No. 24-

IN THE

Supreme Court of the United States

MICHAEL NISSEN,

Petitioner,

v.

JAVIER AMBLER, SR., INDIVIDUALLY, ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES OF JAVIER AMBLER, II, ON BEHALF OF THE ESTATE OF JAVIER AMBLER, II, AND AS NEXT FRIENDS OF J.R.A., MINOR CHILD; MARITZA AMBLER, INDIVIDUALLY, ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES OF JAVIER AMBLER, II, ON BEHALF OF THE ESTATE OF JAVIER AMBLER, II, AND AS NEXT FRIENDS OF J.R.A., MINOR CHILD; MICHELLE BEITIA, AS NEXT FRIEND OF J.A.A., MINOR CHILD; JAVIER AMBLER, II, ESTATE OF JAVIER AMBLER, II,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After a crash filled 20-minute high-speed car chase—caught on video by police helicopter—Javier Ambler II died while resisting being handcuffed due in part to an imperceptible heart condition. Video shows Nissen used a modicum of force for less than 90 seconds to assist the first arriving deputies handcuff Ambler in the prone position. Ambler stated he could not breathe in the scuffle, but force *stopped* when the handcuffs clicked. Nissen was denied qualified immunity.

The questions presented are:

1. Can a fact question on the "deadliness" of force impose a heightened deadly force standard that "constrains" the Fourth Amendment's objective test—essentially requiring officers to forfeit immunity unless they can prove it would have also been appropriate to *shoot the suspect*?

2. After a suspect leads police on a 20-minute high-speed car chase, can a reasonable officer use 90 seconds of soft-hand controls in the prone position to handcuff that suspect—reasonably making a split-second presumption that the suspect is dangerous and his claimed medical emergency is a ploy?

3. Did the law clearly establish that soft-hand controls and a taser—used to effectuate handcuffing in the prone position—became unlawful the instant the suspect stated, "I can't breathe", when no prior precedent in this Court or the Fifth Circuit ever contemplated that such a suspect had *just* led police on an outrageous high-speed chase?

PARTIES TO THE PROCEEDING

Austin Police Officer Michael Nissen was the Defendant-Appellant below and is the Petitioner in this Court.

Javier Ambler, Sr., individually and as representative of the Estate of Javier Ambler II, and as next friend of minor child J.R.A., was a Plaintiff-Appellee below and is a Respondent in this Court.

Maritza Ambler, individually and as representative of all wrongful death beneficiaries of Javier Ambler II, and as next friend of minor child J.R.A., was a Plaintiff-Appellee below and is a Respondent in this court.

Michelle Beita, as next friend of J.A.A., minor child, was a Plaintiff-Appellee below and is a Respondent in this Court.

STATEMENT OF RELATED CASES

All proceedings directly related to this Petition include:

1) *Ambler v. Nissen*, No. 1:20-CV-1068 (W.D. Tex. July 31, 2023) (Report & Recommendation).

2) *Ambler v. Nissen*, No. 1:20-CV-1068 (W.D. Tex. Sept. 21, 2023) (Adopting Report & Recommendation).

3) *Ambler v. Nissen*, 116 F.4th 351, 355 (5th Cir. 2024) (dismissing interlocutory appeal).

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The Fifth Circuit's decision is reported at 116 F.4th 351 (5th Cir. 2024). Pet. App. 1a – 23a. Judge Smith filed a separate dissenting opinion. Pet. App. 24a – 43a. The Report and Recommendation in the district court is not reported, but it is available at 2023 WL 4879903, and it is reproduced in Appendix D. Pet. App. 49a – 90a. The District Court's decision to adopt the Report and Recommendation is not reported, but it is available at 2023 WL 6168253, and it is reproduced in Appendix C. Pet. App. 46a – 49a.

STATEMENT OF JURISDICTION

The Fifth Circuit had appellate jurisdiction because the district court's order denying Petitioner's motion for summary judgment was a final decision within the meaning of 28 U.S.C. § 1291 and the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 527 – 30 (1985).

The Fifth Circuit entered its opinion on September 10, 2024. The Fifth Circuit denied rehearing en banc eight-to-nine on January 2, 2025. Pet. App. 92a. Petitioner filed this timely petition for writ of certiorari on April 2, 2025. *See* Sup. Ct. R. 13(1), (3). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * .

U.S. Const. amend. IV.

Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress * * * .

42 U.S.C. § 1983.

INTRODUCTION

"[I]t stacks the deck against the officer, it seems to me, to describe his action as the application of deadly force."

—*Mullenix v. Luna*, 577 U.S. 7, 19 (2015) (Scalia, J., concurring).

* * *

Below, Austin Police Officer Michael Nissen played against the stacked deck Justice Scalia's concurrence foresaw in *Mullenix*.[1] Unsurprisingly, Nissen lost.

"In the wake of a high-speed chase involving three crashes and triple digit speeds, Officer Michael Nissen used a modicum of force to restrain Javier Ambler." Pet. App. 24a (Smith, J., dissenting). But qualified immunity was denied.

Below, a 2-1 Fifth Circuit panel declined to disturb the district court's finding that—since Ambler died—a jury *could* find that Nissen's soft hand force constituted "deadly force." Under a "constrained" Fourth Amendment test that the Fifth Circuit adopted post-*Garner* in 1998, the majority held that Nissen must forfeit qualified immunity unless he could pass this "constrained" test. That test essentially required Nissen to prove he could *shoot* Ambler.

Vigorously dissenting, Judge Jerry E. Smith rejoined that this Court "flatly" rejected this reading of *Garner* in *Scott v. Harris*, and that the majority's "deadly force" sleight-of-hand made it impossible for officers to receive qualified immunity in *any* case involving an accidental death. Judge Smith explained how the deck was loaded:

> "One might charitably express a narrow version of what the majority advances as follows:

1. "It does not assist analysis to refer to all use of force that happens to kill the arrestee as the application of deadly force…. [t]hough it was force sufficient to kill, it was not applied with the object of harming the body of the felon." *Mullenix v. Luna*, 577 U.S. 7, 19 (2015) (Scalia, J., concurring) (cleaned up).

> Ambler died. Deadly force is a question of fact. There is no question that if Nissen had walked up and shot Ambler in the head he would be liable. So deadly force is obviously material. Ergo, we deny [qualified immunity]." Pet. App. 25a.

This is the "stacked deck" that the *Mullenix* concurrence contemplated—and which this Court *explicitly* prohibited in *Scott v. Harris*, 550 U.S. 372 (2007).[2] This case thus presents the optimal vehicle for this Court to grant Certiorari to enforce *Scott* on Circuits that are split on applying its mandate.

This is also the ideal case to decisively issue nationwide guidance on the prone position. *Lombardo v. City of St. Louis, Missouri*, 594 U.S. 464 (2021). Specifically, *this case* should be an example of a clearly constitutional use of the maneuver. After all, if officers cannot use the prone position for 90 seconds to put handcuffs on a felon who *just* previously fled for 20 minutes at 100mph—then this common yet crucial police maneuver might as well be *per se* unconstitutional.

The dissent similarly underscored the majority's logic "arbitrarily denies QI to officers in another category of situations. As soon as a suspect goes prone, for however long, if the suspect happens to die later, the case must go to trial. That would be a bizarre result indeed." Pet. App. 36a – 37a.

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2. *Scott*, 550 U.S. at 382. ("*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute deadly force.").

A divided Fifth Circuit denied en banc review by the slimmest of margins—an eight-to-nine vote. This Court should accordingly grant Certiorari to correct a closely divided Fifth Circuit. If left unreviewed, the dissent correctly warns this case will make it "impossible for officers to receive qualified immunity in cases of accidental death, no matter how reasonable their force was in context." Pet. App. 24a – 25a. This Court should not forsake law enforcement to that fate.

STATEMENT OF THE CASE

A. Statement of Facts

In the dark early morning hours of March 28, 2019, Javier Ambler II refused to pull over for a routine traffic stop initiated by Williamson County Deputies.

Instead, Ambler fled. Deputies chased Ambler for more than twenty minutes as he sped down both interstate highways and residential roads. Pet. App. 2a. Ambler reached speeds exceeding 100mph and crashed his car numerous times—only to subsequently resume his attempt to escape. Pet. App. 2a – 3a, 24a, 38a, 59a.

Ambler's flight from justice was so dangerous that the Austin Police Department deployed its helicopter to monitor Ambler. The footage from the helicopter shows Ambler weaving in and out of traffic in what amounted to a "desperate" flight from justice. Pet. App. 24a, 27a. His driving endangered the public, the officers, and himself. Pet. App. 24a.

Austin Police Officer Michael Nissen was not part of the chase, but it is undisputed that he knew all about it, as he was kept informed via radio while he was patrolling. Pet. App. 58 – 59a. Nissen became involved when he learned that Ambler's anticipated flight path would pass his location. Attempting to terminate the chase non-lethally, Nissen got out of his car in order to deploy tire spikes on the street. ROA.3643 (Exhibit 12, 02:50 – 02:57).

Before Nissen could deploy the spikes, Ambler's wrecked car sped *right* past him. Moments later, Nissen observed Ambler spinout sideways, almost hit cars stopped at a traffic light, and then skid across a sidewalk before stopping after hitting a traffic sign. Pet. App. 59a. The spinout was captured by the helicopter's video camera. This crash was loud and severe—but Ambler resumed fleeing. ROA.3624 (Exhibit 6, 2:25 – 2:37).

Finally, Ambler's flight was terminated when he crashed a third time—this time into some trees on the side of a residential road. Pet. App. 2a, 59a. The pursuing Williamson County deputies quickly arrived on the scene. Ambler opened his car door and was promptly ordered to get on the ground by a deputy. When Ambler did not immediately get on the ground, he was tased. Ambler fell to the asphalt, and the deputies began trying to handcuff him. Pet. App. 3a, 50a – 51a.

Officer Nissen arrived at the scene a little less than one minute after the deputies. Pet. App. 9a, 40a – 41a. On arrival, Nissen saw the deputies standing over Ambler as they vigorously struggled to cuff him in the prone position. Pet. App. 3a, 32a, 51a.

Nissen observed that Ambler was an enormous man[3] who was still unrestrained at night on a dark road. Ambler was feet away from his unsearched car. Pet. App. 29a. Since Ambler had just feloniously evaded arrest in a motor vehicle, Nissen made the split-second decision to help the deputies handcuff Ambler in the prone position. Pet. App. 37a; *see* Tex. Penal Code § 38.04. Nissen's body-worn camera video captured that he used a "modicum" of force. Pet. App. 24a. As the dissent below noted:

> Nissen spent about a minute controlling Ambler's hand—without touching any other part of his body—and then no more than 20 seconds applying pressure to Ambler's upper back and head. Pet. App. 24a.

During this force, Ambler disobeyed command after command to lay flat on his stomach and put his hands behind his back so he could be handcuffed. Instead, he "rather obviously" provided physical resistance to the multiple officers trying to cuff him. Pet. App. 32a. As he resisted the cuffs, Ambler stated, "I can't breathe," and softly stated that he had congestive heart failure. Nissen later testified that he did not hear the latter. Pet. App. 32a, 51a.

Nissen also testified as to his thinking:

> [I]n this situation, where I am assisting trying to take an individual into custody who just spent the last 20-or-so minutes driving recklessly through the City of Austin, crashing multiple

3. 410 pounds to be exact.

> times, I had to weigh the risk of not taking him into custody quickly against what possible health conditions he may or may not have had. Pet. App. 37a.

In the scuffle, one deputy tased Ambler again in "drive stun" mode. Unlike the first tasing, this second tasing occurred in Nissen's presence. Pet. App. 32a, 71a. Finally, the officers managed to handcuff Ambler. Pet. App. 51a. Two minutes and fifteen seconds passed between the time the first deputy made physical contact with Ambler and the time the handcuffs clicked. Pet. App. 32a.

Force stopped once Ambler was handcuffed, and the officers quickly moved him off his stomach and into a seated position. They checked him for a pulse, which they could not find. Ambler was taken to a hospital where he was pronounced dead. Pet. App. 52a.

The Travis County Medical Examiner determined that Ambler's cause of death was "congestive heart failure and cardiovascular disease associated with morbid obesity in combination with forcible restraint." Pet. App. 65a. Or as the dissent below put it, "[t]ragically, in part because of an imperceptible medical condition, Ambler died during the arrest as a result of the restraint." Pet. App. 24a.

Respondents sued Officer Nissen under 42 U.S.C. § 1983. In relevant part, they accused Nissen of using excessive force against Ambler in violation of his Fourth Amendment rights, and for failing to intervene to stop the Williamson County Deputies from using excessive force. Pet. App. 2a, 52a.

Officer Nissen moved for summary judgment based on qualified immunity. Pet. App. 49a – 50a.

B. Procedural History

1. District Court.

The district court[4] denied Nissen's motion for summary judgment. It determined that, because Ambler died, it would treat this case as a "deadly force case" pursuant to the Fifth Circuit's precedent in *Aguirre v. City of San Antonio*, 995 F.3d 395, 412 (5th Cir. 2021) Pet. App. 64a.

The district court noted that under *Aguirre*, the Fifth Circuit treats deadly force cases as a "special subset of excessive force claims" in which the "objective reasonableness balancing test is constrained." Pet. App. 64a. Under this constraint, the court applies a heightened restrictive standard derived from *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

The constrained two-part test asks: (1) "whether the force constituted deadly force" and (2) whether "the subject posed a threat of serious harm justifying the use of deadly force." Pet. App. 64a (numerals added). If the answer to part one is "yes" and the answer to part two is "no" then the officer is *per se* not entitled to qualified immunity. Nissen argued below that his force did not

4. The district court adopted the Report & Recommendation of the Magistrate Judge *in toto* and without adding its own articulated analysis. Pet. App. 46a. Petitioner therefore refers to the Magistrate's order as if it were the district court's order.

amount to deadly force as a matter of law warranting a restricted *Garner* standard, and that instead all that mattered under this Court's precedent in *Scott v. Harris* was if his force was reasonable. ROA.7460 (citing 550 U.S. 372, 382).

Pursuant to a 1998 Fifth Circuit precedent the district court rejected Nissen's argument that his force did not amount to deadly force as a matter of law. Pet. App. 64a (citing *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998)). Instead, the district court followed this pre-*Scott* precedent and reiterated:

> Whether a use of force is 'deadly force' is a question of fact. Deadly force is force that carries with it a substantial risk of causing death or serious bodily harm. A reasonable jury can find that the restraint used by an officer amounted to deadly force. Pet. App. 64a.

Because the medical examiner and Respondents' expert opined that Ambler died of his cardiovascular disease in combination with restraint, and because Nissen acknowledged he had received training on the risks of asphyxia in the prone position, the district court held that:

> A reasonable jury could conclude that the use of prone restraint on an individual with obesity and congestive heart failure created a substantial risk of death or serious bodily injury. Pet. App. 64a – 66a.

Analyzing Respondents' "deadly force claim" in isolation, the district court denied Nissen qualified immunity. It held

genuine issues of material fact existed as to if soft hand restraining force constituted "deadly force." Pet. App. 67a.

Separately, the district court also analyzed Nissen's force under the factors announced in *Graham v. Connor*, 490 U.S. 386, 109 (1986). The district court concluded that the first factor—the severity of the crime—weighed in favor of the force Nissen used. The district court acknowledged that the videos showed that Ambler "evaded police for 22 minutes, driving at high rates of speed on both a highway and residential streets" and that he crashed three times. Pet. App. 58a. Since evading arrest in a motor vehicle is a felony under Texas law, the first factor weighed for Nissen. Pet. App. 59a (citing Tex. Penal Code § 38.04).

But the district court found that fact questions prevented resolving the second and third *Graham* factors for Nissen's force.

As to the second factor, "whether the suspect poses an immediate threat to the safety of the officers or others," the district court determined that it would be a material fact question as to if Nissen should have realized that Ambler was not a threat because he had been sufficiently "subdued" by the two deputies standing over him when Nissen began helping them handcuff Ambler. Pet. App. 61a.

As to the third factor—"whether the suspect is actively resisting arrest or trying to evade arrest by flight"—the district court determined that it would be a material fact question as to if Nissen should have realized that Ambler's resistance to being handcuffed was the result of him "instinctively" resisting due to a medical

emergency, instead of intentional resistance to arrest. Pet. App. 63a. The district court determined that the video evidence did not provide clarity to resolve a factual dispute as to Ambler's reason for resistance. Pet. App. 63a.

The district court also held it was clearly established by *Darden v. City of Fort Worth*, 880 F.3d 722 (5th Cir. 2018) that it was unconstitutional to use this force on a suspect claiming a medical emergency. Pet. App. 68a. The district court reached this conclusion even though the suspect in *Darden* never attempted to escape police. Pet. App. 29a.

For similar reasons, the district court also denied Nissen qualified immunity on Respondents' bystander liability claim. The district court found that it was clearly established that Nissen had a duty to intervene to stop the force used by the Williamson County deputies. Pet. App. 69a – 71a.

2. Fifth Circuit Majority Opinion.

On September 10, 2024, a divided panel of the Fifth Circuit affirmed and dismissed Nissen's interlocutory appeal. Pet. App. 2a.

