he

was a threat to use a firearm. If anything, the manner of carrying his arm suggested an intent to conceal a firearm rather than an intent to display it menacingly.

The majority opinion concludes that Argueta was "concealing his right arm as he fled in a way that objectively suggested he was armed and dangerous." App.17. This is a failed attempt to comply with this Court's directive that an officer should be able to point to "particular facts from which he reasonably inferred that the individual was armed and dangerous." *Sibron v. New York*, 392 U.S. 40, 64 (1968). But "armed" and "dangerous" are two different things, and the record must support a reasonable belief of both. *See Northrup v. City of Toledo Police Dept.*, 785 F.3d 1128, 1132 (6th Cir. 2015).

The Fifth Circuit substitutes a process of taxonomy for analysis of the dangerousness element. It concludes that the manner in which someone runs away from an officer is equivalent to a furtive gesture, and from that concludes that prior furtive-gesture authority would authorize the shooting. But the majority opinion does not cite any evidence or authority that running away, in a manner consistent with merely stabilizing an object and showing one's back, presents a level of danger akin to the furtive gesture of reaching inside one's waistband while engaged with an officer. Rather, the opinion recites:

> [W]e are not persuaded that ... whether Argueta's flight posed any risk to the officers or the public ... is a question of fact at all.... [W]e have repeatedly recognized that the risk an individual poses to officers or others is part of our objective-reasonableness analysis, a legal inquiry....

> Instead, we review as part of our objective-reasonableness analysis whether Argueta posed a threat to the officers or others. Our answer is straightforward: because we conclude that Argueta's concealing his right arm as he fled the police amounted to a furtive gesture akin to reaching for a waistband during a police confrontation, Jaradi's conclusion that Argueta posed an immediate danger was not unreasonable.

App.15-16. Concluding that the way Argueta was running is akin to the furtive gesture of reaching into a waistband depends on an assessment of whether the circumstances are similar. *Cf. New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 29 (2022) ("[B]ecause '[e]verything is similar in infinite ways to everything else,' ... one needs 'some metric enabling the analogizer to assess which similarities are important and which are not.'") (quoting C. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 774 (1993); F. Schauer & B. Spellman, *Analogy, Expertise, and Experience*, 84 U. Chi. L. Rev. 249, 254 (2017)). Yet the majority makes this determination as a matter of law, uninformed by citation to undisputed expert evidence concerning the relative danger of someone who is fleeing, showing his back to an officer, and the impediments to a fleeing subject making an aimed shot toward one facing his back. The Fifth Circuit's characterization is made without adequate basis to determine whether the circumstances are comparable.

Moreover, it is telling that the majority opinion references the officer allegedly being "concerned that he could not, if necessary, react with his handgun in

time to stop an attack." App.3. The majority's analysis substitutes for the dangerousness element a presumption that a person bearing a firearm constitutes an actual threat of imminent deadly force, and can be summarily shot, without warning, by an officer unless the officer is aware of circumstances that would prevent the person's imminent use of the firearm.

In short, the majority opinion's conclusion that Jaradi reasonably believed that he was in grave danger is based solely on his perception that Argueta possessed a firearm, not that he was engaged in any threatening behavior.

C. Allowing the use of deadly force based merely on the perceived possession of a firearm is inconsistent with almost every other Circuit.

Many federal circuits have expressly held that the mere possession of a firearm, without any adjacent threatening behavior, is insufficient grounds for the use of deadly force under the Fourth Amendment. For example, the Third Circuit has expressly declared, "Law enforcement officers may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed." *Bennett ex. rel. Est. of Bennett v. Murphy*, 120 F. App'x 914, 918 (3d Cir. 2005) (emphasis added).

Similar pronouncements have been made by the Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits. *See Franklin v. City of Charlotte*, 64 F.4th 519, 534-35 (4th Cir. 2023) ("it was well established in this Circuit that carrying a weapon, without more, does not justify an officer's choice to shoot"); *Heeter v. Bowers*, 99 F.4th 900,

914 (6th Cir. 2024) ("[A]n officer does not have probable cause to use deadly force against a suspect just because he is armed."); *Cole Est. of Richards v. Hutchins*, 959 F.3d 1127, 1132 (8th Cir. 2020) ("Generally, an individual's mere possession of a firearm is not enough for an officer to have probable cause to believe that individual poses an immediate threat of death or serious bodily injury; the suspect must also point the firearm at another individual or take similar 'menacing action.'"); *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013) (the fact that the "'suspect was armed with a deadly weapon' does *not* render the officers' response per se reasonable under the Fourth Amendment" (emphasis in original)); *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997) ("Law enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed."); *Perez v. Suszczynski*, 809 F.3d 1213, 1220 (11th Cir. 2016) ("[T]he mere presence of a gun or other weapon is not enough to warrant the exercise of deadly force and shield an officer from suit.").

