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 AMICUS CURIAE CIVIL RIGHTS CORPS IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

CIVIL RIGHTS CORPS ("CRC") is a non-profit organization dedicated to challenging systemic injustice in the United States' legal system. CRC works with survivors of violence, individuals accused and convicted of crimes, families and communities, and government officials to create a legal system that promotes safety, equality, and freedom.[1]

SUMMARY OF THE ARGUMENT

The Fifth Circuit erred in its excessive force analysis below in two major respects: (1) by failing to consider and appropriately weigh the officers' lack of reasonable suspicion to detain or probable cause to arrest Mr. Argueta; and (2) by grossly expanding "furtive gesture" jurisprudence such that officers may kill anyone who could conceivably be armed, contradicting established law.

As Petitioner's brief explains in depth, the Fifth Circuit failed to construe the facts in the light most favorable to the non-moving party at the summary judgment stage: here, Petitioner-Plaintiff. Had the court done so, it would have concluded that Officer

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[1] No counsel for any party authored any part of this brief, and no party or counsel for party 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.

Derrick Jaradi had no reason to stop or arrest Santos Argueta in the first place. This fact weighs heavily in favor of a finding that it was excessive and unreasonable for Jaradi to shoot Mr. Argueta in the back and kill him. The Fifth Circuit's decision in this case contradicts both its own and other Circuits' precedent and loses sight of the fact that "reasonableness" is the paramount inquiry in the Fourth Amendment context.

In addition, the Fifth Circuit's decision dangerously expands upon "furtive gesture" jurisprudence, allowing officers to use deadly force against anyone they suspect of possessing a gun, whether or not that person takes affirmative steps to threaten others. The court concluded that Jaradi's decision to shoot Mr. Argueta in the back was proper because video evidence showed Mr. Argueta "clutch[ing] his right arm to his side as he fled," and a gun was later found on his person. The court conceded that the video did not reflect Mr. Argueta showing his gun, let alone pointing it at anyone, at any point. There is no Supreme Court precedent supporting the notion that a person being armed, without more, justifies the use of deadly force, and for good reason. This approach places insufficient weight on the sanctity of human life and invites Fourth Amendment violations and tragedy, especially in constitutional carry states like Texas.

ARGUMENT

I. THE ABSENCE OF PROBABLE CAUSE TO ARREST MR. ARGUETA RENDERED THE DEADLY FORCE INFLICTED ON HIM EXCESSIVE.

In conducting its excessive force analysis, the Fifth Circuit failed to consider that Jaradi lacked reasonable suspicion to stop or probable cause to arrest Mr. Argueta. As noted in Plaintiffs' opening brief, the Fifth Circuit's majority opinion also failed to view the facts in the light most favorable to Mr. Argueta, as is required at the summary judgment stage, in violation of clear Supreme Court precedent. *See* Pet. Br. at 4, 13-14, 33-35; *see also Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam). Had the court done so, it would have been forced to engage with the following set of facts:

- That Mr. Argueta was not wanted for any crime;
- That he was driving a vehicle at around 3 AM;
- That he entered a convenience store;
- That he exited the convenience store without any issue;
- That he returned to his car; and
- That he drove away at a moderate rate of speed, adhering to all traffic laws. App.2-3, 23-24.

No reasonable officer faced with these facts could conclude that they possessed reasonable suspicion, much less probable cause, that a crime had occurred. Such a

finding is integral to excessive force analysis. *See, e.g., Thomas v. Dillard*, 818 F.3d 864, 889-90 (9th Cir. 2016), *as amended* (May 5, 2016) ("Thus, that Dillard had no reason to believe Thomas was armed and dangerous, and hence no need to conduct a frisk, is relevant—indeed, highly relevant—to the excessive force analysis."). And yet, Jaradi activated his police lights and stopped Mr. Argueta's car, which culminated in Mr. Argueta exiting his vehicle and running away from the officers. App.3, 33-34. Jaradi then shot Mr. Argueta in the back. App.33-34.

As this Court has noted, the central question when examining an asserted Fourth Amendment violation is "the factbound morass of 'reasonableness." *See generally Scott v. Harris*, 550 U.S. 372, 383 (2007). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989). This determination necessitates "careful attention to the facts and circumstances of each particular case" including consideration of 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. But underlying the objective-reasonableness test is the principle that the force used must be balanced against the need for force. *See Lincoln v. Turner*, 874 F.3d 833, 847 (5th Cir. 2017). This analysis applies whether the excessive force used is deadly or not. *Graham,* 490 U.S. at 395.