Continuing to analyze "deadly force" separately from the *Graham* factors, the majority denied Nissen's argument that "no reasonable officer would have known that using force on Ambler for such a brief period of time would lead to his death." Pet. App. 13a. The majority also dismissed Nissen's assertion that "any conclusion otherwise would essentially require denying QI in all cases involving an accidental death" and "that such a

result would trade the Fourth Amendment's general reasonableness standard for an outcome-oriented one that contravenes Supreme Court authority." Pet. App. 14a (citing *Scott v. Harris*, 550 U.S. 372, 383 (2007)).

In dismissing that argument, the majority held that "Nissen's fears are unfounded" because "[a]s a threshold matter, whether a use of force is 'deadly' is a question of fact." Pet. App. 14a. In support, the majority cited *Flores*, a Fifth Circuit case decided nearly three years before *Scott v. Harris*. Pet. App. 14a (citing *Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004)).

Concluding its separate "deadly force" analysis, the majority admitted that Nissen's maneuver may have resulted in no injury at all on a healthy suspect, but that "[n]ot all plaintiffs are the same, and harmless force in one situation could be deadly force in another" and that holding otherwise would "trade nuance for willful blindness." Pet. App. 15a – 16a.

The majority also refused to disturb the district court's proffered material fact questions precluding immunity on the second and third *Graham* factors and the Respondents' failure to intervene claim. To do so, the majority distinguished *Salazar* and held that Nissen was incorrect in his argument that any reasonable officer would believe Ambler's prior flight made it reasonable to view him as an ongoing threat justifying at least soft hand controls until he was restrained in handcuffs. Pet. App. 9a (citing *Salazar v. Molina*, 37 F.4th 278 (5th Cir. 2022)).

The majority also held that Nissen was incorrect to argue he was *objectively* reasonable in viewing Ambler's

struggle against the handcuffs as resisting arrest due to his prior flight. Instead, the majority determined that Nissen could not reasonably suspect Ambler was engaging in a ploy to avoid being handcuffed by claiming a medical emergency. Distinguishing *Salazar*, the majority determined that Nissen was "[a]pplying such reasoning without context" and therefore attempting to "undermine the fact-specific nature of the excessive force analysis." Pet. App. 11a.

The majority held that a jury would decide if "Ambler was indeed refusing to submit to officers by pulling his body away from the ground" or if he was instead "in a struggle for his life." Pet. App. 12a.

Finally, the majority affirmed that *Darden* had clearly established that Nissen's conduct amounted to unconstitutional excessive force, and that it was also clearly established that Nissen had a duty to intervene to stop the Williamson County deputies' force. Pet. App. 21a – 23a (citing *Darden*, 880 F.3d at 733 – 34).

3. The Dissent.

Judge Smith dissented. He criticized that a charitable view of the majority's logic "essentially eliminates qualified immunity in cases of accidental death, almost all of which are situations where deadly force is not warranted. If it were warranted, they would likely not be *accidental*." Pet. App. 26a (emphasis original). "[W]hether force is deadly will almost always be material in accidental death cases. Since deadliness is a fact question, a defendant will never get QI." Pet. App. 26a.

Judge Smith explained that the majority erroneously used *Garner* to obscure the relevant analysis to instead "establish some sort of threshold inquiry in deadly-force cases" which presupposes that an officer's force is *per se* unconstitutional unless the officer has probable cause to believe the suspect posed a significant threat of death or serious harm. Pet. App. 35a.

This Court, Judge Smith wrote, "flatly rejected this errant reading of *Garner*" in *Scott v. Harris*. Pet. App. 35a. Judge Smith explained that this Court held that *Garner* did not permit courts to flip "a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute deadly force." Pet. App. 35a (citing *Scott*, 550 U.S. at 382). Under the *Scott* standard, Judge Smith dissented that "whether or not Nissen's actions constituted application of deadly force, all that matters is whether Nissen's actions were reasonable." Pet. App. 35a (cleaned up).

The dissent also criticized the majority for "curiously" recontextualizing *Garner*'s language to untether it "from *Garner*'s very different set of facts." Pet. App. 35a. Judge Smith wrote that a fair reading of *Garner*'s text limited any such heightened standard "to the facts of that case, which involved shooting a fleeing suspect with live rounds to prevent his escape." Pet. App. 36a (citing *Garner*, 471 U.S. at 3). Judge Smith noted that shooting someone with live rounds was very different from the force Nissen used here, and "consequently it calls for a different sort of inquiry." Pet. App. 36a.

Judge Smith also disagreed with the majority's *Graham* analysis. He found that the district court's

proffered material fact questions were immaterial[5] to finding that Nissen's force was constitutional under *Graham*. Pet. App. 36a.

On the second *Graham* factor, Judge Smith rejoined that whether a reasonable officer would believe that Ambler was a threat was a "question of law left to the court." Pet. App. 28a (citing *Argueta v. Jaradi*, 86 F.4th 1084, 1090 (5th Cir. 2023), cert. denied, 145 S. Ct. 435 (2024)). In light of the video evidence, Judge Smith wrote it "boggles the mind" to think a reasonable officer could not view Ambler as a threat as a matter of law. Pet. App. 29a.

On the third *Graham* factor, Judge Smith agreed that any further escape attempt by Ambler would have failed—but only because of the multiple officers "applying to Ambler the precise sort of force that the majority finds objectionable." Pet. App. 32a. Judge Smith noted that the videos showed that Ambler ignored command after command to lay flat and put his hands behind his back. Thus, it was clear Ambler was resisting. Pet. App. 32a.

Finally, the dissent faulted the majority's finding that the law was clearly established that Nissen's force was unconstitutional, and that it was clearly established that he was required to intervene to stop the Williamson County deputies.

The majority's reliance on *Darden*, in Judge Smith's view, failed at its first breath because *"Darden never attempted to escape the police*." Pet. App. 39a (emphasis

5. In light of "multiple clear videos of what happened…". Pet. App. 25a.

original). The dissent noted that the law was arguably established in the opposite direction—in favor of Nissen—as prior precedent "stands for the proposition that lack of restraint after an extended attempt to escape justifies a heightened use of force." Pet. App. 40a (citing *Salazar*, 37 F.4th at 284).

4. En Banc.

Officer Nissen filed a petition for rehearing en banc. On January 2, 2025, the Fifth Circuit denied rehearing by an eight-to-nine vote. Judges Jones, Smith, Richman, Ho, Duncan, Engelhardt, Oldham, and Wilson voted to rehear the case.

Chief Judge Elrod and Judges Stewart, Southwick, Haynes, Graves, Higginson, Willett, Douglas, and Ramirez voted against rehearing. Pet. App. 92a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Flouts *Scott* to Eliminate Qualified Immunity in Cases of Accidental Death.

Below, the majority impermissibly used a "constrained" deadly force framework based on pre-*Scott* precedent to deny Nissen qualified immunity. *Gutierrez*, 139 F.3d at 446. The majority flouted *Scott* to hold that "whether a use of force is 'deadly' is a question of fact." Pet. App. 14a. *Flores*, 381 F.3d at 399.

Conversely, the dissent is correct. *Scott* flatly rejected and overruled this "constrained" 1998 test as an errant reading of *Garner*. Pet. App. 35a (citing *Scott*, 550 U.S. at

382). This Court should grant Certiorari to enforce *Scott* and resolve the Circuit split on *Scott*'s application.

A. This Court should grant Certiorari to enforce *Scott*, which held that *Garner* did not establish a magical on/off switch triggering a rigid "Deadly Force" standard. *Scott* is ignored by the Fifth Circuit and other circuits in favor of pre-*Scott* precedents.

Forty years ago, this Court decided *Tennessee v. Garner* and announced that a police officer may not use deadly force to "prevent the escape of all felony suspects" no matter the circumstances. *Garner*, 471 U.S. at 11. Specific to the facts of *Garner*, this Court held that "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Id.* Instead, it would only be constitutional to use this force "[w]here the officer has probable cause to believe the suspect poses a threat of serious physical harm…". *Id.*

Three dissenters admonished the *Garner* majority, asserting that by failing to explicitly "limit its holding to the use of firearms, the Court unnecessarily implies that the Fourth Amendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk." *Id.* at 31 (O'Connor, J., dissenting).

With no explicit definition of what "deadly force" was from this Court, the lower courts rushed to adopt their own. This created a landscape of shifting definitions and legal frameworks between the mid-1980s and mid-2000s. Many Circuits eventually settled on the Model Penal

Code's definition, with some adopting a modified version to remove the Code's subjective component.[6]

In 1998 in *Gutierrez*, the Fifth Circuit determined it would define deadly force as "carrying with it a substantial risk of causing death or serious bodily harm." *Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004) (citing *Gutierrez*, 139 F.3d at 446). This precedent also held that it would be a "***a question of fact, not one of law***" as to if an officer used such force. *Id.* (emphasis added). Tying it all together, the Fifth Circuit determined that under *Garner,* the "objective reasonableness balancing test is ***constrained***" and that an officer's conduct would *per se* be unconstitutional unless they could satisfy the constrained test. *Id.* (emphasis added).

In *Harris v. Coweta County*, the Eleventh Circuit issued an identical holding based on a modified Model Penal Code definition. 433 F.3d 807, 814 (11th Cir. 2005), rev'd *Scott v. Harris*, 550 U.S. 372 (2007) (citing *Pruitt*,

6. *See e.g.*, *Smith v. City of Hemet*, 394 F.3d 689, 705 (9th Cir. 2005) (overruling previous definition established in *Vera Cruz v. City of Escondido*, 139 F.3d 659, 663 (9th Cir. 1998)) (collecting cases); *Gutierrez v. City of San Antonio,* 139 F.3d 441, 446 (5th Cir. 1998) (deadly force "creates a substantial risk of death or serious bodily injury"); *Estate of Phillips v. City of Milwaukee,* 123 F.3d 586, 593 (7th Cir. 1997) (same); *In re City of Philadelphia Litigation,* 49 F.3d 945, 966 (3d Cir. 1995) (adopting the Model Penal Code definition); *Ryder v. City of Topeka,* 814 F.2d 1412, 1416 n.11 (10th Cir. 1987) (same); *Robinette v. Barnes,* 854 F.2d 909, 912 (6th Cir. 1988) (same); *Pruitt v. City of Montgomery,* 771 F.2d 1475, 1479 n.10 (11th Cir. 1985) (same).

771 F.2d at n.10).[7] Using that definition, the Eleventh Circuit found that "there is little dispute that the ramming of [the suspect's] car could constitute a use of 'deadly force' (under the Model Penal Code definition) and that a jury could so reasonably conclude." *Id.* (cleaned up) (parenthetical added). Under a constrained and heightened *Garner* standard, the Eleventh Circuit denied Officer Scott qualified immunity.[8]

This Court granted Certiorari to review the Eleventh Circuit and resoundingly reversed. *Scott*, 550 U.S. at 382. This Court's majority then announced the guardrails that the dissent in *Garner* contemplated. *Garner*, 471 U.S. at 31 (O'Connor, J., dissenting).

First, this Court noted that the *Scott* Respondent urged the Court "to analyze this case as we analyzed *Garner*." *Scott*, 550 U.S. at 381 – 82. That meant deciding as a threshold matter "whether the actions [the officer] took constituted deadly force." *Id.* The *Scott* Respondent defined deadly force as per the Eleventh Circuit's definition: "[A]ny use of force which creates a substantial likelihood of causing death or serious bodily injury." *Id.*

Second, the *Scott* Respondent argued that if the force met that definition, then "*Garner* prescribes certain preconditions that ***must be met*** before Scott's actions can survive Fourth Amendment scrutiny." *Id.* (emphasis added). One of those preconditions was that "[t]he suspect

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7. *See id.* ("'Deadly force' is force that creates 'a substantial risk of causing death or serious bodily injury.'") (citing *Pruitt*, 771 F.2d at 1479).

8. *Id.* at 815 (Holding that under *Garner* "[n]one of the antecedent conditions for the use of deadly force existed in this case.").

must have posed an immediate threat of serious physical harm to the officer or others." *Id.* If any precondition was not met, then the officer's "actions were *per se* unreasonable." *Id.* at 382.

Scott categorically rejected that position, and with it any case law holding that *Garner* required a heightened "deadly force" standard that could be triggered by a Model Penal Code definition.

This clause is dispositive:

> **"*Garner* did not establish a magical on/off switch** (rejecting a fact question) **that triggers rigid preconditions** (rejecting a "constrained" deadly force analysis) **whenever an officer's actions constitute deadly force."** (rejecting the Model Penal Code definition) (cleaned up) (parentheticals added) *Scott*, 550 U.S. at 382.

At bottom, *Scott* explained that *Garner* was merely an application of the Fourth Amendment's reasonableness test regarding a particular type of force in a particular situation.[9] Said another way, *Garner* applies when *Garner*'s facts apply—when an officer shoots a gun so as to hit a person. *Id.* at 383; *accord Mullenix*, 577 U.S. at 19 – 20 (Scalia, J., concurring); *accord* Pet. App. 36a (Smith, J., dissenting).

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9. *See id.* at 383 ("Whatever *Garner* said about the factors that *might have* justified shooting the suspect in that case, such 'preconditions' have scant applicability to this case, which has vastly different facts. *Garner* had nothing to do with one car striking another or even with car chases in general . . . . A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person") (cleaned up).

In the aftermath of *Scott*, some Circuits explicitly acknowledged and applied this holding.

The Second Circuit acknowledged and applied *Scott*'s holding as outlined *supra*. In *Terranova*, police officers intentionally stopped traffic to create a barricade of stopped cars to stop motorcyclists who were fleeing police at high-speed. *Terranova v. New York*, 676 F.3d 305, 307 (2d Cir. 2012). As a result, one of the motorcyclists was killed. *Id*. The case was tried, and despite acknowledging that the officer's actions "placed the plaintiff 'at risk of serious injury or death'" the district court refused to give a heightened deadly force instruction derived from *Garner*. *Id*. at 309, n.2. The Second Circuit affirmed after an in-depth analysis of *Scott*—holding a deadly force instruction would be impermissible in a case which did not involve the equivalent of "firing a gun aimed at a person." *Id*.[10]

The Fourth Circuit in *Cansler* also acknowledged that *Scott* rejected "any effort to prescribe certain preconditions for a police officer's use of reasonable force." *Cansler v. Hanks*, 777 Fed. Appx. 627, 635 (4th Cir. 2019). Instead, the Fourth Circuit affirmed that *Scott* repudiated any strict framework that "a suspect would have to pose an immediate threat of serious physical harm to the officer or others for deadly force to be reasonable" in all circumstances. *Id*.[11]

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10. *Id*. (Noting that under *Scott* "[t]he present matter is easily distinguishable from *Garner* given the type of force used—a traffic stop as opposed to firing a gun aimed at a person.").

11. *See also Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892 (4th Cir. 2016) (declining to use any framework other than the *Graham* factors in a lethal tasing case).

But other Circuits have declined to apply *Scott* in favor of their *pre-Scott* precedents and a modified Model Penal Code definition.[12]

The Fifth Circuit is one of those Circuits. After *Scott*, the Fifth Circuit never analyzed if this Court had overruled the permissibility of the "constrained" deadly force framework that it established in 1998 until *Aguirre* in 2021. *Aguirre*, 995 F.3d 395. In *Aguirre*, the Fifth Circuit finally analyzed if *Scott* prohibited its framework in a non-shooting case where force resulted in the suspect's death. After briefly acknowledging *Scott*'s mandate, the opinion ***shockingly*** proceeded to ignore it entirely. Holding in its next breath:

> ***Nevertheless***, we have long held that the use of deadly force is unreasonable where an officer does not have probable cause to believe that the suspect pose[d] a threat of serious physical harm…and we know of no case that has departed from this basic principle….[T]his court defines deadly force as force that creates a substantial risk of death or serious bodily injury. *Id*. at 412 – 13 (emphasis added) (citing *Gutierrez*, 139 F.3d at 446).

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12. *See e.g.*, *Scott v. Smith*, 109 F.4th 1215 (9th Cir. 2024) (creating a deadly force fact question under a Model Penal Code definition adopted in 2005 in *Smith*, 394 F.3d at 706, to deny immunity under a heightened deadly force standard in a case where a suspect died of prone restraint); *see also Bradley v. Benton*, 10 F.4th 1232 (11th Cir. 2021) (creating a deadly force fact question under a Model Penal Code definition established in 1985 in *Pruitt*, 771 F.2d at 1479, to deny immunity under a heightened deadly force standard in a case where a suspect died after being tased while climbing a wall).

Aguirre's dismissal of *Scott* in favor of continuing the Fifth Circuit's 1998 "constrained" deadly force framework was clearly wrong. This Court should grant certiorari to enforce its holding in *Scott*, and to resolve the split amongst the Circuits.

B. This case is important, as the decision below stacks the qualified immunity deck to eliminate immunity in all cases of accidental death.

This Court should also grant this Petition because the issue is important. Sup. Ct. R. 10. Specifically, the importance of enforcing *Scott*'s mandate *in this case* is made manifest by Judge Smith's dissent—which correctly stated that the majority used *Guiterrez*'s "constrained" deadly force framework to essentially eliminate qualified immunity in ***any*** case involving an accidental death. Pet. App. 25a – 26a.

That *has* to be error. If qualified immunity has any home, then "this sort of accidental death case is squarely within its heartland." Pet. App. 26a. The dissent explained this reductivism:

> Ambler died. Deadly force is a question of fact. There is no question that if Nissen had walked up and shot Ambler in the head he would be liable. So deadly force is obviously material. Ergo, we deny [qualified immunity]. Pet. App. 25a.

As Nissen argued below, this logic trades the Fourth Amendment's general reasonableness test for an outcome-oriented one—a test the officer *always* loses. Pet. App. 14a.

