No. 23-1257

In the
# Supreme Court of the United States

SANTOS ARGUETA, *et al.*,
*Petitioners*,

v.

DERRICK S. JARADI,
*Respondent*.

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

## REPLY BRIEF FOR PETITIONERS


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## Introduction

The majority opinion breaks new ground by holding that police can stop a teen for a minor traffic violation and then shoot him in the back, without warning, because he may have been holding a gun while he ran away. As the petition shows, virtually all other circuits disagree. The Court should grant the petition because cases like this frequently recur, because lower courts look to of out-of-circuit authority when deciding qualified immunity, and because the decision will inevitably chill exercise of Second Amendment rights by lawful gun owners concerned, quite understandably, about what might happen during their own encounters with law enforcement when they openly carry.

In response, Jaradi mostly stresses his view of the facts, ignoring that appellate courts can't review district courts' findings that particular facts are genuinely disputed. When he does accept that the facts must be construed in Petitioners' favor, he defends the shooting and the majority's decision in a way that just highlights the circuit split at issue, rather than negating it or somehow explaining its insignificance. Lastly, Jaradi contends that Argueta's Fourth Amendment rights in these circumstances weren't clearly established. That assessment would be better made by the lower courts in the first instance, and in any case Jaradi is wrong – Argueta's rights here were well settled in 2018. The Court should review this case or summarily reverse, as in many of this Court's qualified immunity cases.

## Argument

### I. Jaradi's Relitigation of the District Court's Factual Rulings Fails to Address the Circuit Split Petitioners Identify

The petition demonstrates how the majority's decision creates a circuit split over whether police can shoot a suspect who might be holding something, including possibly a gun, as he flees, but who exhibits no other signs of dangerousness. Pet. 15-23. Jaradi responds by relitigating the existence of key factual disputes found by the district court and claiming that Argueta "insist[s] on a recording corroborating Officer Jaradi's testimony." Opp. 19. Neither argument convinces.

This Court held in *Johnson v. Jones* that an officer invoking qualified immunity "may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id.* 515 U.S. at 319-20; *accord Plumhoff v. Rickard*, 572 U.S. 765, 772-73 (2014). The only exception is where video evidence "blatantly contradict[s]" the plaintiff. *Scott v. Harris*, 550 U.S. 372, 380 (2007); App. 5.

The district court found four genuine and material factual disputes, including "whether Jaradi could see that Argueta held a weapon." App. 32. It concluded that "a jury could find that Jaradi did not know or reasonably suspect that Argueta possessed a weapon when he fired." *Id.* The court noted Jaradi's deposition testimony that he saw Argueta holding a

pistol, but it also recognized that his "body-camera footage could lead a reasonable jury to doubt whether Jaradi could see Argueta's weapon" given the lighting, the speed of the encounter, and their positioning. *Id.* The majority reviewed the video and confirmed this finding. App. 8-9.

Whether Jaradi could see that Argueta was holding a gun is therefore conclusively resolved for purposes of this appeal: he could not. Nonetheless, Jaradi's primary basis for opposing the petition is that Argueta had a gun, which Jaradi saw. Opp. 10-21; *see* Opp. 10 ("The evidence establishes that Argueta *was* holding a gun (emphasis in original)). As proof, he quotes his own testimony, stresses that there was "some illumination," notes that he saw Argueta well enough to hit his target, and observes that his body camera was only chest-high and therefore might not have captured everything he saw. *Id.* at 10-11, 14-15. These hair-splitting disagreements with the district court's finding of a genuine factual dispute have no place on interlocutory appeal and are therefore irrelevant to the petition. So is the fact that Argueta was found holding the gun as he lay dying; what an officer learns *after* the incident doesn't matter. *Hernandez v. Mesa*, 582 U.S. 548, 554 (2017). Indeed, Jaradi's factual parsing – literally step-by-step as Argueta ran, Opp. 17-18, and inch-by-inch from Jaradi's neck to his eyes, *id.* at 19 – only highlights that the case turns on circumstantial specifics appropriate for resolution by jurors, not judges.