Several Circuit Courts have held that the absence of reasonable suspicion weighs heavily in favor of a finding of excessive force, as it indicates that there was no crime at issue. This finding makes sense, because, as this Court has underscored, "[i]n the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference." *Brown v. Texas*, 443 U.S. 47, 52 (1979). In *Velazquez v. City of Long Beach*, 793 F.3d 1010, 1026-27 (9th Cir. 2015), the Ninth Circuit held that the district court's improper dismissal of an unlawful arrest claim tainted the jury's consideration of an excessive force claim, because the central theory of plaintiff-petitioner's case was that there was no basis for detention to begin with. The Ninth Circuit reasoned that because the jury was not provided an adequate opportunity to consider the circumstances that did or did not justify the arrest in the unlawful arrest claim, they were unable to consider these factors when evaluating the excessive force claim—factors which should have been integral to a finding of excessive force. *See id.* at 1026.

In *Pauly v. White*, 874 F.3d 1197 (10th Cir. 2017), after remand back from this Court, the Tenth Circuit re-examined an incident where the decedent was shot by a police officer who arrived at his home following an earlier allegation of road rage. The Tenth Circuit noted that the first of the *Graham* factors weighed in favor of plaintiff-petitioners because the officers "did not have enough evidence or probable cause to make an arrest." *Id.* at 1215 (internal quotations omitted). But the Tenth Circuit went even further, stating that the *third* of the *Graham* factors also weighed in favor

of plaintiff-petitioners: because the officers lacked probable cause to make an arrest, it could not be stated that decedent was actively resisting arrest or attempting to evade arrest by flight. *Id.* at 1222.

The Fifth Circuit itself has acknowledged that the overarching question in evaluating a Fourth Amendment violation is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Trammell v. Fruge*, 868 F.3d 332, 340 (5th Cir. 2017) (quoting *Graham*, 490 U.S. at 397). In *Trammell*, the Fifth Circuit noted that "a minor offense militat[ed] against the use of force." *Trammell*, 868 F.3d at 340. Likewise, in *Goodson v. City of Corpus Christi*, 202 F.3d 730 (5th Cir. 2000), petitioner suffered a broken shoulder as a result of being tackled by police officers who lacked reasonable suspicion to detain him and from whom he was not fleeing. After determining that questions of fact persisted as to the existence of probable cause, and finding that this precluded summary judgment as to an unlawful arrest claim, the Fifth Circuit held that sufficient evidence existed for the fact finder to determine that excessive force was used. *Id.* at 740.

Yet, here, the Fifth Circuit's majority opinion failed to consider the absence of probable cause while analyzing the deadly force Jaradi used against Mr. Argueta. In meticulously analyzing whether certain disputed facts were material to its excessive force analysis at the summary judgment stage, the Fifth Circuit "failed to see the forest (the overall standard of objective reasonableness) for the trees." *See Estate of Hill by Hill v. Miracle*, 853 F.3d 306, 313 (6th Cir. 2017) (explaining that, although the *Graham* factors are certainly used as an aid in the excessive force

context, it is the overall standard of reasonableness that controls). As in *Velazquez, Pauly, Trammell,* and *Goodson*, when viewing the facts in the light most favorable to the plaintiff-petitioner, there was no reasonable suspicion or probable cause to arrest Mr. Argueta.[2] This fact should have been weighed by the majority here, and it should have steered the court away from a finding that Jaradi's actions—shooting Mr. Argueta in the back and killing him—were reasonable.

Had the majority considered these facts, the court could not possibly have determined that Jaradi's use of force was reasonable. This Court should reverse the Fifth Circuit's majority opinion for failing to consider and weigh crucial facts.

II. THE FIFTH CIRCUIT'S HOLDING CONSTITUTES A DANGEROUS EXPANSION OF FURTIVE GESTURE JURISPRUDENCE THAT CONTRADICTS ESTABLISHED LAW.

In view of the sanctity of human life, this Court made clear in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), that "[i]t is not better that all felony suspects die than that they escape." Accordingly, "notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him." *Id.* at 2. When evaluating deadly force used during a foot chase, courts should consider whether: 1) the fleeing person "threaten[ed] the officer with a weapon or there [was] probable cause to believe that he [] committed a crime involving the infliction or

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[2] Nor could it even be stated that Mr. Argueta was actively resisting or attempting to evade arrest (the third *Graham* factor) because, as in *Pauly*, officers had no basis to arrest Mr. Argueta in the first instance.

threatened infliction of serious physical harm;" 2) deadly force was "necessary to prevent escape;" and 3) "where feasible, some warning [was] given." *Id.* at 11-12.