Ten years ago, Justice Scalia's concurrence in *Mullenix* foresaw and forewarned that it "stacked the deck" against officers to describe all "force that happens to kill the arrestee as the application of deadly force." *Mullenix*, 577 U.S. at 19 (Scalia, J., concurring). The concurrence explained that the deadly force attribution—in a case where the officer "did not shoot to wound or kill the fleeing [suspect]"—contravened *Scott*. In a non-shooting case, the Fourth Amendment required the Court to ask "not whether it was reasonable to kill" but whether the officer's objective in using force was reasonable. *Id.*

Ten years later, the value of this wisdom is even more prescient in this case. Currently, the Fifth Circuit's deadly force framework "distorts" the Fourth Amendment's inquiry. *Id.* Some panels in the Fifth Circuit have tacitly recognized the error. *See Morrow v. Meachum*, 917 F.3d 870, 878 (5th Cir. 2019) (Oldham, J., Maj. Op.) ("[t]he Supreme Court has warned us against extending *Garner*.").

But the divided Fifth Circuit below denied en banc review by the slimmest of margins—an eight-to-nine vote. Review is needed to help the Fifth Circuit rid itself of its persisting error. Otherwise, this case will truly make it impossible for officers to receive qualified immunity in cases of accidental death, no matter how reasonable their use of force was in context. Pet. App. 24a – 25a.

II. The Decision Below is Wrong. Addressing the Prone Position is Important, and the Majority Ignored the Mandates of *Plumhoff* to Deny Immunity.

A. Reviewing the prone position in this case is important, as the decision below arbitrarily denies qualified immunity in all cases if the suspect dies after going prone, even if they were unhandcuffed and only prone for a short time.

Handcuffing in the prone position is one of the oldest techniques of modern policing.[13] Yet this Court has yet to issue an opinion that provides affirmative nationwide guidance on *when* the prone position meets constitutional muster under the Fourth Amendment.

But the legality of this maneuver is undoubtably an important and reoccurring issue, as it regularly appears in controversy in the lower courts.[14] It is also a profoundly *common* and *crucial* aspect of day-to-day police work.[15]

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13. W.E. Fairbairn, *Scientific Self-Defence*, 52 (1931) (British police superintendent's published trainings, teaching that the prone position is "the only way one man can handcuff another, unless the latter is willing to submit.") *available at* https://archive.org/download/william-e.-fairbairn-scientific-self-defense/William%20E.%20Fairbairn%20-%20Scientific%20Self-Defense.pdf.

14. *See e.g.*, *Perez v. City of Fresno*, 98 F.4th 919, 928 (9th Cir. 2024) (Thomas, J., concurring in part) (collecting cases with a negative view of the prone position).

15. Kroll M.W., Brave M.A., et al., *Applied Force During Prone Restraint: Is Officer Weight a Factor?* Am. J. Forensic Med. Pathol. Vol. 40, No. 1 (2019) ("North American law enforcement officers

And though much maligned, *very* recent medical studies have shown that the prone position actually helps oxygenation.[16]

In *Lombardo*, this Court issued a summary disposition to the Eighth Circuit in a prone position case where a pre-trial detainee died after he was "already handcuffed" and shackled and *then* placed in the prone position for 15 minutes with weight pressed against him. *Lombardo*, 594 U.S. at 467. Without deciding the merits, this Court worried that the Eighth Circuit had held prone restraint *per se* constitutional for any length of time if the suspect kept resisting—even if already handcuffed. *Id*. This Court remanded to consider "the kind, intensity, duration" and surrounding circumstances of the prone restraint. *Id*. at 467.

Three members of this Court dissented, and wrote the case should have been decided on the merits, noting "a decision by this Court on the question here could be instructive." *Id*. at 460 (Alito, J., dissenting).

That instruction is still needed. In this case, the dissent articulates that the majority below has held that the prone position is *per se* unconstitutional if the suspect

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(LEOs) control and restrain agitated and resistant subjects in the prone position more than 500,000 times each year without a death or serious injury.").

16. Luo J., Pavlov I., et al., *Awake Prone Positioning Meta-Analysis Group. Awake Prone Positioning in Adults With COVID-19*: An Individual Participant Data Meta-Analysis. JAMA Intern. Med. (2025) (Noting that "awake prone positioning" was found to improve COVID-19 outcomes).

dies—no matter how short the duration or minimal the force. Pet. App. 36a – 37a. To wit, the majority concedes that Nissen's "maneuver" may have resulted in no injury at all "on a healthy plaintiff." Pet. App. 15a.

This case should be an example of a clearly constitutional use of the prone position. Here, the clear video evidence reveals that Nissen's force was minuscule, the duration was minimal, but the need for the maneuver after the dangerous chase was *maximal*—as Ambler had yet to be handcuffed. Pet. App. 24a. This Court should accordingly grant this Petition because the need for instruction on the prone position is important and reoccurring. Sup. Ct. R. 10.

B. The Decision violated *Plumhoff* by failing to decide the threat posed by Ambler as a matter of law and failing to adopt an on-scene reasonable officer's perspective on Ambler's resistance without the benefit of hindsight.

At the first step of a qualified immunity analysis, the question of whether an officer's conduct was objectively reasonable "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." *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014) (citing *Graham*, 490 U.S. at 396). In *Plumhoff*, this Court announced that when an officer raises legal issues, it is the core responsibility of the appellate courts "to decide such issues" and that such issues may not be dismissed as fact questions. *Id.* at 773.

Below, the majority violated this cardinal rule by dismissing as a fact question "whether [Ambler] pose[d]

an immediate threat to the safety of the officers or others." *Graham*, 490 U.S. at 396. Balancing the nature of the intrusion against the government's interests, this amounted to holding that there was a fact question as to if Ambler was so non-threating that he could not be subjected to 90 seconds of handcuffing in the prone position despite a 20-minute high-speed flight that endangered the Texas citizenry. Pet. App. 28a, 59a.

But as discussed the last time this Court reviewed a high-speed chase from the Fifth Circuit, the "immediacy of the risk" posed by a suspect "is a pure question of law." *Mullenix*, 577 U.S. at 10. Said another way, "an assessment of whether a suspect's physical actions amount to threatening behavior bearing on an excessive force claim is a question of law." *Terrell v. Allgrunn*, 114 F.4th 428, 438 (5th Cir. 2024) (citing *Argueta*, 86 F.4th at 1090).

Here, the majority conceded that when Nissen used force, Ambler was unhandcuffed and "pulling his body away from the ground" despite three officers struggling to cuff him in the prone position. Pet. App. 12a. The majority would send this case to trial based on the district court's belief that a jury could find Ambler was not a threat because he was inexplicably "subdued" despite resisting to the cuffs. Pet. App. 10a. Such a bare bones "fact question" is "simply a restatement of the objective reasonableness test"—not a true controversy. *Mullenix*, 577 U.S. at 10.

The videos reveal a reasonable officer could view Ambler as an ongoing threat as a matter of law. Firstly, Ambler was an enormous man who was unhandcuffed and feet from an unsearched car that he had just crashed. Secondly, Ambler's prior high-speed flight suggested that

he had little to no regard for the lives of others, and that he had demonstrated a willingness to flee police at all costs. Pet. App. 29a. Any reasonable officer would say that such a man is dangerous and cannot have his hands free.

The majority below also failed to properly state and follow the law regarding how an officer's split-second choices are analyzed under the Fourth Amendment's test. Instead, the majority decided to second guess Nissen's split-second on-scene judgment that—in light of the prior chase—the need to handcuff Ambler outweighed the risk of not immediately attending to "what possible health conditions he may or may not have had." Pet. App. 37a (Nissen's testimony).

That is not permissible. Objective reasonableness is examined "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Plumhoff*, 572 U.S. at 775. It is error to fail to account "for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* Officers are allowed latitude for "mistaken beliefs" about the amount of force necessary. *Saucier v. Katz*, 533 U.S. 194, 204 (2001).

With the prejudicial hindsight of knowing Ambler died, the majority determined that Nissen was "reasoning without context…" when he argued he could doubt the sincerity of Ambler's statement that he could not breathe. Pet. App. 11a. But it is undisputed that Ambler was resisting the handcuffs. Pet. App. 12a. The only controversy presented is accordingly Ambler's

subjective intent for resisting. *See Graham*, 490 U.S. at 399 ("subjective concepts" have "no proper place" in the Fourth Amendment query).

But in the aftermath of a dangerous chase, a reasonable officer is permitted to conclude that a suspect who endangered others by fleeing at high-speed would also engage in "ploys" to continue to evade arrest. *See Salazar*, 37 F.4th at 278. Here, Nissen made a judgment call as he helped the deputies handcuff Ambler in the dark of night in the wake of a high-speed chase. Pet. App. 11a. The Fifth Circuit denied qualified immunity on the excessive force and failure-to-intervene claims only because it knew in hindsight that Nissen's call was wrong—not because an objectively reasonable officer could not have made it.

III. The Fifth Circuit's Decision Contravened This Court's Qualified Immunity Precedent by Defining Clearly Established Law at a High Level of Generality.

This Court has established *distinct* guidelines for the lower courts at the second step of the qualified immunity analysis. Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *White v. Pauly*, 580 U.S. 73, 78 – 79 (2017).

Though a case does not have to be directly on point for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question ***beyond debate***." *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (emphasis added). Said better, "immunity protects all but the plainly incompetent or those who knowingly violate the

law." *Id.* This Court has repeatedly had to correct lower courts that define clearly established law too generally. *Id.* (citing *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015)).

Here, the Fifth Circuit erred by denying immunity when it failed to identify any prior precedent that found an officer used excessive force, or impermissibly failed to intervene, in a case with even generally similar facts. "[S]pecificity is especially important in the Fourth Amendment context" as this Court has emphasized it is difficult to recognize how the relevant legal doctrines "will apply to the factual situations the officer confronts." *Id.* (citing *Mullenix*, 577 U.S. at 305).

This case called for Nissen to control an enormous suspect in the aftermath of a high-octane chase. In the preceding chase, this suspect had endangered the general public by crashing numerous times only to resume his escape attempt. When Nissen arrived a minute after the deputies, he saw this dangerous individual resisting being handcuffed despite the efforts of two men. Pet. App. 38a.

Here, just as in *Kisela*, "the most analogous Circuit precedent favors [Nissen]." *Kisela*, 584 U.S. at 106. The Fifth Circuit's precedent in *Salazar* stands for the proposition that "what preceded" an arrest "matters" and that after an extended attempt to escape at high-speeds, an unrestrained suspect cannot "turn around, appear to surrender, and receive the same Fourth Amendment protection" from force. *Salazar*, 37 F.4th at 283 – 84; *accord* Pet. App. 40a.

Even assuming that Circuit precedent can "constitute clearly established law" it did not do so here. *Sheehan*, 575 U.S. at 614. The majority relied on *Darden* and *Ramirez* for the proposition that the law was clearly established that Nissen used excessive force and failed to intervene to stop the deputies' force. Specifically, the majority relied on *Darden* for the proposition that officers needed to cease force when they are told a subdued suspect is having a medical emergency. Pet. App. 20a.

Neither of the majority's proffered precedents involved a preceding high-speed chase. *Darden*, 880 F.3d at 725; *see also Ramirez v. Martinez*, 716 F.3d 369, 379 (5th Cir. 2013). In fact, *Darden* made no effort to run at all, and instead "immediately raised his hands in the air." *Id.* The facts presented by these two precedents could accordingly not be more different. For similar reasons, it was not clearly established that Nissen failed to intervene—especially since he arrived late and had to trust the deputies were using appropriate force. *White*, 580 U.S. at 80.

CONCLUSION

For these reasons, the Court should grant certiorari.

Repectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 10, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-50696

JAVIER AMBLER, SR., INDIVIDUALLY, ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES OF JAVIER AMBLER, II, ON BEHALF OF THE ESTATE OF JAVIER AMBLER, II, AND AS NEXT FRIENDS OF J.R.A., A MINOR CHILD; MARITZA AMBLER, INDIVIDUALLY, ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES OF JAVIER AMBLER, II, ON BEHALF OF THE ESTATE OF JAVIER AMBLER, II, AND AS NEXT FRIENDS OF J.R.A., A MINOR CHILD; MICHELLE BEITIA, AS NEXT FRIEND J.A.A., A MINOR CHILD; JAVIER AMBLER, II, ESTATE OF JAVIER AMBLER, II,

Plaintiffs-Appellees,

versus

MICHAEL NISSEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:20-CV-1068

Appendix A

Before SMITH, WIENER, and DOUGLAS, *Circuit Judges.*

DANA M. DOUGLAS, *Circuit Judge*:

Several officers attempted to restrain an individual following a high-speed chase. As they did so, the suspect exclaimed that he was suffering congestive heart failure and could not breathe. One Austin City Police Officer continued to restrain the arrestee despite those pleas. A few minutes later, the suspect died. His family later brought a lawsuit in federal court, alleging theories of excessive force and bystander liability against the restraining officers. As pertinent here, the Police Officer moved for summary judgment on qualified immunity grounds. But the district court denied the motion, reasoning that genuine fact disputes precluded a judgment as a matter of law. Because those fact disputes were material, we DISMISS for lack of jurisdiction and REMAND for further proceedings.

I

Javier Ambler II was traveling on a Texas roadway in the early morning hours without dimming the high beams on his vehicle. A Texas sheriff's deputy noticed and signaled for Ambler to stop, but Ambler refused. A high-speed pursuit then ensued as more officers joined the chase. Authorities trailed Ambler for more than twenty minutes along interstate highways and residential streets, at times exceeding speeds of one-hundred miles per hour. The chase ended when Ambler crashed into roadside trees

within the city limits of Austin, Texas. After the collision, a deputy approached Ambler and the wrecked vehicle with his gun drawn. As Ambler opened his car door, another deputy ordered him to "get on the ground," and discharged a taser. Ambler fell to the ground from the shock, and two deputies tried handcuffing him.

That was the moment when Austin City Policeman Michael Nissen entered the scene. The events that followed are in dispute. We nevertheless restate the facts "in the light depicted by the videotape" *Scott v. Harris*, 550 U.S. 372, 381, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007), or in this case, Nissen's body-worn camera, which shows the following: On arrival, Nissen advanced toward Ambler's vehicle with his gun drawn. He called out to the other officers that the car "look[ed] clear" and then approached the deputies, who were standing over Ambler's body. One of the deputies held a taser to Ambler's neck and said: "Give me your hand or I'm going to Tase you again." Ambler faintly exclaimed that he had congestive heart failure. An officer then yelled: "Other hand. Give me your hand." As one officer instructed Ambler to lie "flat on [his] stomach," Ambler twice said, "I can't breathe."

The officers repeatedly told Ambler to stop resisting, to which Ambler responded: "I am not resisting." Using his hands, Nissen then applied force to Ambler's arms and the back of his head, pushing it into the pavement. One of the deputies exclaimed: "I think I just broke his finger." Another said "I am going to put my knee on this one to control him. Let me know when you're ready." The officers then handcuffed Ambler, who appeared limp. Less than

thirty seconds later, the officers raised Ambler to a seated position and checked for a pulse. They felt nothing. Ambler was taken to a hospital where he was pronounced dead; the medical examiner's report stated that his manner of death was homicide.

Ambler's family filed suit in federal district court against Williamson County, the City of Austin Texas, and several defendants, including Nissen.[1] According to the family, Nissen violated Ambler's constitutional rights by using excessive force and failing to intervene in the altercation that allegedly cost Ambler his life. The district court denied Nissen's motion for summary judgment, finding that Nissen could not avail himself of qualified immunity.[2] Nissen now appeals that ruling.

II

We typically lack jurisdiction over non-final district court orders, although a few exceptions exist. Numbered

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1. Several defendants had been dismissed prior to Nissen's motion for summary judgment. Plaintiffs also alleged that the City of Austin failed to provide Ambler reasonable accommodations, in violation of Title II of the ADA, and is liable for Nissen's Fourth Amendment violation under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Neither theory is relevant to this appeal. The district court dismissed the deliberate indifference claim, and the arguments against the City are not implicated in this appeal.

2. The factual findings and legal conclusions were outlined in a report and recommendation issued by the Magistrate Judge. Because the district court adopted the ruling, we refer to the opinion throughout as the "district court's ruling."

among them, we may review interlocutory denials of summary judgment on qualified immunity. But that review is confined: We have jurisdiction to consider such appeals only if they "turn[] on an issue of law." *Curran v. Aleshire*, 800 F.3d 656, 660 (5th Cir. 2015) (quoting *Kinney v. Weaver*, 367 F.3d 337, 346 (5th Cir.2004) (en banc)).[3] In other words, judging the genuineness of the district court's factual findings (i.e., whether they exist) is off limits; determining whether those factual findings have "legal significance" is fair game. *Joseph ex. rel. Est. of Joseph v. Bartlett*, 981 F.3d 319, 331 (5th Cir. 2020) (citation omitted). We review the latter issue de novo. *See, e.g.*, *Flores v. City of Palacios*, 381 F.3d 391, 394 (5th Cir. 2004).