Jaradi further accuses Petitioners of seeking a new rule requiring an officer to "face trial unless [he] files a recording of the armed suspect holding the gun

when the officer fired." Opp. 20. Of course, Petitioners don't argue this, which is why Jaradi fails to cite anything in the petition. It's not that Jaradi needs a video showing Argueta holding a gun, it's that the video his own body camera recorded could lead a reasonable juror to conclude that Argueta never showed a weapon, since one isn't seen on film. Similarly, Jaradi asserts that the video doesn't "negate his testimonial evidence." Opp. 18. It is true that testimonial evidence is no less weighty than video evidence, but here the two conflict, creating a factual dispute not reviewable in this appeal.

## II. *Mullenix v. Luna* is Irrelevant to the Petition

A further circuit split created by the majority's decision concerns whether the degree and immediacy of the threat presented by a suspect is a factual or legal question. Pet. 23-27. Petitioners acknowledge that the objective reasonableness of an officer's conduct is a matter for the court, but that inquiry "turns on the 'facts and circumstances of each particular case,'" *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021) (*quoting Graham v. Connor*, 490 U.S. 386, 396 (1989)), Pet. 23-27, and *Graham* identifies "whether the suspect poses an immediate threat to the safety of the officers or others" as one such fact. 490 U.S. at 396. The danger's imminence and seriousness are subsidiary factual questions – not the ultimate legal question of objective reasonableness. *Id.* The passage from *Scott* cited by Jaradi himself clarifies this further: reasonableness is a "pure question of law," but it can only be answered "once we have determined the relevant set of facts." 505 U.S. at 381

n. 8; Opp. 21-22. Unsurprisingly, then, circuit courts routinely affirm denials of summary judgment on qualified immunity grounds because district courts' assessments of the extent and nature of the threats to officers are unreviewable on appeal. Pet. 25-26.

Here, the district court determined that the level of danger Argueta posed was a disputed factual issue because the video shows him "running away from the officers," and the autopsy report confirms he was shot in the back. App. 33-34. Although this finding is plainly factual, the majority erroneously deemed it to be legal, reviewed it, and reached a contrary conclusion despite *Johnson*'s rule precluding interlocutory oversight of the genuineness of factual disputes. Had the majority left this factual dispute standing, as it should have, it could not have reversed the denial of summary judgment.

In response, Jaradi stresses a single decision: *Mullenix v. Luna*, 577 U.S. 7 (2015). Opp. 22-23. But *Mullenix* doesn't concern whether the extent of danger prefigured by a suspect is factual or legal. It avoided the objective reasonableness prong altogether, considering only whether applicable law was clearly established. 577 U.S. at 11. Jaradi cites the procedural history of the case, which notes Fifth Circuit Judge King's opinion characterizing the imminence of risk as a restatement of the objective reasonableness test. *Id.* at 10; Opp. 22. Whatever the meaning or correctness of one circuit judge's views in *Mullenix*, however, this Court didn't address the subject at all, and the decision doesn't somehow erase the circuit split that now exists based on more recent caselaw. Pet. 25-26. At a minimum, these latest

decisions reflect ongoing confusion about the proper scope of appellate review, which merits clarification from this Court.

### III. Jaradi's Claim That He Acted Reasonably Again Turns on Disputed Facts and Only Highlights the Circuit Split at Issue

Next, Jaradi asserts that shooting Argueta was objectively reasonable. Opp. 24-34. Again, however, he chiefly relies on facts found to be disputed by the district court. More importantly, his argument simply underlines the circuit split Petitioners emphasize.

Initially, Jaradi repeats his position that he could see Argueta holding a pistol although, as discussed above, this contention is foreclosed on interlocutory review. Opp. 27. The same goes for Jaradi's claim that he "was in a position from which Argueta could easily have" shot at him with just a "slight motion of [his] hand," Opp. 29, or a "slight turn." App. 14. Actually, the district court determined that jurors could find Argueta went by Jaradi and was ahead running away from him toward the empty lot – "retreating," as the court put it – when Jaradi shot him in the back, as the video and autopsy confirm. App. 33-34. Nor can Jaradi rely on his testimony that he "verbally commanded Argueta to get his hand out of his pocket." Opp. 29. The district court credited Jaradi's account but found the matter to be disputed based on Mary Ann Luna's contrary recollection and the video. App 36, App. 10.