Although *Scott v. Harris*, 550 U.S. 372, 382 (2007), clarified that *Garner* "did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force,'" it reaffirmed that courts must weigh the risk of bodily harm an officer poses to a fleeing person against the "threat to the public" the officer seeks to eliminate. *Id.* at 383. Where, as in *Scott*, "it is clear from the videotape that [the fleeing person] posed an actual and imminent threat to the lives" of other civilians and officers present, an officer is given commensurate leeway to address that risk, up to and including the use of deadly force. *Id.* at 384-386 (holding that car chase Harris initiated "posed a substantial and immediate risk of serious physical injury to others" and "no reasonable jury could conclude otherwise," thus "Scott's attempt to terminate the chase by forcing respondent off the road was reasonable."). Further, the *Scott* court made clear that *Garner*'s cogent analysis is still good law that can and should be applied to similar factual scenarios. *Id.* at 383.

Here, the Fifth Circuit grappled with *Garner* and *Scott* only in the broadest and barest sense, reciting the Fourth Amendment standard, but evading its demands. There is zero video evidence showing that Mr. Argueta threatened anyone with a weapon or had committed a crime involving the infliction or threat of physical harm. *Garner*, 471 U.S. at 11. As the Fifth Circuit itself acknowledged,

> [t]he only action visible in the police footage is Argueta slowly driving away from the police, exiting the vehicle, and fleeing toward an

> empty lot. And, while the footage does show that Argueta keeps his right arm pressed against the right side of his body during flight . . . *the video does not clearly reflect that Argueta showed the gun during his flight.*

App.9 (emphasis added). Had the video evidence been ambiguous as to whether Mr. Argueta threatened anyone with a weapon, the court would still have been required to draw all inferences in Mr. Argueta's favor and assume that he did not threaten the officers with a weapon. *Tolan v. Cotton*, 572 U.S. 650 (2014). It failed to do so. Further, as discussed *supra* Section 3, Jaradi did not suspect Mr. Argueta of "a crime involving the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11. Taking the facts in the light most favorable to Mr. Argueta, Jaradi had no reason to stop him or suspect him of any crime. However, even under Jaradi's version of events, the officers merely observed Mr. Argueta speaking to a woman "whom Jaradi suspected of being a prostitute." App.2. Accordingly, he was, at most, suspected of the nonviolent crime of soliciting prostitution—an offense that posed no threat of serious physical harm to anyone. Beyond all this, it was not "necessary" to shoot and kill Mr. Argueta, with "no warning," in order to prevent him from escaping from a solicitation arrest. *Garner*, 471 at 11; App.17.

The Fifth Circuit's decision in this case constitutes a dangerous expansion of "furtive gesture" jurisprudence, transforming any physical posture an officer cannot immediately explain into a justification to kill. Were there more than one "bad fact" here, the opinion would lend credence to the old adage that "bad facts make bad law." Instead, the court seems to have worked

backwards from *one* fact—that Mr. Argueta ultimately had a gun on his person—and ignored the far greater number of facts in Mr. Argueta's favor; facts that insist he should be alive today. A clockmaker's duty is not to ask whether a broken clock happened to get the time right, but to ask how and whether the clock must be fixed. The same is true of courts confronted with tragedies like these: the after-the-fact revelation that Mr. Argueta was armed, alone, does not justify his death, nor should it shield Jaradi's deadly force from close scrutiny.

The Fifth Circuit conceded that—taking the facts in the light most favorable to Mr. Argueta—"the gun was not visible to Jaradi when Jaradi fired." App.15. Jaradi's sole basis for suspecting Mr. Argueta of having a gun was that he "clutched his right arm to his side as he fled." App.15. It is commonplace to see people jogging in this manner—to keep their phone and wallet from bouncing out of their pocket; to support a bad arm or hip; or to keep a bottle of water or umbrella under their arm. Nonetheless, it is this "clutching" behavior, made while Mr. Argueta was running *away* from police, that the Fifth Circuit characterized as a "furtive gesture akin to reaching for a waistband,"—this, in the Court's eyes, made it reasonable for Jaradi to conclude that Mr. Argueta "posed an immediate danger" and kill him. App.16. This is an enormous reach. In fact, Jaradi admitted that "[Mr.] Argueta's motion was not consistent with how he would raise his arm to shoot a gun, and that Argueta could have just been swinging his arm while running." App.35.