With those basics in mind, we must unfortunately complicate matters further. Although the district court's factual findings are given near-complete deference, we cannot disregard clear video footage when available: If events in dispute are recorded, as they are here, we do not accept any facts that are "*blatantly* contradicted by the record" *Scott*, 550 U.S. at 380 (emphasis added); *see also Bros. v. Zoss*, 837 F.3d 513, 517 (5th Cir. 2016) (Smith, J.) ("The Supreme Court has created a narrow exception to this jurisdictional limitation where the record blatantly contradicts one party's version of events."). The summary judgment standard otherwise remains the same: We view all other facts "in the light most favorable to the

3. Because both qualified immunity issues involve questions of law, we consider the merits of the disputes to the extent that they are legally significant. *See Argueta v. Jaradi*, 86 F.4th 1084, 1088 (5th Cir. 2023).

nonmoving party and draw all reasonable inferences in its favor." *Deville v. Marcantel*, 567 F.3d 156, 164 (5th Cir. 2009). A movant is entitled to a judgment as a matter of law if they show "no genuine dispute as to any material fact." FED. R. CIV. P. 56(a).

III

Plaintiffs' complaint challenges Nissen's allegedly unconstitutional conduct under 42 U.S.C. § 1983, a statute that holds state actors liable for depriving claimants of their constitutional rights. In this case, Plaintiffs say Nissen violated the Fourth Amendment, which protects individuals from "unreasonable searches and seizures." U.S. CONST. amend. IV. Plaintiffs contend that, by holding Ambler's body to the ground during a medical emergency, Nissen used unreasonable force which was a contributing cause of Ambler's death." Plaintiffs also contend that Nissen should have protected Ambler from the other officers' unnecessary force. Nissen's failure to do so, Plaintiffs assert, means Nissen is equally liable for his failure to intervene.

In response to Plaintiffs' allegations, Nissen invokes the doctrine of qualified immunity ("QI"), a defense that shields government officials "from liability for civil damages[.]" *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Whether an official is entitled to such a defense depends on the answers to two distinct legal questions. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). The first asks whether the official violated another's

constitutional rights; the other asks if the alleged violation was "clearly established" when the misconduct occurred. *Id.* The latter inquiry involves a review of legal authority to see if caselaw has deemed similar police actions to be illegal, thus putting state officials on "notice." *Id.*

In this case, the district court denied QI based on an inconclusive record and the presence of several factual disputes. The issue presented for this appeal is whether those disputes were "legally significant" and support the district court's holding. *See Joseph*, 981 F.3d at 331.

A

To resolve that issue, we begin with the constitutional violation prong of the QI analysis. We accordingly consider whether Nissen violated Ambler's Fourth Amendment right to be free from excessive force. Recovering under an excessive force theory requires that Plaintiffs prove "(1) an injury (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009) (quoting *Freeman v. Gore*, 483 F.3d 404, 416 (5th Cir. 2007)). No one disputes the first element—and for good reason. Ambler, after all, suffered more than injuries; he died as officers tried to arrest and detain him.

The crux of the parties' dispute instead concerns the force Nissen used to subdue Ambler and whether such force was clearly excessive or unreasonable. Collapsing these questions into a single inquiry, the district court

found that Plaintiffs raised material fact issues about whether the level of force Nissen used was appropriate given the circumstances of the encounter. It reached that conclusion after considering the "totality of the circumstances" from the "perspective of a reasonable officer on the scene" and the well-established *Graham* factors, named after the Supreme Court case bearing the same name. *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). We address the district court's reasoning and the parties' arguments below.

1

One *Graham* factor relevant to the excessive force inquiry considers the severity of the arrestee's crime. *Id.* In Nissen's view, the district court's Fourth Amendment analysis deemphasized this issue and, by extension, key portions of our precedent. Doing so, according to Nissen, was reversible error. In making his argument, Nissen points to our ruling in *Salazar v. Molina*, 37 F.4th 278 (5th Cir. 2022), a case involving a suspect who, like Ambler, led officers on a high-speed chase. The chase in *Salazar* culminated in the subject stopping and exiting his vehicle, and then lying on the ground, presumably in an act of surrender. *Id.* at 280. Despite the suspect's submission, however, a sheriff's deputy immediately tased him. The arrestee later sued, alleging excessive force. *Id.* We concluded that the arrestee's claim was meritless, partly because the suspect could have posed a serious safety threat after dangerously evading capture. *Id.* at 282.

Nissen claims here that Ambler similarly posed a serious threat of bodily injury after leading officers

on a dangerous chase. And like the circumstances in *Salazar*, Nissen asserts that any reasonable officer would believe that Ambler was an ongoing threat until he was restrained in handcuffs. Nissen accordingly contends that he is entitled to judgment as matter of law on Plaintiffs' excessive force claim. We hold a different view. For one thing, the district court's ruling did not undermine the significance of the high-speed pursuit—nor could it, as the state of Texas considers evading arrest via high-speed chase a felony, Tex. Penal Code § 38.04, and the helicopter footage clearly shows Ambler weaving in and out of traffic, jeopardizing the safety and wellbeing of others, *see Salazar*, 37 F.4th at 281-82.

But, for another, the Fourth Amendment analysis considers the facts and circumstances of each challenged encounter. *See Graham*, 490 U.S. at 396. And although some of *Salazar*'s factual details parallel Ambler's initial evasion, what happened after the pursuit in each case is meaningfully distinct. Of particular note, the officers in *Salazar* encountered the unrestrained suspect mere seconds after the chase ended. *Id.* at 280. Such a timeframe and scenario are unlike those at issue here: Nissen entered the arrest scene nearly one minute after the chase. On arrival, Nissen witnessed several officers surrounding Ambler's body with one officer pointing a taser to Ambler's neck. Distinguishing matters further, Ambler was gasping as he presumably underwent a medical emergency, all the while repeating "I have congestive heart failure," and "I can't breathe."

Relying on these distinctions, the district court believed a separate *Graham* factor outweighed the

severity of Ambler's initial crime—that is, Ambler's immediate threat of danger. *Graham*, 490 U.S. at 396. The court specifically held that the record raised a genuine issue of "material fact as to whether a reasonable officer would believe that [Ambler] . . . was subdued [or] an immediate threat to safety when Nissen began helping handcuff him." The video footage does not blatantly contradict that holding. *Scott*, 550 U.S. at 380. True enough, Ambler engaged in dangerous behavior before his arrest. Even still, based on the district court's factual findings, a reasonable jury could conclude that Ambler lacked a means to evade custody when Nissen entered the scene. *See Joseph*, 981 F.3d at 335 ("If the suspect lacks any means of evading custody—for example, by being pinned to the ground by multiple police officers—force is not justified."). A reasonable jury could therefore conclude that Ambler posed little or no threat to Nissen or others during the arrest. *See id.* The fact issues identified by the district court in this context were therefore material to Plaintiffs' Fourth Amendment claim. And we lack jurisdiction to consider anything more. *See id.* at 331.

2

Another *Graham* factor relevant to the excessive force inquiry is whether Ambler was resisting or evading arrest by flight. *Graham*, 490 U.S. at 396. According to Nissen's testimony, he was unaware whether Ambler had been compliant before coming to the scene. But Nissen said that, after he arrived, it was "clear" that Ambler was not complying with commands; he was "physically resisting [Nissen's] efforts to place his hands behind his back." Plaintiffs view the facts differently. They contend

that Ambler was not resisting but instead "instinctively putting one arm on the ground to try to breathe." For its part, the district court held that the videos did "not provide the clarity necessary to resolve the factual dispute presented by the parties' conflicting accounts."

On appeal, Nissen contests the district court's characterization, reasoning that any reasonable officer would have believed Ambler was resisting authority. Although Ambler alerted the officers about his inability to breathe, Nissen says he need not have credited "Ambler's statements that he was having a medical emergency." Nissen again references Ambler's choice to evade arrest by vehicle, explaining that an officer could have reasonably been concerned about the sincerity of Ambler's appeals. "When a suspect has put officers and bystanders in harm's way," Nissen stresses, "it is reasonable for officers to question whether the now-cornered suspect's purported surrender is a ploy." *See Salazar*, 37 F.4th at 282.

Applying such reasoning without context, however, would undermine the fact-specific nature of the excessive force analysis. After all, a criminal's choice to engage in unreasonable behavior does not give officer license to do the same. To the contrary, an officer must use a "justifiable level of force in light of the continuing threat of harm that a reasonable officer could perceive." *Id.* at 283. And in this case, "the issue of whether reasonable officers in this situation would have credited the warnings from [Ambler] . . . is a factual question that must be decided by a jury." *Darden v. City of Fort Worth*, 880 F.3d 722, 730 (5th Cir. 2018).

None of that means that Nissen acted unreasonably as a matter of law. Perhaps Ambler was indeed refusing to submit to the officers by pulling his body away from the ground, and perhaps Nissen responded in a reasonable manner. But viewing the evidence in Plaintiffs' favor as we must, however, it is just as believable that their allegations are correct, and Ambler was in a struggle for his life. In either case, such a dispute is reserved for a jury, not summary judgment. Fed. R. Civ. P. 56(a) (stating that a "court shall grant summary judgment if the movant *shows that there is no genuine dispute* as to any material fact."). Because the court correctly considered the legal significance of the factual disputes, we end our inquiry on this issue here. *See Joseph*, 981 F.3d at 331.

B

To supplement their Fourth Amendment allegations, Plaintiffs next contend that Nissen's use of restraint was an application of deadly force. Such a theory "is treated as a special subset of excessive force claims." *Aguirre v. City of San Antonio*, 995 F.3d 395, 412 (5th Cir. 2021). And like the excessive force analysis above, this particular inquiry still calls for an objective reasonableness standard, *see Scott*, 550 U.S. at 382-83, even though the analysis includes an added layer: Analyzing the validity of a deadly force allegation involves a two-pronged test. The first part asks "whether the force used constituted deadly force"; the second considers "whether the subject posed a threat of serious harm justifying the use of deadly force." *Timpa v. Dillard*, 20 F.4th 1020, 1028 (5th Cir. 2021). Applying both prongs to the facts here, the district court denied Nissen

summary judgment. On appeal, Nissen contends that the district court's holding was in error and contradicted by video evidence.

Nissen focuses his challenge on the first prong of the analysis—whether the force used was deadly. Even though he concedes that deadly force was unwarranted in Ambler's case, he nevertheless avers that the force he applied was not deadly to begin with. In Nissen's telling, he was using "minimal force" or "soft hand force" to place Ambler into handcuffs. That Ambler died because of such minimal restraint was merely accidental and mainly the result of Ambler's poor health. Nissen reasons that it was unforeseeable that applying "soft hand force" would result in an injury, let alone death. In support of this argument, Nissen points to video footage that he argues "conclusively shows that no officer was using deadly force to try and kill Ambler."[4] As the video depicts, Nissen restrained Ambler for 90 seconds. Compared with other deadly force cases, Nissen explains that such a period was minuscule. Indeed, two similar cases the district court referenced involved officers who restrained decedents for at least five minutes. *See, e.g.*, *Aguirre*, 995 F.3d at 413 (five minutes); *Timpa*, 20 F.4th at 1028 (fourteen minutes).

Nissen believes that no reasonable officer would have known that using force on Ambler for such a brief period would lead to his death. He contends that any conclusion otherwise would essentially require denying QI in all

4. We note that the test isn't whether an officer was *trying* to kill Ambler, but whether the force is deadly—that is, could have killed him. *See Scott*, 550 U.S. at 381.

cases involving an accidental death. Such a result, in Nissen's telling, would trade the Fourth Amendment's general reasonableness standard for an outcome-oriented one that contravenes Supreme Court authority. *See Scott*, 550 U.S. at 383. ("Whether or not [the officer's] actions constituted application of 'deadly force,' all that matters is whether [the officer's] actions were reasonable.").

At least in this case, however, Nissen's fears are unfounded. As a threshold matter, whether a use of force is "deadly" is a question of fact. *Flores*, 381 F.3d at 399 ("We lack jurisdiction to review the district court's factual finding that [the officer] used deadly force."). The question is whether a jury could find that the use of force "carr[ied] with it a substantial risk of causing death or serious bodily harm." *Timpa*, 20 F.4th at 1032 (quoting *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998)). And the district court here identified specific material fact issues precluding summary judgment. For example, it considered the recorded footage of the encounter. As noted, the video shows an obese Ambler stating: "I have congestive heart failure" and twice exclaiming "I can't breathe." Nissen himself even acknowledged that one "obvious pitfall[] of [a suspect lying face down] is, you know . . . people could be at risk for positional asphyxiation."

The district court also considered expert reports. The medical examiner who performed Ambler's autopsy determined that Ambler's death was a homicide and found that it was caused by "congestive heart failure and cardiovascular disease associated with morbid obesity in combination with forcible restraint." Plaintiffs' medical expert further opined that Ambler died from "a vicious

cycle of respiratory distress from hypertensive crisis and worsening heart failure pushed to physiological extremes by subsequent tasing and forcible restraint."

And while Nissen's maneuver on a healthy plaintiff may have resulted in no injury at all, it is well established that state actors who unlawfully use excessive force take their victims as they find them. *Darden*, 880 F.3d at 728. Although that standard does not make minimal force excessive when used on an eggshell plaintiff, a claimant may nevertheless prevail on an excessive force claim if a reasonable officer would be aware of a preexisting health issue and then aggravates it. *See Windham v. Harris Cnty.*, 875 F.3d 229, 242 (5th Cir. 2017) ("Our law is clear that the second [excessive force] prong does not 'preclude [] recovery for aggravation of preexisting injury caused by the use of excessive force.'") (second alteration in the original). In this case, the court identified enough evidence to conclude that a reasonable officer could have been aware of Ambler's health issues giving his obvious size and pleas for air. *See, e.g.*, *Timpa*, 20 F.4th at 1033 (holding that reasonable jury could find "use of a prone restraint with bodyweight force on an individual with three apparent risk factors—obesity, physical exhaustion, and excited delirium—'created a substantial risk of death or serious bodily injury.'" (quoting Gutierrez, 139 F.3d at 446)). This was so even if Nissen applied force for a mere ninety seconds.

Perhaps Nissen heard Ambler's cries. Perhaps he did not. And perhaps Nissen's use of force, in his mind, was minimal given the context. But the issues here do not turn on Nissen's subjective appraisals; the relevant

inquiry is whether a "reasonable officer" would consider applying Nissen's level of force in the same situation. *See Graham*, 490 U.S. at 396. The district court acknowledged this reality and, to that end, did not legally err as a result. If anything, the district court's holding demonstrates precisely why these Fourth Amendment cases are fact intensive: Not all plaintiffs are the same, and harmless force in one situation could be deadly force in another. While Nissen would have us disregard the context of his encounter with Ambler, doing so would trade nuance for willful blindness. And contrary to his view, such an approach is incompatible with the Fourth Amendment reasonableness standard. *See Graham*, 490 U.S. at 396 ("Because 'the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular case[.]") (citation omitted) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979))).

In sum, the district court's factual findings regarding a Fourth Amendment violation support its legal conclusions. We lack jurisdiction to "second guess" anything more. *See Joseph*, 981 F.3d at 331.

IV

Excessive force aside, Plaintiffs' other basis for establishing § 1983 liability stems from Nissen's alleged failure to intervene. According to Plaintiffs, Nissen is liable under this theory because he was "present at

the scene and [did] not take reasonable measures to protect a suspect from another officer's use of excessive force." *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995). Section 1983 claimants may succeed on these "bystander liability" claims when the officer "(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act." *Whitley v. Hanna*, 726 F.3d 631, 330 (5th Cir. 2013) (cleaned up). In resolving whether a bystander liability claim is viable, courts also consider whether an officer "acquiesce[d] in" the alleged constitutional violation. *See Hale*, 45 F.3d at 919.

When addressing Plaintiffs' allegations here, the district court identified a genuine dispute of material fact as to whether Nissen failed to reasonably intervene. Relying on video evidence and testimony, the court found that Nissen helped with the arrest after he cleared Ambler's vehicle. It further pointed to evidence showing that Nissen heard Ambler say he had congestive heart failure and repeatedly say he could not breathe. Based on Nissen's proximity and the duration of force, the court concluded that a reasonable jury could find that Nissen had an opportunity to intervene. Nissen disagrees.

As a threshold issue, Nissen stresses that he cannot be liable for the force other officers used outside his presence. As for the force they used after he arrived, Nissen claims it was insignificant. He argues that videos reveal that he saw Ambler tased only once by the deputies—and this occurred as they tried rolling Ambler back onto his stomach after Ambler had "effectively resisted all

three officers." In Nissen's telling, it was impossible for him to know how Ambler acted between the time the crash occurred and his arrival on the scene. As a policy matter, Nissen contends that courts should give leeway to late-arriving officers because they must make split-second assumptions based on incomplete information. *See Chivers v. Reaves*, No. 1:13-CV-00171, 2017 U.S. Dist. LEXIS 159397, 2017 WL 4296726, at *27 (D. Utah Sept. 26, 2017) (holding that "[i]t [was] plain that a reasonably prudent officer arriving on scene with limited information would be justified in assuming that . . . [a plaintiff] [was a] potential threat[].").

While it might be true that Nissen's actions were reasonable, the video evidence here does not blatantly contradict Plaintiffs' version of events or the district court's findings. Plaintiffs allege that Nissen had every reasonable opportunity to mitigate and stop the use of force once he arrived at the active arrest. After all, Plaintiffs note, Nissen had at least two minutes when he was within arm's reach to realize that Ambler was not resisting and posed no threat. Based on the video footage, Plaintiffs say Nissen was in earshot of Ambler to hear his breathing and pleas for help. Nissen was also present as the deputies tased Ambler at least once. It is true that Nissen's expert report explained that the other officer's taser was set to a mode that "does not penetrate deeply enough to affect any human muscles or organs." But as the district court found, Plaintiffs' expert concluded that Ambler died from "a vicious cycle of respiratory distress from hypertensive crisis and worsening heart failure pushed to physiological extremes by subsequent tasing and forcible restraint."