Opinions from the First, Fifth, Seventh, and Tenth Circuits have allowed claims to proceed, or reversed their dismissal, on the basis that a question of fact existed on the level of danger present—even when the suspect possessed a weapon. *See McKenney v. Mangino*, 873 F.3d 75, 79 (1st Cir. 2017) (affirming the denial of summary judgment on qualified immunity grounds when an officer shot a man with a gun in his hand, but the suspect "was not making any sudden or evasive movements and was not pointing his gun at anyone"); *Allen v. Hays*, 65 F.4th 736, 744 (5th Cir. 2023) (reversing dismissal of a Section 1983 action based on the excessive use of force when officers fatally shot a motorist who they believed was reaching for a firearm,

noting that "an officer cannot escape liability any time he claims he saw a gun"); *Weinmann v. McClone*, 787 F.3d 444, 448 (7th Cir. 2015) (reversing a summary judgment granted on qualified immunity grounds, and noting that the suspect, who officers found with a gun in his lap, had "a constitutional right not to be shot on sight if he did not put anyone else in imminent danger or attempt to resist arrest for a serious crime"); *Walker v. City of Orem*, 451 F.3d 1139, 1157-60 (10th Cir. 2006) (affirming denial of summary judgment on qualified immunity grounds, noting that despite the fact that the suspect was armed with a weapon, the suspect presented no immediate threat to the safety of officers or others).

In short, almost all Circuits hold that the mere possession of a deadly weapon alone is insufficient to justify the use of deadly force. Yet when the facts of this case are closely scrutinized, the belief that Argueta was carrying a firearm is the only concrete circumstance the Fifth Circuit majority opinion relies on to support Jaradi's belief that he was in danger. That holding creates dangerous and against-the-grain precedent that this Court should address.

II. The Fifth Circuit majority's implied holding that mere possession of a firearm by an otherwise non-threatening person is grounds for the use of deadly force undermines the Second Amendment.

A. This Court has interpreted the Second Amendment to apply to carrying firearms in public.

Sixteen years ago, this Court declared, "There seems to us no doubt, on the basis of both text and history, that

the Second Amendment conferred an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). That opinion further explained that the right to "'bear arms'" refers to the right to "wear, bear, or carry [a firearm] ... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id*. at 584 (internal quotations and citations omitted).

Fourteen years ago, this Court confirmed that the Second Amendment limits state action. *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (plurality opinion). After the decisions in *Heller* and *McDonald*, lower courts presented with the issue "typically ... either found such a right to bear arms in public exist[ed] or assumed that it does, although there ... [was] some contrary authority." R. Barondes, *Federalism Implications of Non-Recognition of Licensure Reciprocity Under the Gun-Free School Zones Act*, 32 J.L. & Pol. 139, 186–87 (2017) (footnotes omitted). And that conclusion was implicit in the Court's *per curiam* determination in *Caetano v. Massachusetts*, 577 U.S. 411, 412 (2016), where the Court rejected application of a toothless standard in challenges under the Second Amendment, as applied to a ban on possession of a stun gun outside the home. *Com. v. Caetano*, 26 N.E.3d 688, 775 (Mass. 2015), *cert. granted, judgment vacated sub nom. Caetano v. Massachusetts*, 577 U.S. 411 (2016) (noting the arrest for possession of a stun gun of a woman seated in a vehicle in a supermarket parking lot).

The Second Amendment's inclusion of private firearm possession in public was unequivocally confirmed by this Court in *Bruen*, 597 U.S. at 1, 9–10, 60 (2022) (citing authority from 1857).

B. The Fifth Circuit's majority opinion burdens Second Amendment rights without grappling with the effect of its holding on the Second Amendment.