As the Fifth Circuit's own citations demonstrate, "furtive gestures" justifying force usually involve a fast or sudden reaching movement indicating a gun is

about to be drawn. *See Batyukova v. Doege*, 994 F.3d 717, 723 (5th Cir. 2021) (affirming grant of summary judgment in favor of defendant officers where decedent "*reached* behind her towards her waistband") (emphasis added); *Manis v. Lawson*, 585 F.3d 839, 844 (5th Cir. 2009) (holding that officer's use of deadly force did not violate Manis's Fourth Amendment rights where "Manis *reached* under the seat of his vehicle and then moved as if he had obtained the object he sought.") (emphasis added). This is generally understood across Circuits. For example, in *Aleman v. City of Charlotte*, 80 F.4th 264, 286-87 (4th Cir. 2023), *cert. denied*, 144 S.Ct. 1032 (2024), the Fourth Circuit indicated that a "furtive" movement justifying deadly force is a "threatening movement with the weapon, thereby signaling to the officer that the suspect intends to use it in a way that imminently threatens the safety of the officer or another person." Similarly, in *Calonge v. City of San Jose*, 104 F.4th 39, 46 (9th Cir. 2024), the Ninth Circuit stated that "an immediate threat might be indicated by a furtive movement, harrowing gesture, or serious verbal threat," but clarified that "[i]f a person possesses a weapon but doesn't reach for his waistband or make some similar threatening gesture, it would clearly be unreasonable for the officers to shoot him."

There is no video evidence that Mr. Argueta ever made such a threatening reaching motion, thus, his odd running posture could hardly be deemed a "furtive gesture" in the first place. In any case as legal scholars have long observed,

> The courts have been inconsistent in their definition of "furtive gesture," calling it any conduct which an experienced officer considers suspicious. Because such a gesture is often

> innocent movement on the part of the suspect, however, it is not grounds for reasonable suspicion in the absence of additional facts. Nervousness, excitement, or abrupt movement is generally considered a natural response to confrontation with an officer of the law.[3]

There is no Supreme Court precedent holding that the mere indication a person *may* be armed justifies the use of deadly force, and for good reason. Mannerisms and gestures capable of innocent explanations, alone, should not lead to the loss of human life. Had Jaradi been *certain* Mr. Argueta was armed, his use of deadly force would still have been unreasonable. All Circuit Courts but the Fifth agree that even confirmed weapon possession does not, by itself, justify the use of deadly force. Notably, the Fifth Circuit used to be in lockstep with the other Circuits, as recently as 2015. *See Cole v. Carson*, 802 F.3d 752 (5th Cir. 2015) (holding that, if officers shot the plaintiff while he held a gun to his own head and turned to his left, this violated the Fourth Amendment, because "reasonable officers were on notice that they could not lawfully use deadly force to stop a fleeing person who did not pose a severe and immediate risk to the officers or others . . . ").

FIRST CIRCUIT

- *McKenney v. Mangino*, 873 F.3d 75, 84 (1st Cir. 2017) (holding that, where officer shot McKenney, a suicidal man who held a gun

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[3] Michelle Conklin & William Mulcahy, *People v. Thomas: Furtive Gestures as an Element of Reasonable Suspicion-The Ongoing Struggle to Determine a Standard*, 61 DENV. L. REV. 579, 590 (1984), available at https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=2870&context=dlr

in his hand, from a distance and without warning, he violated McKenney's clearly established rights)

SECOND CIRCUIT

- *Jamison v. Metz*, 541 F.App'x 15, 19 (2d Cir. 2013) (holding that, where officer shot Jamison, a man who had been running and firing at officers with a gun, force was still objectively unreasonable because "the officers lacked probable cause to believe that Jamison posed a serious threat to the officers or to others" at the time they shot him)

THIRD CIRCUIT

- *Bennett ex rel. Est. of Bennett v. Murphy*, 120 F.App'x 914, 918 (3d Cir. 2005) ("'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.'" (quoting *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997)).

FOURTH CIRCUIT

- *Hensley ex rel. North Carolina v. Price*, 876 F.3d 573, 582 (4th Cir. 2017) (holding that, if officers shot Hensley without warning and "only because he was holding a gun, although he never raised the gun to threaten" them and "he never pointed the gun at anyone" force would be objectively unreasonable)
- *Cooper v. Sheehan*, 735 F.3d 153, 159 (4th Cir. 2013) ("[T]he mere possession of a firearm by a suspect is not enough to permit the use of deadly force. Thus, an officer does not

possess the unfettered authority to shoot a member of the public simply because that person is carrying a weapon. Instead, deadly force may only be used by a police officer when, based on a reasonable assessment, the officer or another person is *threatened* with the weapon.")