Given those contradicting facts, the court held that a jury could reasonably determine that Nissen had an opportunity to stop the excessive force but failed to do so. We agree that the factual disputes the district court identified are material. Ambler's pleas for help, coupled with his arguably obvious medical distress, may have alerted a reasonable officer to intervene in the ordeal to stop the tasing and continued use of force. *See, e.g.*, *Carroll v. Ellington*, 800 F.3d 154, 178 (5th Cir. 2015) (affirming denial of summary judgment when it was disputed whether officer was present for taser strikes of restrained individual). We have no authority to engage Nissen's arguments further on this claim because they turn on factual disputes alone.

V

Our analysis does not end after a plaintiff clears QI's first hurdle. As noted above, plaintiffs must also meet the "clearly established" prong to avoid summary judgment. Doing so requires them to point to a case where an official, faced with similar circumstances as the defendant, was held to have violated the Constitution. *White v. Pauly*, 580 U.S. 73, 79, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017). Although the law can be clearly established "despite notable factual distinctions between the precedents relied on and the cases then before the Court," *Hope v. Pelzer*, 536 U.S. 730, 740, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), relying on generalized principles is not enough: The pertinent decisions must give "reasonable warning that the conduct then at issue violated constitutional rights" *White*, 580 U.S. at 79.

Appendix A

A

We first address excessive force. Citing *Darden v. City of Fort Worth*, 880 F.3d at 733-34, the district court held that Nissen violated clearly established law. In *Darden*, officers performed a no-knock raid to execute a narcotics warrant inside a residence. During his subsequent arrest, arrestee Darden was thrown to the ground, tased, choked, and punched. He was "obese" and died from a "heart attack" during the encounter. *Id.* at 725. Throughout Darden's arrest "other people in the residence were repeatedly yelling that Darden could not breathe." *Id.* at 726. A unanimous panel of this court held it clearly established that "the degree of force an officer can reasonably employ is reduced when an arrestee is not actively resisting." *Id.* at 733 (collecting cases). Because *Darden* was issued years before the relevant encounter here, the district court held that it applied to this case; Nissen, according to the district court, was therefore on notice that it was unlawful to use excessive force against a person who was on the ground, not resisting, and possibly unable to breathe.

Nissen disputes that holding, arguing that the district court's rehashing of *Darden* "glossed" over the relevant facts without considering the relevant distinctions. Most importantly, Nissen explains, the *Darden* court held that the force used on an arrestee was excessive partly because he "was not suspected of committing a violent offense." *Id.* at 729 (citation omitted). That issue alone, Nissen thinks, makes *Darden* counterfactual to the case here. Indeed, Nissen argues that Ambler was suspected of committing a

crime that revealed an abject intention to endanger others and escape at all costs.

In making his argument, however, Nissen seems to suggest that Ambler continued fleeing throughout the encounter, despite the clear video evidence suggesting otherwise. To be sure, "where a suspect initially resists, force must be reduced once he has been subdued." *Bagley v. Guillen*, 90 F.4th 799, 803-04 (5th Cir. 2024) (internal quotation marks, alteration, and citation omitted). As explained above, there is a fact dispute about whether Ambler was subdued when Nissen arrived on the scene. If Ambler was indeed compliant and not resisting arrest, then the continued use of force, particularly after Ambler said he had congestive heart failure and could not breathe, necessarily would be excessive. *See id.*; *see also Timpa*, 20 F.4th at 1038 (determining that law in 2016 clearly established that if plaintiff was "subdued and nonthreatening by nine minutes into the restraint, then the continued use of force for five additional minutes was necessarily excessive"). To that end, such a circumstance would, as the district court found, parallel *Darden*. On that basis, the district court did not commit legal error.

B

Turning last to Plaintiffs' § 1983 bystander claim on QI's second prong, the district court held that an officer violates clearly established law in excessive force cases if the officer "knew a constitutional violation was taking place and had a reasonable opportunity to prevent the harm." *Hamilton v. Kindred*, 845 F.3d 659, 663 (5th Cir.

2017). In this context, the district court concluded that tasing someone who is subdued and does not pose a threat can constitute excessive force. *See Ramirez v. Martinez*, 716 F.3d 369, 379 (5th Cir. 2013); *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012).

On appeal, Nissen again points to Ambler's decision to flee from police by motor vehicle. He contends that no clearly established case put Officer Nissen on notice that the deputies—in subjecting Ambler to a taser and prone restraint after a high-speed chase—violated Ambler's constitutional rights. But, again, the district court identified a fact dispute about whether Ambler was visibly undergoing a medical emergency when Nissen arrived at the active arrest. It also found a dispute about whether Nissen had time to decide that force was not necessary and try to stop it. *See Hamilton*, 845 F.3d at 663. If Plaintiffs' view of the encounter prevails at trial, Nissen had fair notice that participating in another officers' use of excessive force gives rise to liability. *See, e.g.*, *Carroll*, 800 F.3d at 178 (affirming denial of summary judgment where it was disputed whether officer was present for taser strikes of restrained individual); *Timpa*, 20 F.4th at 1039 (holding that it was clearly established in 2016 that officers who stood "mere feet away" from plaintiff during fourteen-minute restraint were subject to bystander liability). The district court did not legally err in reaching that conclusion.

One final point bears mentioning. In reaching our conclusion today, we deferred to the district court's sound identification of genuine factual disputes and reserved

the weighing of evidence for the jury's capable hands. In doing so, we have not only allowed the district court space to do its job, but we have given jurors the space to do theirs. *See Joseph*, 981 F.3d at 331. So, for all the dissent's inflammatory rhetoric, it makes at least one salient point: The majority's ruling indeed "serves . . . this plaintiff." *See post*, at 15. Absent from the dissent's observation, however, is the value our decision offers this defendant. A restrained judiciary, after all, benefits all parties in equal measure. In the dissent's view, our decision today in this interlocutory appeal will lead to an endless parade of horribles. But to the extent the dissent's concerns are valid, it should direct its criticisms at the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 56(a), or Supreme Court authority, *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), not this opinion. *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) ("[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.").

VI

As outlined above, Nissen fails to raise pure legal issues and instead challenges the district court's factual findings. Nissen has therefore failed to invoke this court's limited interlocutory jurisdiction and this appeal is accordingly DISMISSED. This case is REMANDED for further proceedings.

Appendix A

JERRY E. SMITH, *Circuit Judge*, dissenting:

The majority, albeit with the most wholesome of intentions, preaches that qualified immunity is "a defense that shields state officials from being held accountable for their misconduct." Op. at 5 (citation omitted). Given that opening, what follows is no surprise.

In the wake of a high-speed chase involving three crashes and triple digit speeds, Officer Michael Nissen used a modicum of force to restrain Javier Ambler. Nissen spent about a minute controlling Ambler's hand—without touching any other part of his body—and then no more than 20 seconds applying pressure to Ambler's upper back and head. That is hardly anything out of the ordinary, especially in the immediate aftermath of Ambler's extended and reckless flight from justice that endangered the public, the officers, and Ambler himself. Indeed, that is precisely the type of controlled and measured response we expect from police reacting to a manifestly dangerous suspect. Tragically, in part because of an imperceptible medical condition, Ambler died during the arrest as a result of the restraint.

Qualified immunity exists for just this sort of a case. A police officer made an appropriate, split-second judgment about reasonable force in light of the gravity of the situation and is now tied up in a federal lawsuit, facing possible civil damages, because of it. Yet the majority jettisons QI for officers who do just that.

Because the majority makes it impossible for officers to receive qualified immunity in cases of accidental death,

no matter how reasonable their use of force was in context, I respectfully dissent.

I.

Some of the majority's errors stem from its misconception of the appropriate standard of review. It avers that "judging the genuineness of the district court's factual findings (i.e., whether they exist) is off limits." Op. at 4 (citation omitted). Yet, though some judges, in error, have suggested that we are forbidden to do so,[1] "we are permitted to review genuineness where, as here, video evidence is available." *Argueta v. Jaradi*, 86 F.4th 1084, 1088 (5th Cir. 2023) (citations omitted). There are multiple, clear videos of what happened. Therefore, reviewing the district court's determinations of genuineness is not off the table.

II.

One might charitably express a narrow version of what the majority advances as follows:

> Ambler died. Deadly force is a question of fact. There is no question that if Nissen had walked up and shot Ambler in the head he would be liable. So deadly force is obviously material. Ergo, we deny QI.

The practical problem is two-fold. *First*, the majority essentially eliminates qualified immunity in cases of

1. *See Argueta v. Jaradi*, 94 F.4th 475, 476-81 (5th Cir. 2024) (Douglas, J., dissenting from denial of rehearing en banc).

accidental death, almost all of which are situations where deadly force is not warranted. If it were warranted, they would likely not be *accidental*. That means "whether force is deadly" will almost always be material in accidental-death cases. Since deadliness is a fact question, a defendant will never get QI.

That is error. If we accept the basic rationale behind qualified immunity, this sort of an accidental-death case is squarely within its heartland. But instead, the majority's rationale categorically eliminates QI from this set of cases.

Second, the majority's reasoning creates a perverse incentive for police to use deadly force when it is justified, even if the situation can be deescalated. This case is the perfect example: To avoid liability, Nissen should have shot Ambler during the chase (when deadly force was more likely justified to protect the public). In the majority's view, waiting and trying to defuse the situation with minimum force increased, counterintuitively, Nissen's risk of liability. That is an odd result, indeed.

Obviously, we are not policymakers, so none of the above matters on its own accord. I offer it only to demonstrate the grave consequences of the majority's legal error.

II.

And what a legal error! Nissen should receive qualified immunity from both claims at both prongs of the standard QI analysis.

Appendix A

A.

Nissen did not use constitutionally excessive force.

1.

> In excessive-force claims, the reasonableness of an officer's conduct depends on the "facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight."

Cooper v. Brown, 844 F.3d 517, 522 (5th Cir. 2016) (quoting *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). These are the so-called *Graham* factors, each of which supports Nissen's use of force against Ambler.

The majority agrees that the first *Graham* factor supports Nissen. It rightly notes that "the state of Texas considers evading arrest via high-speed chase a felony, Tex. Penal Code § 38.04, and the helicopter footage clearly shows Ambler weaving in and out of traffic, jeopardizing the safety and wellbeing of others." Op. at 7 (citation omitted). The majority wrongly emphasizes the district court's weighing of the factors. "[T]he ultimate determination of Fourth Amendment objective reasonableness is a question of law." *White v. Balderama*, 153 F.3d 237, 241 (5th Cir. 1998) (per curiam) (citation

omitted). Therefore, we may freely weigh the first *Graham* factor in favor of Nissen.

The majority does not grapple with the degree to which this factor supports Nissen's use of force. Undeterred by multiple crashes, Ambler continued to flee at triple-digit speed through residential neighborhoods—gravely endangering many innocent lives to evade a routine traffic stop. This weighs strongly in favor of Nissen.

2.

On to the second *Graham* factor, "whether the suspect poses an immediate threat to the safety of the officers or others." *Graham*, 490 U.S. at 396. The majority suggests that there is a genuine dispute of material fact "whether a reasonable officer would believe that [Ambler] . . . was subdued [or] an immediate threat to safety when Nissen began helping handcuff him." Op. at 8 (citation omitted). But this factor—which may or may not be the most important in this context[2]—"is a question of law left to the court." *Argueta*, 86 F.4th at 1092. And with the benefit of two videos of Ambler's arrest, this factor readily resolves in favor of Nissen.

There are several reasons why a reasonable officer in Nissen's position might act as he did. *First*, Ambler

2. "[T]he second factor—whether there is an immediate threat to safety—is generally the most important factor in determining the objective reasonableness of an officer's use of deadly force." *Baker v. Coburn*, 68 F.4th 240, 247-48 (5th Cir. 2023) (citation omitted). I will address the argument that this was a use of deadly force.

had just come from of a high-speed chase fleeing a traffic stop for failure to dim his high beams. That suggests (1) that Ambler had little to no regard for the lives of others, (2) that Ambler had a demonstrated willingness to flee the police at all costs, and (3) that maybe this was not just about a minor traffic infraction. Maybe Ambler had something else in the car that heightened his desire to flee. Maybe he was mentally ill or on drugs. Each of these is a meaningful possibility that a reasonable officer would consider. Ambler's flight alone makes this *Graham* factor weigh in favor of Nissen.

But the flight was not the only fact known to Nissen from which he could have reasonably inferred Ambler's dangerousness. *Inter alia*, Ambler—at 410 pounds—was a very large individual, who was still unrestrained and feet from an unsearched car, despite the efforts of multiple other police officers who had deployed a taser. It boggles the mind to think that a reasonable officer would not perceive Ambler as a meaningful threat.

Resisting this conclusion, the majority attempts to distinguish *Salazar v. Molina*, 37 F.4th 278 (5th Cir. 2022), in which, after a considerably less dangerous chase,

> Salazar abruptly stopped his vehicle. He quickly got out, dropped to his knees next to the car, and raised his hands. He then lay on the ground with arms above his head and legs crossed. Five seconds after stopping his car, Salazar was lying prone on the ground.

Id. at 280. Despite the clear surrender, the police tased Salazar. Our court rejected Salazar's excessive force claim, holding that

> when a suspect has put officers and bystanders in harm's way to try to evade capture, it is reasonable for officers to question whether the now-cornered suspect's purported surrender is a ploy. That's especially true when a suspect is unrestrained, in close proximity to the officers, and potentially in possession of a weapon.

Id. at 282. Here, "[Ambler] ha[d] put officers and bystanders in harm's way to try to evade capture." *Id.* He was also "is unrestrained, in close proximity to the officers, and potentially in possession of a weapon." *Id.*[3]

The majority attempts to distance itself from *Salazar*: "Distinguishing matters further, Ambler was gasping as he *presumably* underwent a medical emergency, all the while repeating 'I have congestive heart failure,' and 'I can't breathe.'" Op. at 8 (emphasis added). But what the majority labels a distinction is the central analogy. The majority gets the presumption precisely backward. In the

3. I grant that whether Ambler was "potentially in possession of a weapon" is the weakest point of comparison. But it is not inconceivable, given Ambler's size and proximity to the relatively unsearched car. More importantly, this is just one of many factors that heighten the already reasonable assumption that Ambler's actions were a ploy. That's especially true when every single one of the other facts mentioned in this holding from *Salazar* is on all fours with this case.

context of this sort of a chase, when a reasonable officer hears Ambler's pleas, he reasonably assumes "ploy," not "medical emergency." *See Salazar*, 37 F.4th at 282. Or, at the very least, he is reasonably entitled to make that presumption.[4]

The majority fixates on one other aspect of Ambler's situation, that "a reasonable jury could conclude that Ambler lacked a means to evade custody when Nissen entered the scene." Op. at 8 (citation omitted). This falls properly under the third *Graham* factor, "whether he is actively resisting arrest or attempting to evade arrest by flight," 490 U.S. at 396, so I will address it there.

But factor two—"whether the suspect poses an immediate threat to the safety of the officers or others," *id.*—unambiguously favors Nissen.

3.

Thus far, we are faced with an unrestrained suspect who poses a substantial threat to officers in the wake of a serious crime indicating a very low regard for human life.

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4. The majority also points to Nissen's comparatively late arrival, though it admits the difference between the cases is measured in mere seconds. The majority does not explain why time of arrival—especially when still so close to the initial contact—matters in applying the *Salazar* presumption. The *Salazar* presumption is that somebody who is willing to flee at great cost to others might also be willing to lie to officers to get out of a tricky spot. Why that has anything do with a difference in arrival times escapes my imagination.

Those factors alone justify Nissen's light-touch application of force to Ambler.

The final *Graham* factor is "whether he is *actively resisting arrest* or attempting to evade arrest by flight." *Id.* (emphasis added). I agree with the majority that any attempt by Ambler to flee the scene would have likely failed.[5] But the third *Graham* factor includes "actively resisting arrest." *Id.* And it's hard to characterize Ambler's actions as anything other than that. Two minutes and fifteen seconds pass between the time the first officer makes physical contact with Ambler and the time the handcuffs click. In those two-plus minutes, Ambler ignored command after command, continuously and rather obviously providing physical resistance to the multiple officers trying to cuff him. It does not get more clear-cut than that.

Yet the majority proffers two objections to the clarity of this situation. First, the majority concludes that "a reasonable jury could conclude that Ambler lacked a means to evade custody when Nissen entered the scene." Op. at 8 (citation omitted). Its best authority for the relevance of that conclusion is an absurdly overbroad reading of *Joseph v. Bartlett*, 981 F.3d 319, 335 (5th Cir. 2020).

Joseph held that "[i]f the suspect lacks any means of evading custody—for example, by being pinned to the ground by multiple police officers—force is not justified." *Id.* The only way that might matter in this case is if one

5. Though this is only because of multiple officers' applying to Ambler the precise sort of force that the majority finds objectionable.

reads the court to be imposing a categorical bar on the use of any force when a suspect is on the ground. But that is quite clearly not what *Joseph* stands for.