Eventually, Jaradi sets aside controverted facts and maintains that the shooting was reasonable even

if Argueta's pistol wasn't visible. Opp. 27-33. The majority's decision similarly turns on the reasonableness of Jaradi concluding Argueta had a weapon, despite it being unseen, because Argueta supposedly ran and carried his right arm in a way that "objectively suggested he was armed and dangerous." App. 17. This although Jaradi himself "concedes… that Argueta could have just been swinging his arm while running" normally. App. 35. Jaradi stresses that his training in the supposedly "scientific principle of action versus reaction" entitled him to shoot first, before Argueta ever manifested an intent to shoot at or otherwise harm him. Opp. 27. He quotes testimony supporting this idea from a former Texas Ranger in a completely different lawsuit fifteen years ago. Opp. 31-33.

Against Jaradi's argument and the majority's conclusion, however, is the clear consensus from other circuits holding that simply running away from an officer with a hand out of view or possibly holding something *or even plainly holding a gun* doesn't itself warrant being shot. Pet. 16-21; *Amicus* Brief of Rutherford Institute 5-6; *Amicus* Brief of Civil Rights Corps 11-16; *Amicus* Brief of Law Professors 13-15; *Amicus* Brief of Cato Institute 20-21. Police can't "justify deadly force just because the person's hands are in his pockets and the officer cannot see his hands." *Palma v. Johns*, 27 F.4th 419, 443 (6th Cir. 2022); *accord A.K.H. by and through Landeros v. City of Tustin*, 837 F.3d 1005, 1012-1013 (9th Cir. 2016). Nor is merely seeing a weapon sufficient. *See, e.g.*, *Cole Estate of Richards v. Hutchins*, 959 F.3d 1127, 1134 (8th Cir. 2020); *Naselroad v. Mabry*, 763 F.App'x 452, 461 (6th Cir. 2019); *Hensley ex rel. North Carolina*

*v. Price*, 876 F.3d 573, 582 (4th Cir. 2017), *cert. denied*, 584 U.S. 950 (2018).[1]

Far from endorsing Jaradi's "shoot first" philosophy, other circuits correctly demand at least some hint that the suspect's gun was coming into play against the officer, or some other portent of danger. Pet. 19-21. No such circumstance exists here, as Judge Haynes recognized: "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). He just ran. Consequently, Judge Douglas concluded that "the furtive-gesture line of cases does not apply here." App. 48.

If Jaradi and the majority are correct and other circuits are wrong, citizens who openly carry firearms for personal safety will increasingly find themselves at risk of deadly force from officers – a prospect that can only erode Second Amendment freedoms and return the right to its old, second-class status. Pet. 29-32; *Amicus* Brief of Law Professors 15-24; *Amicus* Brief of Cato Institute 12-23. Obviously, anyone holding a gun can rapidly raise it and fire. To say that nothing more need be shown because "action beats reaction" is

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[1] Yet more such cases were decided after the petition was filed. *See, e.g., Selto v. County of Clark*, 2024 WL 3423717 at * 1 (9th Cir. July 16, 2024) (shooting unjustified where armed, fleeing suspect didn't "point the gun at anyone… or make any furtive" gesture toward police); *Calonge v. City of San Jose*, 104 F. 4th 39, 46, 48 (9th Cir. 2024) (same where suspect didn't make a sudden "threatening movement;" "We have held over and over that a suspect's possession of a gun does not itself justify deadly force").

dangerously novel and would understandably discourage lawful gun owners who want to protect themselves outside the home. In the end, Jaradi's insistence that he can shoot a teenager who wasn't wanted for any serious crime because Jaradi believed (without seeing) that he was holding a gun as he ran away simply underscores the circuit split Petitioners emphasize. Given how often these cases recur and their life-or-death importance, that divergence merits this Court's attention.

## IV. Jaradi's Claim That Argueta's Fourth Amendment Rights Weren't Clearly Established Isn't a Reason to Deny the Petition

Lastly, Jaradi asks the Court to find that Argueta's Fourth Amendment rights in these circumstances weren't clearly established. Opp. 34-38. This is premature, since the lower courts never confronted the issue. Regardless, it is mistaken.