The Fifth Circuit's majority opinion focuses on the Fourth Amendment and does not mention the Second Amendment—though Second Amendment rights are implicated by its decision. The same is true for the opinions on which the majority opinion relies. *See supra* pp. 7-10 (citing *Salazar-Limon*, *Batyukova*, and *Manis*).

C. If the right to bear arms is conditioned on being subject to the otherwise unconstitutional use of deadly force, it becomes a second-class right.

In a number of contexts, courts have stated that one need not relinquish one constitutional right in order to preserve another one. This Court has stated, "[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968). *See also*, *e.g.*, *Arreola v. Mun. Ct.*, 139 Cal. App. 3d 108, 117 (Cal. Ct. App. 1983) ("We cannot hold that the legitimate exercise of a constitutional right will imply waiver of another constitutional right."); *State v. Diaz*, 808 S.E.2d 450, 452 (N.C. Ct. App. 2017), *aff'd in part, rev'd in part on other grounds*, 831 S.E.2d 532 (N.C. 2019) ("The State may not condition one constitutional right upon the violation of another.").

That holding follows *a fortiori* from the principle that:

> [A]s a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.

Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583, 593–94 (1926).

Where there is a right to bear arms, a non-threatening action that one might ordinarily take when bearing a firearm—in this case, running in a fashion that is consistent with maintaining control of, or preventing the movement of, a firearm at one's side—cannot be the additional element that justifies shooting the person. The alternative is to treat the Second Amendment as securing a second-class right. Yet this Court has confirmed that this right is not a second-class right. *Bruen*, 597 U.S. at 70.

D. The Fifth Circuit majority opinion conditions the exercise of the constitutional right to carry firearms on the relinquishment of the constitutional right to be free from the imposition of deadly force in the absence of threatening conduct.

As this case's procedural posture requires the facts to be taken, the Fifth Circuit validated the following conduct:

> A police officer fatally shot in the back a fleeing, non-threatening person, unrestrained by any commands from the officer because a combination of low light and body position prevented a view of one of the subject's hands.

In reaching this conclusion, the Fifth Circuit elided addressing the implications of its holding on the right to bear arms.

This case raises profound questions concerning what potential governmentally-imposed sanctions non-violent members of the public should weigh in deciding whether to bear arms. A consequence of the Fifth Circuit's approach is that members of the public considering exercising a constitutional right should weigh whether the value to them of doing so in a non-threatening manner exceeds the risk arising from it being lawful for the government to use deadly force against them. Moreover, that approach may result in one entirely abandoning Second Amendment rights, for there is always a possibility of coming into the presence of police. No court should be allowed to impose that burden arising from exercise of a constitutional right without even mentioning the right it is burdening.

The import of this consequence, based solely on suspicion that a non-threatening private person is bearing an arm, is breathtaking. One might conceive of numerous circumstances in which an officer may encounter a non-threatening subject bearing an arm, where view of one of the subject's hands is obscured. And it is possible that events will transpire so that, for a person properly carrying an otherwise concealed firearm, an officer will know that he is carrying a firearm. A transient combination of body

position, either alone or with windy conditions, can cause a firearm to "print." The Fifth Circuit's approach does not provide a limiting principle that would prevent validation of officers shooting private citizens in those cases.

E. Authority preceding the middle of the nineteenth century supports the view that the right to bear arms constrains governmental exercise of authority against non-violent members of the public suspected of carrying arms.

In *Bruen*, this Court indicated that a primary component of analyzing burdens on bearing arms is an assessment of whether the contemporary restriction had a Founding-Era analogue,[2] in terms of a comparable

2. *Bruen* reserves the issue of whether, for state restrictions, the relevant timeframe would be that of ratification of the Fourteenth Amendment. *Bruen*, 597 U.S. at 37–38. Adopting that later timeframe would seem inconsistent with the principles announced by Justice Baldwin in *Johnson v. Tompkins*, 13 F. Cas. 840 (C.C.E.D. Pa. 1833), while riding circuit, discussed *infra* p. 24-25.