First, the language immediately before this passage makes it plain that subduing a suspect means that officers must reduce but not necessarily cease force. Second, it conditions that reduction in force to require the actual subduing of the suspect. And Ambler was far from subdued. That differs significantly from the situation in *Joseph*.[6] And third, even if Nissen's toes edged beyond the boundary set forth in *Joseph*, we don't jettison the other *Graham* factors—which obviously and strongly support a robust use of force in this case.[7]

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6. In *Joseph*, a schizophrenic man who had been seen standing by a middle school jumped behind a convenience store counter while avoiding the police. He promptly crumpled into the fetal position. Then, "Officer Martin, weighing 300 pounds, immediately placed his full weight onto Joseph, who was still lying on the floor with his legs bent toward his chest." 981 F.3d at 326. And the use of force continued for some time, including "deploy[ing] [a] taser for eleven seconds," "jabb[ing] [a baton] downward, striking Joseph at least twice with the pointed end," tasing for another three seconds, "kick[ing] Joseph twelve to thirteen times while holding onto the counter," "punching Joseph in the head three times," "drag[ging] Joseph toward [a] wider area," then "punch[ing] Joseph in the face [another] three times," and closing out the "scrum" with "punch[ing] Joseph in the head [yet another] six times." *Id.* at 326-27. Read in context, the court was concerned about the timing of all this in relation to the initial pinning. *See id.* at 335.

7. Especially relative to *Joseph*—in which the police used significantly more force against a significantly less dangerous person because of a far less serious offense. *See supra* note 5.

Second, the majority attempts to distinguish *Salazar* by appealing to "the fact specific nature of the excessive force analysis." Op. at 9. Beyond this vague handwringing, we get very little. Presumably, the majority means to impute its attempt to distinguish *Salazar* under the second *Graham* factor here. But that distinction proves the central analogy between the cases on the third factor, just as it does on the second factor. Indeed, the third *Graham* factor also implicates reasonable concerns about the genuineness of a surrender. *See Salazar*, 37 F.4th at 284. Because Nissen could reasonably doubt the genuineness of Ambler's pleas, he could reasonably interpret Ambler's attempts to move away from officers as resistance rather than as "a struggle for his life." Op. at 10.[8]

Because all three *Graham* factors support Nissen, Ambler's excessive-force claim fails on the first prong of qualified immunity.

4.

The majority separately treats plaintiffs' claims of deadly force. That methodology is error as a matter of law. Though "[c]laims that law enforcement unreasonably utilized deadly force are treated as a special subset of excessive force claims," *Aguirre v. City of San Antonio*, 995 F.3d 395, 412 (5th Cir. 2021), the constitutional inquiry is still governed by the *Graham* factors.[9]

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8. And that's assuming Ambler's actions were ambiguous. But they were not.

9. All that changes is which factors are emphasized. "When an officer uses deadly force, the second *Graham* factor is generally the most important." *Singleton v. Casanova*, No. 22-50327, 2024 U.S.

The majority relied on the important decision in *Tennessee v. Garner*, 471 U.S. 1, 3, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), to obscure the relevant analysis. In particular, the majority reads *Garner* to establish some sort of threshold inquiry in deadly-force cases: "Deadly force is objectively unreasonable 'unless it is necessary to prevent [a suspect's] escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" Op. at 10 (quoting *Garner*, 471 U.S. at 3). That is error twice over.

First, the Supreme Court has flatly rejected this errant reading of *Garner*. *See Scott v. Harris*, 550 U.S. 372, 382, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). Indeed, "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Id.* Instead, "Whether or not [Nissen]'s actions constituted application of 'deadly force,' all that matters is whether [Nissen]'s actions were reasonable." *Id.* at 383. Having already applied the *Graham* factors and found that each one favors Nissen, that ends our inquiry.

Second, the majority curiously recontextualizes *Garner*'s language to untether it from *Garner*'s very different set of facts. In full, the passage from *Garner* reads,

> This case requires us to determine the constitutionality of the use of deadly force to

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App. LEXIS 14073, 2024 WL 2891900, at *31 n.17 (5th Cir. June 10, 2024) (unpublished) (citation and internal quotation marks omitted).

> prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

Garner, 471 U.S. at 3 (emphasis added). The use of "such" harkens back to the facts of that case, which involved shooting a fleeing suspect with live rounds to prevent his escape. *See id.* at 4. That sort of force that is very different from what was present here, and consequently it calls for a different sort of inquiry.

In short, none of the facts raised by the majority in this section materially bears on whether Nissen's actions were reasonable in light of the *Graham* factors. Whether Nissen heard Ambler does not matter because Nissen could reasonably disregard Ambler's complaints in the context of his flight. Whether Nissen's actions did or did not *in fact* lead to Ambler's death, as the medical examiner suggested, doesn't matter because it does not cast doubt on the reasonableness of Nissen's split-second decisions at the time of the accident. Even Nissen's admission about the risks of the prone position in the abstract does not matter because of the negligible amount of time Nissen forced Ambler to be quasi-prone in this case. That such a position "could be" dangerous to "some people" "depending on the situation" is not enough to send this case to trial.[10]

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10. In this way, the majority arbitrarily denies QI to officers in another category of situations. As soon as a suspect goes prone,

In Nissen's words,

> In this specific situation, Mr. Ambler's size was certainly a consideration that I had when I was attempting to take him into custody, but the other part of that, what they also teach us at the Academy is that you have to weigh those considerations against the situation that you are facing. So in this situation, where I am assisting trying to take an individual into custody who just spent the last 20-or-so minutes driving recklessly through the City of Austin, crashing multiple times, I had to weigh the risk of not taking him into custody quickly against what possible health conditions he may or may not have had.

Nissen's testimony confirms what the video plainly shows—that he acted reasonably.

B.

We should also extend qualified immunity because the law is not clearly established. The majority only gets to "clearly established" by stringing together several cases—none of which contains all the major facts in this case—at an inappropriately high level of generality. But applying the appropriate level of generality is central to this part of the QI inquiry:

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for however long, if the suspect happens to die later, the case must go to trial. That would be a bizarre result, but seemingly one that the majority's reasoning dictates.

> What clearly established means depends largely upon the level of generality at which the relevant legal rule is to be identified. An official does not lose qualified immunity merely because a certain right is clearly established in the abstract. Officials should receive the protection of qualified immunity unless the law is clear in the more particularized sense that reasonable officials should be on notice that their conduct is unlawful.

Cantrell v. City of Murphy, 666 F.3d 911, 919-20 (5th Cir. 2012) (cleaned up). Recall the high bar required to deny QI: "Qualified immunity is justified unless *no* reasonable officer could have acted as Officer [Nissen] did here, or *every* reasonable officer faced with the same facts would" have acted differently. *Mason v. Faul*, 929 F.3d 762, 764 (5th Cir. 2019).

The law is not clearly established because there is no case that is factually similar, even at a low level of generality. The majority fails to identify a single decision that found an excessive-force violation based on (1) controlling a subject in the aftermath of a high-octane chase; (2) let alone an unhandcuffed subject in the aftermath of a high-octane chase; (3) and a subject who crashed and resumed his attempt at escape several times; (4) and whose car had not yet been searched; (5) and who was an exceedingly large individual (6) who'd been able to avoid being handcuffed despite the efforts of multiple able-bodied police officers. Keep in mind this was all over a busted light. Ambler's desperate attempt

to escape suggests any number of additional facts that justify Nissen's actions.

The majority leans on *Darden*:

> In *Darden*, officers performed a no-knock raid to execute a narcotics warrant inside a residence. During his subsequent arrest, arrestee Darden was thrown to the ground, tased, choked, and punched. He was obese and died from a heart attack during the encounter. Throughout Darden's arrest other people in the residence were repeatedly yelling that Darden could not breathe. A unanimous panel of this court held it clearly established that the degree of force an officer can reasonably employ is reduced when an arrestee is not actively resisting. Because *Darden* was issued years before the relevant encounter here, the district court held that it applied to this case; Nissen, according to the district court, was therefore on notice that it was unlawful to use excessive force against a person who was on the ground, not resisting, and possibly unable to breathe.

Op. at 16-17 (cleaned up).

But the many differences from *Darden* are striking. One is sufficient: *Darden never attempted to escape the police.* Here's how the court described the beginning of that raid:

> When the police first arrived at the house, the entry team broke down the front door with a battering ram, yelled that they were police, and ordered everyone to get down. A large man, later identified as Darden, was kneeling on the seat of a couch near the door when the officers first entered, and he immediately raised his hands in the air.

Darden v. City of Fort Worth, 880 F.3d 722, 725 (5th Cir. 2018). Darden made no effort to run at any point. That stands in striking contrast to Ambler's prolonged flight with reckless disregard for the lives of others.

The majority pushes back by insisting that Nissen's argument depends on the premise that "Ambler continued fleeing throughout the encounter, despite the clear video evidence suggesting otherwise." Op. at 17. Even were that portrayal of facts correct, that misses the point: Ambler's *immediately prior flight* fundamentally changes the analysis, particularly because he was not yet restrained.

That's where *Salazar* comes in. *Salazar* stands for the proposition that lack of restraint after an extended attempt to escape justifies a heightened used of force. *See* 37 F.4th at 284. The majority faults the analogy to *Salazar*, because unlike as in *Salazar*,

> Nissen entered the arrest scene nearly one minute after the chase. On arrival, Nissen witnessed several officers surrounding Ambler's body with one officer pointing a taser

> to Ambler's neck. Distinguishing matters further, Ambler was gasping as he presumably underwent a medical emergency, all the while repeating "I have congestive heart failure," and "I can't breathe."

Op. at 8. But these distinctions are not as extreme as the majority makes them out to be.[11] And, more importantly, it tiptoes away from the relevant standard here. *Salazar* creates enough ambiguity that the law is not *clearly established*. At the time of the officers' respective arrivals, both subjects remained unrestrained. Sure, officers were hovering over Ambler, but that hardly constitutes restraint, given Ambler's size, proximity to the unsearched car, and demonstrated hostility to arrest.[12]

III.

For largely similar reasons, the failure-to-intervene claim fails at both prongs of the analysis. Taser deployment easily gets expanded leeway after a high-speed chase. *See Salazar*, 37 F.4th at 284. If the officers

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11. For example, the gap between the arrival of the officers in *Salazar* (eight seconds), 37 F.4th at 280, and Nissen here ("nearly one minute"), is still a matter of seconds.

12. For what it's worth, the chase here was also substantially longer and more dangerous than that in *Salazar* (in which the chase lasted 5 minutes and topped out at 70 mph). *Id.* So, even if the treatment of the suspects between the cases were meaningfully different, the discrepancy would be justified because officers could reasonably believe that Ambler was considerably more dangerous than Salazar.

were not clearly committing a constitutional violation, then Nissen cannot be faulted for failing to intervene.[13] And Nissen gets even broader leniency because of his late arrival.[14] Neither the majority nor the briefing serves up a case that overcomes the doubt raised by *Salazar* as to the law in these circumstances. Indeed, neither *Ramirez v. Martinez*, 716 F.3d 369, 379 (5th Cir. 2013), nor *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012), involved a flight from justice at all.

* * * * *

The majority's opinion serves nobody but this plaintiff. Police will be unduly subject to litigation because of circumstances completely beyond their control. Suspects face greater danger because police now have an incentive to use deadly force instead of de-escalating.

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13. Though not legally relevant here, it's worth noting that the officers were acquitted of manslaughter, criminally negligent homicide, and assault by a jury. *See* Serena Lin & Tony Plohetski, *Former sheriff's deputies found not guilty of all charges in death of Javier Ambler*, Austin Am.-Statesman, Mar. 7, 2024, available at https://tinyurl.com/94aprsxj.

14. "Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed." *White v. Pauly*, 580 U.S. 73, 80, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017). *Cf., e.g.*, *Otkins v. Gilboy*, 2023 U.S. App. LEXIS 26548, 2023 WL 6518119 at *3-4 (5th Cir. Oct. 5, 2023) (per curiam) (unpublished) (affirming QI for late-arriving officers with limited information while vacating as to first responder).

Because Officer Nissen acted as would any reasonable officer in this tricky, high-stakes, split-second situation, I respectfully dissent.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 10, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-50696

JAVIER AMBLER, SR., *INDIVIDUALLY, ON BEHALF OF* ALL WRONGFUL DEATH BENEFICIARIES OF JAVIER AMBLER, II, *ON BEHALF OF* THE ESTATE OF JAVIER AMBLER, II, *AND AS NEXT FRIENDS OF J.R.A., A MINOR CHILD*; MARITZA AMBLER, *INDIVIDUALLY, ON BEHALF OF* ALL WRONGFUL DEATH BENEFICIARIES OF JAVIER AMBLER, II, *ON BEHALF OF* THE ESTATE OF JAVIER AMBLER, II, *AND AS NEXT FRIENDS OF J.R.A., A MINOR CHILD*; MICHELLE BEITIA, *AS NEXT FRIEND* J.A.A., *A MINOR CHILD*; JAVIER AMBLER, II, ESTATE OF JAVIER AMBLER, II,

Plaintiffs-Appellees,

versus

MICHAEL NISSEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:20-CV-1068

Appendix B

Before SMITH, WIENER, and DOUGLAS, *Circuit Judges.*

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the appeal is DISMISSED for lack of jurisdiction. Nissen fails to raise pure legal grounds and instead challenges the district court's factual findings. Nissen has therefore failed to invoke this court's limited interlocutory jurisdiction and this appeal is accordingly DISMISSED. This case is REMANDED for further proceedings.

IT IS FURTHER ORDERED that appellant pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See Fed. R. App. P. 41(b). The court may shorten or extend the time by order. See 5th Cir. R. 41 I.O.P.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED SEPTEMBER 21, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

1:20-CV-1068-DII

JAVIER AMBLER, SR, *INDIVIDUALLY, ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES OF JAVIER AMBLER, II, ON BEHALF OF THE ESTATE OF JAVIER AMBLER, II, AND AS NEXT FRIENDS OF J.R.A., A MINOR CHILD*, ET AL.,

Plaintiffs,

v.

MICHAEL NISSEN AND CITY OF AUSTIN,

Defendants.

ORDER

Before the Court is the report and recommendation from United States Magistrate Judge Susan Hightower concerning Defendants City of Austin's and Michael Nissen's (collectively, "Defendants") Motions for Summary Judgment, (Dkts. 165, 167). (R. & R., Dkt. 206). Pursuant to 28 U.S.C. § 636(b) and Rule 1(d) of Appendix C of the Local Rules of the United States District Court

for the Western District of Texas, Judge Hightower issued her report and recommendation on July 31, 2023. (*Id.*). Both Defendants filed objections to the report and recommendation. (Objs., Dkts. 210, 212).

A party may serve and file specific, written objections to a magistrate judge's findings and recommendations within fourteen days after being served with a copy of the report and recommendation and, in doing so, secure *de novo* review by the district court. 28 U.S.C. § 636(b)(1)(C). Because Defendants timely objected to the report and recommendation, the Court reviews the report and recommendation *de novo*. Having done so and for the reasons given in the report and recommendation, the Court overrules Defendants' objections and adopts the report and recommendation as its own order.

Accordingly, the Court **ORDERS** that the Report and Recommendation of the United States Magistrate Judge, (Dkt. 206), is **ADOPTED**.

Defendant Michael Nissen's Motion for Summary Judgment, (Dkt. 167), is **GRANTED IN PART** and **DENIED IN PART**. Specifically, the motion is granted as to Plaintiffs' deliberate indifference to a serious medical need claim but denied in all other respects.

Defendant City of Austin's Motion for Summary Judgment, (Dkt. 165), is **GRANTED IN PART** and **DENIED IN PART**. Specifically, the motion is granted as to Plaintiffs' claims that the City is liable for Nissen's Fourth Amendment violation based on its policy of

condoning excessive force and failing to train its officers but denied as to Plaintiffs' claims for failure to enforce its intervention policy and violation of the Americans with Disabilities Act.

SIGNED on September 21, 2023.

/s/ Robert Pitman
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER AND REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED JULY 31, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Case No. 1:20-cv-1068-DII-SH

JAVIER AMBLER, SR. AND MARITZA AMBLER, INDIVIDUALLY, ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES OF JAVIER AMBLER, II, ON BEHALF OF THE ESTATE OF JAVIER AMBLER, II, AND AS NEXT FRIENDS OF J.R.A. A MINOR CHILD; AND MICHELLE BEITIA, AS NEXT FRIEND OF J.A.A. A MINOR CHILD,

Plaintiffs,

v.

MICHAEL NISSEN and CITY OF AUSTIN,

Defendants.

ORDER AND REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE DISTRICT COURT

Before the Court are Defendant City of Austin's Motion for Summary Judgment (Dkt. 165) and Defendant Michael Nissen's Motion for Summary Judgment (Dkt.

167), both filed February 28, 2023, and the associated response, reply, and sur-reply briefs. The District Court referred all pending and future nondispositive and dispositive motions in this case to this Magistrate Judge for resolution or Report and Recommendation, respectively, pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72, and Rule 1 of Appendix C to the Local Rules of the United States District Court for the Western District of Texas. Dkt. 144.

The family of decedent Javier Ambler II brings this suit on behalf of Ambler and his heirs ("Plaintiffs") against Austin Police Officer Michael Nissen and the City of Austin under the Civil Rights Act, 42 U.S.C. § 1983, and Title II of the Americans with Disabilities Act ("ADA").