SIXTH CIRCUIT

- *King v. Taylor*, 694 F.3d 650, 653, 662-63 (6th Cir. 2012) (holding that use of deadly force against person who was holding a gun and had earlier threatened to "kill someone today" was unreasonable, assuming the individual "did not point [the] gun towards the officers just before he was shot")

SEVENTH CIRCUIT

- *Williams v. Indiana State Police Dep't*, 797 F.3d 468, 484-85 (7th Cir. 2015) (holding that suspect's mere possession of a weapon does not justify the use of deadly force absent threat of harm to others)
- *See also Weinmann v. McClone*, 787 F.3d 444 (7th Cir. 2015) (denying qualified immunity where officers shot a suicidal man who was sitting in a lawn chair with a shotgun across his lap, because "it does not matter for purposes of the Fourth Amendment that the [officer] subjectively believed that his life was in danger" and "officers may not use deadly force against suicidal people unless they threaten harm to others, including the officers").

EIGHTH CIRCUIT

- *Cole Est. of Richards v. Hutchins*, 959 F.3d 1127, 1134-35 (8th Cir. 2020) ("A robust consensus of cases of persuasive authority, confirms that . . . a person in possession of a firearm is not an immediate threat unless he appears "ready to shoot"—was clearly established" before 2016.)

NINTH CIRCUIT

- *A. K. H ex rel. Landeros v. City of Tustin*, 837 F.3d 1005, 1013 (9th Cir. 2016) (holding that where officer shot Herrera but "never saw a gun" and "could provide no basis for his belief that Herrera was armed except . . . that Herrera had one hand concealed" officer violated clearly established Fourth Amendment law)
    - *See also Hayes v. County of San Diego*, 736 F.3d 1223, 1233 (9th Cir. 2013) ("The mere fact that a suspect possesses a weapon does not justify deadly force.")
    - *Curnow By & Through Curnow v. Ridgecrest Police,* 952 F.2d 321, 325 (9th Cir. 1991) ("[T]he police officers could not reasonably have believed the use of deadly force was lawful because Curnow did not point the gun at the officers and apparently was not facing them when they shot him the first time . . . defendants-appellants are not entitled to qualified immunity.")

TENTH CIRCUIT

- *Walker v. City of Orem*, 451 F.3d 1139, 1157-60 (10th Cir. 2006) (denying qualified immunity where the plaintiff was armed with a weapon, noting that plaintiff posed no immediate threat to the safety of officers or others)

ELEVENTH CIRCUIT

- *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. Where the weapon was . . . and what was happening with the weapon are all inquiries crucial to the reasonableness determination. . . . ")

D.C. CIRCUIT

- *Flythe v. District of Columbia*, 791 F.3d 13, 22 (D.C. Cir. 2015) (reversing District Court's grant of summary judgment in favor of defendant officers, finding that radio transmission indicating that Flythe attempted to stab an officer did not, alone, justify the use of deadly force, because "[j]ustification for deadly force exists only for the life of the threat"; accordingly, "whether [the shooting officer] acted reasonably *does* turn on whether, as he alleges, Flythe attacked him with a knife."

It bears emphasis that all of the states in these Circuits permit concealed carry with the proper license, and many are constitutional carry states, including

Texas.[4] Accordingly, some legal scholars have argued that, "[b]ecause gun rights are considerably more expansive today than they were back in 1968, an individual carrying a firearm, without more, should be insufficient to justify" Fourth Amendment intrusions.[5] Mr. Argueta's case illustrates the too often-deadly conflict between state gun laws and unduly permissive excessive force jurisprudence.

This Court should reverse the Fifth Circuit's majority opinion for expanding "furtive gesture" jurisprudence beyond recognition, transforming any physical posture an officer cannot immediately explain into a license to use deadly force.

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[4] *Which States Allow Constitutional Carry?*, United States Concealed Carry Association, https://www.usconcealedcarry.com/blog/constitutional-carry-in-states/ (last visited July 18, 2024).

[5] Alexander Butwin, *"Armed and Dangerous" A Half Century Later: Today's Gun Rights Should Impact Terry's Framework*, 88 FORDHAM LAW REVIEW 1033, available at https://fordhamlawreview.org/wp-content/uploads/2019/12/Butwin_December_N_5.pdf

CONCLUSION

Mr. Argueta should be alive today, and it is a great tragedy that he is not. If this Court permits the Fifth Circuit to depart from foundational Fourth Amendment principles and protections, many more tragedies will follow. Amicus Curiae urges this Court to reverse the Fifth Circuit's opinion.

Respectfully submitted,

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