The Court's authority that the Bill of Rights did not, before adoption of the Fourteenth Amendment, limit State action is traced to *Barron v. Mayor of Baltimore*. *E.g.*, *Bruen*, 597 U.S. at 37 ("Strictly speaking, New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second. *See*, *e.g.*, *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 250–251, 8 L.Ed. 672 (1833) (Bill of Rights applies only to the Federal Government")). The *Johnson v. Tompkins* opinion is dated, per Westlaw, April 1833. That is a few months after *Barron v. Mayor of Baltimore*, 32 U.S. 243 (1833), was decided. Information published by the Court identifies a decision date for *Barron* of Feb. 16, 1833. *See* Dates of Supreme Court Decisions

governmental objective and a comparable burden on bearing arms. 597 U.S. at 26–30. Two Founding-Era analogues bear consideration and demonstrate that in that era, merely being armed did not justify a governmental actor's use of deadly force.

The first is the Boston Massacre trial:

> On the night of March 5, 1770, British Redcoats fired on a threatening crowd that was pelting them with ice. Five members of the crowd were killed....
>
> Defense counsel John Adams invoked "Self Defence, the primary Canon of the Law of Nature." Citing the treatise of William Hawkins, a leading authority on the common law ... Adams acknowledged that the Bostonians had a right to be armed for self-defense against the soldiers: "Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence, not for offence."
>
> Outside the courtroom, John Adams's cousin Samuel Adams penned an essay on the death of Crispus Attucks, a free Black man who had been killed during the Massacre. Mr. Attucks 'was leaning upon his stick when he fell, which

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and Arguments: United States Reports: Volumes 2-107 (1791-1882), https://www.supremecourt.gov/opinions/datesofdecisions.pdf (visited July 2, 2024).

> certainly was not a threatening posture: It may be supposed that he had as good right, by the law of the land, to carry a stick for his own and his neighbor's defense, in a time of danger, as the Soldier who shot him had, to be arm'd with musquet and ball, for the defence of himself and his friend the Centinel.'
>
> The soldier who killed Crispus Attucks was convicted of manslaughter.

Nicholas J. Johnson et al., Firearms Law and the Second Amendment, at 218–19 (3d ed. 2022) (citation omitted) (quoting 3 Legal Papers of John Adams 248 (L. Kinvin Wroth & Hiller B. Zobel, eds., 1965); 2 The Writings of Samuel Adams 119 (Harry Alonzo Cushing, ed., 1904)).

In this view, a person's being armed does not justify a governmental actor's shooting the person, even if the person is in the company of others who are subjecting governmental actors to threatening, physical contact.

The second illustration is from *Johnson v. Tompkins*, 13 F. Cas. 840 (C.C.E.D. Pa. 1833).

> Justice Baldwin, riding circuit a few months after *Barron v. Mayor of Baltimore* was decided, apparently took the position that the Second Amendment nevertheless restricted State action. *Johnson v. Tomkins* addresses tort claims for false imprisonment against a justice of the peace in connection with the arrest of armed persons who were engaged in retrieving a slave. In an incredibly prolix opinion,

> consisting of the charge to the jury, Justice Baldwin recites, among other authorities, a Pennsylvania constitutional provision and the Second Amendment before concluding that the owner of a slave had a right to seize the slave, and that he "had a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either...."
>
> ... In stating that, under the alleged facts, the alleged wrongdoers would not have had a lawful basis for their actions, Justice Baldwin summarizes constitutional principles that would operate to invalidate any potential State statutory basis for the detention.

R. Barondes, The Civil Right to Keep and Bear Arms: Federal and Missouri Perspectives, at 67 (2023 ed.) (footnotes omitted) (citing *Barron v. Mayor of Baltimore*, 32 U.S. 243 (1833)) (quoting *Tompkins*, 13 F. Cas. at 852). Included in that list of authorities is the Second Amendment, the operative portion of which Justice Baldwin quotes. *Tompkins*, 13 F. Cas. at 850.

This 1833 opinion demonstrates that the Founding-Era conceptualization of the right to bear arms is an impediment to state actors disarming private persons or adversely treating them merely on account of their being armed. Moreover, it does so in the context of a claim against a state actor.

These Founding-Era analogues confirm what we know is true today under the law of the majority of Circuits in

this country: mere possession of a firearm does not justify the use of deadly force by a state actor. Yet here, the Fifth Circuit has permitted just that, with no examination of the burdens its decision imposes on the Second Amendment right to bear arms. This Court should take the opportunity to address the Fifth Circuit's anomalous majority opinion that threatens the Second Amendment right to bear arms.

CONCLUSION

Amici respectfully suggest that the Fifth Circuit opinion should be reversed.

Respectfully submitted,

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