I. Background

Shortly before 1:30 a.m. on March 28, 2019, Williamson County Sherriff's Deputy James Johnson initiated a traffic stop of Ambler's car for failing to dim the lights. Dkt. 185-2 at 3. Ambler, a 40-year-old Black man, did not pull over, and Johnson began pursuing him. Dkts. 174-8 at 6, 185-2 at 3. Williamson County Sherriff's Deputy Zachary Camden joined the chase, which lasted more than 20 minutes along an interstate highway and residential streets, at speeds exceeding 100 miles per hour. Dkt. 167-1 at 48. The chase ended when Ambler crashed into roadside trees within the Austin city limits. Dkt. 167-11.

Video evidence shows that Johnson approached Ambler's car with what appears to be his gun drawn. *Id.*at 22:35-40. As Ambler opens the door to get out of his car,

Johnson orders him to "get on the ground." *Id.* Johnson appears to holster his gun and draw his Taser, which he discharges at Ambler. *Id.* at 22:40-50. Ambler falls to the ground, and Johnson and Camden try to handcuff him as Austin Police Officer Michael Nissen arrives. *Id.* at 22:50-23:11.

Video from Nissen's body-worn camera shows him approach Ambler's vehicle with his gun drawn. Dkt. 167-12 at 4:10-20. Nissen calls out to the Williamson County deputies that the car "looks clear" and then approaches the deputies, who are standing over Ambler. *Id.* at 4:20-28. One of the deputies holds a Taser to Ambler's neck and says: "Give me your hand or I'm going to Tase you again." *Id.* at 4:25-30. Ambler can be heard saying softly that he has congestive failure. *Id.* at 4:25-33. An officer then yells: "Other hand. Give me your hand." *Id.* at 4:33-40. As an officer instructs Ambler to lie "flat on your stomach," Ambler can be heard saying "I can't breathe" twice. *Id.* at 4:40-49. The officers repeatedly tell Ambler to stop resisting, to which Ambler responds: "I am not resisting." *Id.* at 4:50-5:00.

Nissen applies force to Ambler's arms and the back of his head, pushing his head onto the pavement. *Id.* at 5:00-6:10. The parties dispute how much pressure he used, which cannot be determined from the video. During that time, one of the Williamson County Deputies says: "I think I just broke his finger." *Id.* at 5:30-38. An officer then says: "I am going to put my knee on this one to control him. Let me know when you're ready." *Id.* at 5:40-49. The officers then handcuff Ambler, who does not appear to be moving. *Id.* at 6:00-08. Less than thirty seconds later, the

officers raise Ambler to a seated position and check for a pulse, which they cannot find. *Id.* at 6:31-8:20. Ambler was taken to a hospital where he was pronounced dead, and the medical examiner's report states that his manner of death was homicide. Dkt. 174-8 at 3-4.

Plaintiffs sued Williamson County, former Williamson County Sheriff Robert Chody, former Williamson County Sheriff's Deputies Johnson and Camden, Williamson County General Counsel Jason Nassour, Nissen, and the City. Dkt 1. The District Court granted Plaintiffs' motion to dismiss Williamson County, Johnson, Camden, and Nassour. Dkt. 107.

In their First Amended Complaint, Plaintiffs allege that Nissen was deliberately indifferent to Ambler's serious medical needs and violated his Fourth Amendment rights by using excessive force against him and failing to intervene. Dkt. 44. Plaintiffs also allege that the City failed to provide Ambler reasonable accommodations, in violation of Title II of the ADA, and is liable for Nissen's Fourth Amendment violation under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Defendants move for summary judgment under Rule 56.

II. Legal Standards

Summary judgment will be rendered when the pleadings, the discovery and disclosure materials, and any affidavits on file show that there is no genuine dispute as to any material fact and that the moving party is entitled to

judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Washburn v. Harvey*, 504 F.3d 505, 508 (5th Cir. 2007). A dispute over a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Washburn*, 504 F.3d at 508. A court "may not make credibility determinations or weigh the evidence" in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000); *see also Anderson*, 477 U.S. at 254-55.

Once the moving party has made an initial showing that no evidence supports the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence and thus cannot defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Unsubstantiated assertions, improbable inferences, and unsupported speculation also are not competent summary judgment evidence. *Id.* The party opposing summary judgment must identify specific evidence in the record and articulate the

precise manner in which that evidence supports its claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

The qualified immunity defense changes the usual summary judgment burden of proof. *Baker v. Coburn*, 68 F.4th 240, 244 (5th Cir. 2023). "Once an official pleads the [qualified immunity] defense, the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law." *Id.* (citation omitted). Courts also assign greater weight to the video recordings taken at the scene. *Id.* (quoting *Betts v. Brennan*, 22 F.4th 577, 582 (5th Cir. 2022)). But a court "should not discount the nonmoving party's story unless the video evidence provides so much clarity that a reasonable jury could not believe his account." *Id.* at 250 n.9 (quoting *Darden v. City of Fort Worth*, 880 F.3d 722, 727 (5th Cir. 2018)).

III. Nissen's Motion for Summary Judgment

Nissen moves for summary judgment on Plaintiffs' claims for excessive force, failure to intervene, and deliberate indifference to a serious medical need. Plaintiffs do not respond to Nissen's arguments on their claim for deliberate indifference to a serious medical need. When a party fails to pursue a claim or defense beyond its

initial pleading, the claim is deemed abandoned or waived. *Arias v. Wells Fargo Bank, N.A.*, 2019 U.S. Dist. LEXIS 110317, 2019 WL 2770160, at *2 (N.D. Tex. July 2, 2019) ("When a plaintiff fails to defend a claim in response to a motion to dismiss or summary judgment motion, the claim is deemed abandoned."); *see also Black v. North Panola Sch. Dist.*, 461 F.3d 584, 588 n.1 (5th Cir. 2006) (holding that plaintiff abandoned claim when she failed to defend it in response to motion to dismiss). The Court recommends that Plaintiffs' deliberate indifference claim should be dismissed.

Nissen argues that Plaintiffs did not plead a claim for failure to intervene in their First Amended Complaint and therefore cannot raise the claim on summary judgment. The Court rejects this argument because the First Amended Complaint provides notice of the claim. Dkt. 44 ¶ 324 (stating that Nissen is liable as a bystander).

A. Video Evidence

The police chase was recorded by the dashboard camera on Johnson's vehicle, but the recording does not include Johnson's attempted traffic stop. Dkt. 167-11. Ambler's arrest also was recorded by two cameras. The dashboard camera on Johnson's vehicle captured the entire interaction but, because of the distance and angle of the camera, most of the events are difficult to see. *Id.* The video from Nissen's body-worn camera captures the arrest after Nissen arrives at the scene. Dkt. 167-12. While this recording has clearer audio and video than the dashboard camera, the view from the camera is limited. *Id.*

B. Qualified Immunity

Qualified immunity extends to government officials performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). An official who violates a federal right is entitled to qualified immunity if his or her actions were objectively reasonable. *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir. 1993).

To determine whether a government official is entitled to qualified immunity, a court must decide both (1) whether a plaintiff has alleged facts sufficient to establish a constitutional violation and (2) whether the right at issue was clearly established at the time of defendant's alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). A court has discretion to determine the order in which it considers those questions. *Id.* at 236. The Court first considers whether Plaintiffs have adequately alleged a constitutional violation.

C. Nissen's Use of Force

Nissen argues that he is entitled to qualified immunity because the force he used was reasonable under the factors set forth in *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), and Plaintiffs have not identified clearly established law placing his use of force beyond debate. Plaintiffs respond that all the *Graham* factors weigh against the reasonableness of the force and that Fifth Circuit precedent clearly establishes that use of force against a person who is not resisting is unreasonable.

To prevail on an excessive force claim, a plaintiff must show (1) injury (2) which resulted directly and only from a use of force that was clearly excessive and (3) the excessiveness of which was clearly unreasonable. *Hanks v. Rogers*, 853 F.3d 738, 744 (5th Cir. 2017). There is no question that Ambler, who died in the arrest, was injured. The Court thus turns to whether Nissen's use of force was "clearly excessive" or "clearly unreasonable," inquiries that are "often intertwined." *Poole v. City of Shreveport*, 691 F.3d 624, 628 (5th Cir. 2012).

Excessive force claims are fact-intensive. *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009). The reasonableness of an officer's conduct is judged objectively, without reference to the officer's intent or motivation. *Graham*, 490 U.S. at 397. Courts must look at the facts and circumstances "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. Courts also must account for the difficult and split-second decisions that police officers must make in carrying out their duties. *Id.* at 396-97. The determination of "the reasonableness of an officer's conduct under the Fourth Amendment is often a question that requires the input of a jury." *Lytle v. Bexar Cnty., Tex.*, 560 F.3d 404, 411 (5th Cir. 2009).

1. *Graham* Factors

The right to make an arrest or investigatory stop "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396. Determining whether force is "excessive" or "unreasonable" requires considering the totality of the circumstances, including the severity of the crime at issue,

whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or trying to evade arrest by flight. *Id.*

Nissen argues that the force he used on Ambler was "minimal" or "soft-hand force." Dkt. 192-1 at 3. Plaintiffs respond that Nissen was "pushing Ambler's head and neck down, pulling on Ambler's left arm, placing his left knee on Ambler's shoulder sufficient to cause hemorrhage, and further impairing Ambler's breathing." 185-1 at 20. Although the amount of pressure applied is unclear in the videos, Plaintiffs offer evidence that the medical examiner found bruising on Ambler's head and upper extremities, as well as "hemorrhages of the neck muscles and a muscle in the upper right side of the back." Dkt. 174-8.

a. Severity of the Crime

The first *Graham* factor is the severity of the crime at issue. Plaintiffs argue that the severity of the crime weighs against the reasonableness of the force because the original traffic stop was for Ambler's failure to dim his headlights, a violation of the Transportation Code. Plaintiffs also present evidence that Austin Police Department ("APD") officers were instructed not to pursue Ambler because it was against APD policy to engage in a pursuit for this type of offense. Dkt. 185-2 at 3.

The video shows that Ambler evaded police for 22 minutes, driving at high rates of speed on both a highway and residential streets. Dkt. 183-5; *see also* Dkt. 167-13

(APD investigative summary stating that Ambler's vehicle exceeded 100 miles per hour during the chase). Nissen also submits evidence that Ambler had three minor accidents during the chase, hitting a barrier wall and then a road sign before his car crashed into trees on the side of a road, ending the chase. Dkts. 167-9, 167-13.

Evading arrest in a motor vehicle is a felony under Texas law, Tex. Penal Code § 38.04, and "leading law enforcement in a high-speed chase through a heavily populated area is a serious crime that puts at risk not only the lives of Plaintiff and the officers but also those of the general public." *Salazar v. Molina*, 37 F.4th 278, 281-82 (5th Cir. 2022). It is undisputed that Nissen knew about the chase when he arrived at the scene. Nissen Tr. at 73:18-74:3, Dkt. 183-2 at 15. The Court finds that this factor weighs in favor of the reasonableness of the force he used.

b. Immediate Safety Threat

The second *Graham* factor is whether Ambler posed an immediate threat to the safety of the officers or others. Plaintiffs contend that any threat dissipated when Ambler "exited his vehicle, raised his hands in the air, and surrendered to the deputies' authority." Dkt. 185-1 at 13.Nissen relies on *Salazar*, 37 F.4th at 282, for the proposition that "when a suspect has put officers and bystanders in harm's way to try to evade capture, it is reasonable for officers to question whether the now-cornered suspect's purported surrender is a ploy." In *Salazar*, the plaintiff "led police on a high-speed chase

through a residential neighborhood" before exiting his vehicle and lying on the ground. *Id.* When the officer reached the plaintiff, he deployed his Taser twice and then arrested the plaintiff without further incident. *Id.* There was no genuine issue of material fact that the plaintiff posed an immediate threat when the force was used. *Id.* at 282.

An officer must use a "justifiable level of force in light of the continuing threat of harm that a reasonable officer could perceive." *Id.* at 283; *see also Lytle*, 560 F.3d at 413 ("[A]n exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased."). Construing the evidence in Plaintiffs' favor, Nissen knew, before arriving at the scene, that the attempted stop was for a traffic violation and Ambler had no prior criminal history. Dkts. 183-17, 185-2. When Nissen arrived, he scanned Ambler's vehicle for "obvious threats" and did not observe any people or weapons. Nissen Tr. at 226:19-227:16, Dkt. 183-2 at 58. Although Nissen testified that there were "unknowns" because neither Ambler nor the vehicle had been fully searched, there is no suggestion he believed that Ambler had a weapon or was violent.[1] *Id.* at 136:16-138:4, 222:15-22, Dkt. 167-15 at 35-36, 57. When Nissen approached Ambler, Ambler was lying on his stomach with two officers standing over him and a Taser pressed into the back of his neck. Dkt. 167-12 at 4:25-30. Nissen testified that he

1. That a suspect has not been searched, in the absence of other evidence that the suspect might be armed, cannot by itself characterize a suspect as an immediate threat. *Cooper v. Brown*, 844 F.3d 517, 523 n.2 (5th Cir. 2016).

believed a Taser had been used on Ambler once before he arrived, and he heard an officer activate his Taser during the attempt to take Ambler into custody. Dkt. 183-2 at 93:1-25. Nissen also testified that he heard Ambler say he could not breathe. Other officers arrived at the scene while Nissen tried to handcuff Ambler, but Nissen testified that he did not notice them. *Id.* at 204:1-14.

Nissen argues that, after a "dangerous chase," a suspect does not regain their "full" Fourth Amendment protection until they are in handcuffs. Dkt. 192-1 at 10. He offers no support for a bright-line rule requiring that an individual be handcuffed. To the contrary, a suspect can be "subdued," requiring a reduction in use of force, without being in handcuffs if he lacks "any means of evading custody—for example, by being pinned to the ground by multiple police officers." *Austin v. City of Pasadena, Tex.*, 74 F.4th 312, No. 22-20341, 2023 WL 4569562, at *7 (5th Cir. 2023) (citing *Joseph ex rel. Est. of Joseph v. Bartlett*, 981 F.3d 319, 335 (5th Cir. 2020)).

The Court finds that Plaintiffs have raised a genuine issue of material fact as to whether a reasonable officer would believe that Ambler, who was surrounded by multiple officers with a Taser to his neck, was subdued and posed no immediate threat to safety when Nissen began helping handcuff him. *Compare Cooper v. Brown*, 844 F.3d 517, 523 (5th Cir. 2016) (holding that no reasonable officer would believe that suspect, who was suspected of committing serious but nonviolent offense and fled his vehicle on foot, was an immediate threat while lying on his stomach with his hands visible) *with Salazar*, 37 F.4th

at 280 (holding that suspect posed threat seconds after exiting his vehicle because he was "unrestrained at night in the open").

c. Resisting or Evading Arrest

The final *Graham* factor is whether the suspect is actively resisting arrest or trying to evade arrest by flight. The Court finds that there is a genuine issue of material fact as to whether Ambler was actively resisting arrest when Nissen used force. In *Darden*, 880 F.3d at 730, the Fifth Circuit found that a jury could conclude that the plaintiff was not resisting arrest even though he "pushed himself up on his hands, and eventually onto his knees, and he seemed to pull his arm away from the officers when they were trying to handcuff him." These "events occurred while other people in the house were loudly and repeatedly yelling that Darden had asthma and was trying to breathe." *Id.* In that case, the officers argued, as Nissen testified in his deposition, that they had no way of knowing whether these statements were true. *Id.*; Nissen Tr. at 113:3-10, Dkt. 167-15 at 30. The court determined that whether reasonable officers in that situation would have "credited the warnings" is a fact question that must be decided by a jury. *Id.*

Nissen testified that he was unaware whether Ambler had been compliant before he arrived but after he arrived it was "clear" that Ambler was not complying with commands, instead "physically resisting [Nissen's] efforts to place his hands behind his back." Nissen Tr. at 132:20-133:1-17, 235:1-11, Dkt. 167-15 at 34-35, 60. Plaintiffs

contend that Ambler was not resisting but "instinctively putting one arm on the ground to try to breathe." Dkt. 185-1 at 13.

As in *Darden*, the videos "do not provide the clarity necessary to resolve the factual dispute presented by the parties' conflicting accounts." *Id.*, 880 F.3d at 730; *see also Scott v. White*, No. 1:16-CV-1287-RP, 2019 U.S. Dist. LEXIS 2324, 2019 WL 122055, at *12 (W.D. Tex. Jan. 7, 2019) (holding that third factor weighed in plaintiff's favor because video did not "blatantly contradict" plaintiff's position that his movements "were protective or involuntary responses to [the officer's] uses of force"). Viewing the evidence in the light most favorable to Plaintiffs, the Court finds that there are genuine issues of material fact as to whether Ambler posed a threat at the time the force was used or was actively resisting arrest.

2. Deadly Force

The Court next considers whether a reasonable jury could find that Nissen used deadly force. Plaintiffs argue that a reasonable jury could find that Nissen knew forcing Ambler's face into the pavement and the deputies' simultaneous use of force was deadly because of Ambler's visible morbid obesity, congestive heart failure, and pleas for help. Nissen responds that the video shows the Williamson County deputies were using "intermediate force," Nissen was using "minimal" or "soft-hand" force, and Ambler died because he "was the quintessential 'eggshell' suspect." Dkt. 192-1 at 3.