The district court denied summary judgment on the first prong of qualified immunity – whether Jaradi violated the Fourth Amendment – and the majority reversed by concluding that the shooting was reasonable given how Argueta held his arm as he ran. App. 10-15, App. 32-37. Although the majority referred in passing to "the constitutional question [not being] beyond debate," App. 15, 18, it did not canvass governing law and ask whether Argueta's rights were clearly established even if a violation occurred.

In *Tolan v. Cotton*, the Court held that the Fifth Circuit erred by "import[ing] genuinely disputed factual propositions" into the second, "clearly

established" prong of the analysis. 572 U.S. 650, 657 (2014). Rather than answer that question itself, however, the Court remanded for the Fifth Circuit to consider it first. *Id*. at 660. Here too, the majority's decision turns on its disregard for key disputed facts, such as whether Argueta was suspiciously concealing his right arm or just running normally, and whether he needed only a "slight turn" to fire on Jaradi or was actually ahead of him running away when Jaradi shot him in the back. App. 14-15. These facts will frame "the specific context of the case," *Tolan*, 572 U.S. at 657 (cleaned up), and thereby play a part in determining whether Argueta's rights were clearly established. As in *Tolan*, then, the Court may grant the petition, reverse, and permit the lower courts to consider the matter first. *See also Lombardo v. City of St. Louis, MO*, 594 U.S. 464, 468 (2021); App. 42 (Elrod, J.) ("I offer no opinion as to whether Jaradi should have ultimately been entitled to qualified immunity. That question turns on genuine fact disputes that we have no jurisdiction to review in this posture").

In addition, even if the Court reviews the case and ultimately decides that Argueta's rights weren't clearly established, there would still be significant value for "the development of constitutional precedent and the promotion of law-abiding behavior" in addressing whether a violation occurred in this common sort of case – one that will only become more frequent as people increasingly carry firearms openly for self-defense. *Camreta v. Greene*, 563 U.S. 692, 706-07 (2011) (quotation omitted).

Finally, Jaradi is wrong on the merits; it was clearly established in 2018 that he could not justifiably shoot Argueta. Since it must be assumed that Jaradi didn't see Argueta holding a gun – at most, Argueta's hand was obscured – the case is not meaningfully distinguishable from *Tennessee v. Garner*, where the officer also shot an unarmed, fleeing suspect in the back. 471 U.S. 1, 3-4, 11-12 (1985). Pet. 23. Unlike in *Garner*, Argueta wasn't even wanted for burglary. *See id.*

Decisions within and outside the Fifth Circuit only strengthen the point. In *Poole v. City of Shreveport*, the court held that it was clearly established in the Fifth Circuit in 2017 that an officer may not "shoot[] a visibly unarmed suspect who is moving away from everyone present at the scene." 13 F.4th 420, 425 (5th Cir. 2021) (citing cases). The majority here distinguished *Poole* on the ground that Argueta was not "visibly" unarmed, only "apparently" unarmed, App. 14-15, but the distinction is meaningless because in both cases the officer shot a suspect without seeing a gun or even any sudden gesture suggesting one was about to be deployed. Pet. 23; App. 49 (Douglas, J.) ("visibly" vs. "apparently" unarmed distinction "impermissible" and without precedent). Earlier Fifth Circuit decisions also held that, before 2018, a suspect not facing officers had a clearly established right not to be shot in the back without warning even if holding a weapon as long as it wasn't being brandished or pointed. *See Roque v. Harvel*, 993 F.3d 325, 338-39 (2021); *Cole v. Carson*, 935 F.3d 444, 453-54 (5th Cir. 2019) (en banc), *cert. denied*, 141 S. Ct. 111 (2020); *Baker v. Putnal*, 75 F.3d

190, 198-99 (5th Cir. 1996); *Griffin v. Newell*, 981 F.2d 1256, ** 2-3 (5th Cir. 1992).

There is also a robust consensus of such decisions from other circuits, discussed at length in the petition and by *amici*. Pet. 16-19. To quote only one: "it was clearly established [in 2016] that a person does not pose an immediate threat of serious physical harm to another when, although the person is in possession of a gun, he does not point it at another or wield it in an otherwise menacing fashion." *Cole Estate of Richards*, 959 F.3d at 1134.

## Conclusion

The Court should grant the petition.

Respectfully submitted,

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