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Claims that law enforcement used deadly force are "treated as a special subset of excessive force claims." *Aguirre v. City of San Antonio*, 995 F.3d 395, 412 (5th Cir. 2021). When an officer uses deadly force, the "objective reasonableness" balancing test is constrained. *Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004). It is objectively unreasonable to use deadly force "unless it is necessary to prevent [a suspect's] escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). The deadly force inquiry is two-pronged: Whether the force used constituted deadly force, and whether the subject posed a threat of serious harm justifying the use of deadly force. *Timpa v. Dillard*, 20 F.4th 1020, 1032 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2755, 213 L. Ed. 2d 999 (2022).

Whether a use of force is "deadly force" is a question of fact. *Flores*, 381 F.3d at 399. Deadly force is force that "carr[ies] with it a substantial risk of causing death or serious bodily harm." *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998). A reasonable jury can find that the restraint used by an officer amounted to deadly force. *See, e.g., Timpa*, 20 F.4th at 1033 (holding that reasonable jury could find "use of a prone restraint with bodyweight force on an individual with three apparent risk factors—obesity, physical exhaustion, and excited delirium" could constitute deadly force); *Aguirre*, 995 F.3d at 413-14 (same where maximal-restraint position was used on drug-affected individual); *Gutierrez*, 139 F.3d. at 446 (same where "hog-tying" was used on drug-

affected individual). In *Aguirre*, 995 F.3d at 413-14, the plaintiffs offered sufficient evidence through expert testimony that the combination of a maximal restraint position, pressure on the back of the neck, and drug use restricted blood oxygen and ultimately resulted in fatal cardiac arrhythmia.

The medical examiner who performed Ambler's autopsy determined that his death was a homicide and found that his cause of death was "congestive heart failure and cardiovascular disease associated with morbid obesity in combination with forcible restraint." Dkt. 183-6 at 3. Plaintiffs' medical expert, Dr. Aran Kadar, opines that Ambler died from "a vicious cycle of respiratory distress from hypertensive crisis and worsening heart failure pushed to physiological extremes by subsequent tasing and forcible restraint." Dkt. 183-10 (Kadar Dec.) at 3. He explains:

- Obesity and congestive heart failure substantially impaired Ambler's ability to "breathe and survive in high intensity situations";

- Lying flat increases the work of breathing, especially among the obese, and can interfere with oxygenation of the blood even without additional pressure in obese patients; and

- The application of pressure to Ambler's neck further restrained his ability to breathe and

> the pressure on his back would have stopped his chest from expanding.

Id. at 2-3. Kadar opines that Ambler's physiological responses were amplified by the officers using Tasers on him. *Id.* at 3. He concludes: "Had the officers stopped or paused their restraint at any of the points in time when Mr. Ambler was communicating his inability to breathe," it was "more likely than not" that Ambler would not have died. *Id.* at 3-4.

Nissen knew that Ambler, who weighed 410 pounds, was obese. Nissen Tr. at 171:21-25, Dkt. 186-2 at 51; Dkt. 183-6 at 6. Ambler can be heard on the video recording from Nissen's body-worn camera saying faintly: "I have congestive heart failure." Dkt. 167-12 at 4:25-33. Although Nissen testified that he did not hear Ambler say he had congestive heart failure, a reasonable jury could disbelieve his testimony. Nissen Tr. at 284:24-285:18, Dkt. 186-2 at 75-76. Nissen also testified that he was trained in "arresting or detaining people in different positions," one of which was the prone position, and that one of the "obvious pitfalls of that position is, you know, it could be people could be at risk for positional asphyxiation." Nissen Tr. at 61:6-23, Dkt. 183-2 at 10. The City's policies also alerted Nissen to this risk. *See* Dkt. 183-7 at 3 (APD General Orders discussing dangers of positional asphyxia). Based on this evidence, the Court finds that a reasonable jury could conclude that the use of prone restraint on an individual with obesity and congestive heart failure created a substantial risk of death or serious bodily injury.

Officers can use deadly force only if they have "probable cause to believe that the suspect poses a threat of serious physical harm." *Garner*, 471 U.S. at 11. As discussed above, fact issues preclude the Court from determining whether Ambler posed a threat, let alone a threat of serious physical harm. Nissen also concedes that the use of deadly force would not have been justified. Nissen Tr. at 108:1-8, Dkt. 183-2 at 34. The Court finds that genuine issues of material fact exist as to Plaintiffs' deadly force claim.

D. Clearly Established

The doctrine of qualified immunity shields officials from civil liability as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson*, 555 U.S. at 231 (citation and quotation marks omitted).

> "Clearly established" means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful. In other words, existing law must have placed the constitutionality of the officer's conduct beyond debate. This demanding standard protects all but the plainly incompetent or those who knowingly violate the law.

D.C. v. Wesby, 583 U.S. 48, 138 S. Ct. 577, 589, 199 L. Ed. 2d 453 (2018) (cleaned up). There need not be a "case directly on point, but existing precedent must have placed

the statutory or constitutional question beyond debate." *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (citation omitted). The focus of the inquiry is whether the officer had fair notice that his conduct was unlawful. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449 (2018) (citation omitted).

The Court finds that *Darden*, issued more than a year before Ambler's death, provided Nissen fair notice that his actions were unreasonable. There, the police executed a no-knock narcotics warrant and the plaintiff was suspected of a serious but nonviolent offense. While arresting the plaintiff, an officer punched, kicked, choked, and "forced Darden—an obese man—onto his stomach, pushed his face into the floor, and pulled Darden's hands behind his back." *Id.*, 880 F.3d at 725. The court held that it was clearly established "the degree of force an officer can reasonably employ is reduced when an arrestee is not actively resisting." *Id.* at 733 (collecting cases). The officer's actions - while the plaintiff was not resisting and "other people in the residence were repeatedly yelling that Darden could not breathe" - were "plainly in conflict" with Fifth Circuit precedent. *Id.*

Nissen used force on Ambler, who repeatedly said he could not breathe, until he went limp. If a jury finds that Ambler was compliant and not resisting arrest, then the continued use of force, particularly after Ambler said he could not breathe, necessarily would be excessive. *See id.*; *see also Timpa*, 20 F.4th at 1038 (determining that law in 2016 clearly established that if plaintiff was "subdued and nonthreatening by nine minutes into the restraint, then

the continued use of force for five additional minutes was necessarily excessive"). Because it was clearly established in March 2019 that the continued use of force against a person who is on the ground, not resisting, and possibly unable to breathe violates the Fourth Amendment, the Court finds that Nissen is not entitled to qualified immunity.

E. Bystander Liability

Plaintiffs do not dispute that Nissen cannot be liable for the Williamson County deputies' actions before he arrived on the scene. The parties disagree, however, whether there is sufficient evidence to support the elements of bystander liability for the force Nissen witnessed and whether his failure to act violated clearly established law.

It is established that "an officer may be liable under § 1983 under a theory of bystander liability where the officer (1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act." *Whitley v. Hanna*, 726 F.3d 631 (5th Cir. 2013) (cleaned up). To be liable, the officer must have "reasonable opportunity to realize the excessive nature of the force and a realistic opportunity to stop it in order for the duty to intervene to arise." *Malone v. City of Fort Worth, Tex.*, No. 4:09-CV-634-Y, 2014 U.S. Dist. LEXIS 157218, 2014 WL 5781001, at *16 (N.D. Tex. Nov. 6, 2014) (citation omitted). This determination involves consideration of both "the duration of the alleged use of force and the location of the suspect relative to the allegedly bystanding officers." *Id.*

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It was clearly established in March 2019 that "an officer could be liable as a bystander in a case involving excessive force if he knew a constitutional violation was taking place and had a reasonable opportunity to prevent the harm." *Hamilton v. Kindred*, 845 F.3d 659, 663 (5th Cir. 2017). Using a Taser on someone who is subdued and does not pose a threat can constitute excessive force. *Ramirez v. Martinez*, 716 F.3d 369, 379 (5th Cir. 2013); *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012). Nissen had fair notice that participating in another officers' use of excessive force gives rise to liability. *See, e.g., Carroll v. Ellington*, 800 F.3d 154, 178 (5th Cir. 2015) (affirming denial of summary judgment where it was disputed whether officer was present for Taser strikes of restrained individual); *Timpa*, 20 F.4th at 1039 (holding that it was clearly established in 2016 that officers who stood "mere feet away" from plaintiff during fourteen-minute restraint were subject to bystander liability).

Nissen states that he was "not present when Officer Johnson initially used his Taser on Ambler, which is believed to be the only traditional Taser deployment that occurred." Dkt. 167 at 6. Nissen testified that although he did not see the initial Taser deployment, "when I was assisting in taking him into custody, I did hear the taser cycle once. I couldn't tell you exactly when throughout the interaction that was, but it was at least once." Nissen Tr. at 93:19-25, Dkt. 183-2 at 24. Nissen also testified that he "could hear that distinctive kind of clicking noise the taser makes when it's cycling." *Id.* at 94:1-4, Dkt. 183-2 at 25.

Nissen submits an expert report from Mark Kroll supporting his contention that the two Williamson County

deputies used their Tasers only in "drive stun" mode while he was present. Dkt. 167-14 at 30-32. Kroll opines the use of a Taser in "drive stun" mode "does not penetrate deeply enough to affect any human muscles or organs." *Id.* at 54. But, as stated above, Plaintiffs' expert opines that Ambler died from "a vicious cycle of respiratory distress from hypertensive crisis and worsening heart failure pushed to physiological extremes by subsequent tasing and forcible restraint." Dkt. 183-10 (Kadar Dec.) at 3. There is thus evidence that the Williamson County deputies deployed their Tasers in Nissen's presence and their Taser use may have been a contributing cause of Ambler's death.

The videos show that, after Nissen cleared Ambler's vehicle, he helped with the arrest for about 90 seconds. Dkt. 183-4 at 1:35-3:20. As stated, Plaintiffs offer evidence that Nissen heard Ambler say he had congestive heart failure and repeatedly say he could not breathe. Nissen testified that he was in such close proximity to Ambler he could hear him breathing. Nissen Tr. at 113:25-114:9, Dkt. 167-15 at 30. Based on his proximity and how long force was used, a reasonable jury could find that Nissen had a reasonable opportunity to intervene. The Court recommends that summary judgment be denied on Plaintiffs' bystander liability claim against Nissen.

IV. City of Austin's Motion for Summary Judgment

Plaintiffs argue that the City is liable for Nissen's use of excessive force and failure to intervene based on three policies: (1) condoning excessive force; (2) failure to enforce the City's policy of requiring officers to intervene; and (3) failure to train officers in de-escalation. The City argues

that Plaintiffs' Section 1983 *Monell* claim fails because Nissen did not commit an underlying constitutional violation as either a participant or a bystander.

As discussed above, a reasonable jury could find that Nissen committed constitutional violations as a participant and a bystander. The Court therefore turns to the remaining arguments against the City's liability.

A. Municipal Liability

Municipalities can be sued directly under Section 1983, but they cannot be found liable on a theory of vicarious liability or respondeat superior. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); *Webb v. Town of Saint Joseph*, 925 F.3d 209, 214 (5th Cir. 2019). "In other words, 'the unconstitutional conduct must be directly attributable to the municipality through some sort of official action or imprimatur; isolated unconstitutional actions by municipal employees will almost never trigger liability." *Webb*, 925 F.3d at 214 (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)). A municipality is liable under Section 1983 for its officers and employees' actions when they execute an official policy or custom. *Piotrowski*, 237 F.3d at 579. To establish municipal liability for a policy or practice under Section 1983, a plaintiff must establish (1) an official policy (2) promulgated by the municipal policymaker (3) that was the "moving force" behind the violation of the constitutional right. *Piotrowski*, 237 F.3d at 578.

"Official policy establishes culpability, and can arise in various forms." *Peterson v. City of Fort Worth, Tex.*, 588

F.3d 838, 847 (5th Cir. 2009). Official policy usually exists as written policy statements, ordinances, or regulations, but also may arise in the form of a widespread practice "so common and well-settled as to constitute a custom that fairly represents municipal policy." *Id.* A municipality's decision not to supervise or train its employees about their legal duty to avoid violating citizens' rights also may rise to the level of an official policy for purposes of Section 1983. *Connick v. Thompson*, 563 U.S. 51, 61, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 387, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). A policy also can be shown in "extreme factual situations" where "the authorized policymakers approve a subordinate's decision and the basis for it," thereby ratifying the subordinate's unconstitutional actions. *Peterson*, 588 F.3d at 848 (citation omitted).

B. Policy of Excessive Force

Municipal liability claims based on a local government's practices generally require that the plaintiff establish a pattern of conduct because "one act is not itself a custom." *Pineda v. City of Houston*, 291 F.3d 325, 329 (5th Cir. 2002). To prove a pattern or practice, the plaintiff must present evidence of "sufficiently numerous prior incidents of police misconduct." *McConney v. City of Houston*, 863 F.2d 1180, 1184 (5th Cir. 1989) (citations omitted). When prior incidents are used to prove a pattern, they "must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees." *Webster v. City of Houston*, 735 F.2d 838, 842 (5th Cir. 1984). A

pattern also requires "similarity and specificity," such that the pattern "point[s] to the specific violation in question." *Peterson*, 588 F.3d at 851 (citation omitted).

The City submits evidence of its policies and practices regarding use of force at the time of Ambler's death. In his declaration, Police Chief Joseph Chacon states that APD required officers to self-report uses of force and reviewed every report. Dkt. 165-1 (Chacon Dec.) ¶ 10. APD used a "sliding scale" to determine the extent of review required: lower levels of force were reviewed by supervisors, intermediate by the officer's chain of command and the APD Force Review Board, and more serious uses by the Internal Affairs Division and APD's Special Investigations Unit. *Id.* Incidents involving in-custody deaths were classified as "Level 1," the most serious. *Id.* ¶ 11. Every Level 1 use of force was reviewed by the Chief of Police, who determined whether the officer violated APD policy and, if so, the appropriate discipline. *Id.* ¶ 14. APD also used an algorithm to monitor use of force, which notified an officer's supervisor if the number of force incidents exceeded a threshold. *Id.* ¶ 21.

Plaintiffs offer evidence of 25 incidents of excessive force from 2009 until Ambler's death, as well as evidence of excessive force during the May 2020 protests. Dkt. 188-1 at 7-25. Four of the incidents cited differ markedly from the events surrounding Ambler's death: Three involved individuals holding BB guns, and one involved force used in drawing blood from an individual in a restraint chair in a

padded room.[2] The Court finds that these incidents and the May 2020 protests are too dissimilar to the circumstances of Ambler's death to constitute evidence of a pattern.

The Court must determine whether the 21 remaining incidents cited by Plaintiffs, along with statistical and other evidence, constitute a pattern. In *Peterson*, the plaintiff alleged that the City of Fort Worth had an unwritten policy permitting excessive force based on 27 complaints of such force between 2002 and 2005. The incidents cited by the plaintiff included alleged uses of force "that, if true, would be emphatically excessive," almost all of which arose during investigation of "small crimes." *Id.* at 851. Yet the court found that the plaintiffs failed to establish a pattern, given the size of the Fort Worth police department and the absence of contextual information about the number of arrests during that three-year period.

Plaintiffs offer evidence of fewer incidents of excessive force over a significantly longer time (ten years). APD also is larger than the force in *Peterson*, 588 F.3d at 850-51. Dkt. 188-1 at 64 n.359 (stating that Fort Worth employed 1,500 officers compared to 1,900 in Austin). Plaintiffs do not provide context for their evidence, such as the number of arrests or how it compares to other law enforcement departments of similar size.[3] *See Woods v. Harris Cnty.*,

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2. The BB gun incidents involved Richard Munroe, Jason Roque, and Jawhari Smith, and the blood draw involved Caroline Callaway. Dkt. 188-1 at 12-13, 16, 19-20.

3. The contextualizing evidence Plaintiffs offer is misleading. They assert that "APD kills its inhabitants at the second highest

No. 4:18-CV-1152, 2022 U.S. Dist. LEXIS 236314, 2022 WL 18396216, at *15 (S.D. Tex. May 26, 2022) (granting summary judgment for county where plaintiffs did not provide context for "fifteen incidents scattered over an eight-year period").

Plaintiffs' other evidence does not overcome this deficiency. They rely on APD's "Response to Resistance" reports from 2018 through 2020, which they argue show a pattern of APD officers using force to address resistance that was only "passive," "verbal," or "defensive," often in the presence of other officers. Dkt. 188-1 at 62. But this evidence has no information about the nature of the force used or other circumstances. The Court cannot infer from this evidence that any of these incidents involved excessive force or that the events were similar to the facts of this case.

Likewise, Plaintiffs provide insufficient context for evidence of 815 complaints of excessive force against APD between 2004 and 2015. They argue that "the sheer volume of allegations sharply distinguishes *Peterson*, 588 F.3d at 850-51, which pointed to just 27 complaints in a similarly sized department." Dkt. 188-1 at 64 n.359. But the 27 incidents in *Peterson*, 588 F.3d at 850-51, were alleged in

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rate, per capita, when compared to the fifteen largest Cities in the U.S." Dkt. 188-1 at 27. The cited evidence states that "APD has the highest per capita rate of fatal police shootings involving persons believed to be experiencing a mental health crisis." Dkt. 186-46 at 8. Because the parties do not contend that Ambler's death involved a mental health crisis, this evidence is not probative of a relevant pattern.

detail sufficient for the court to infer that they arguably involved excessive force. The number of complaints alone provides no indication that excessive force was used. *Cf. Pineda*, 291 F.3d at 329 (considering only complaints for which offense reports were provided out of 500 narcotics complaints).

Plaintiffs further attempt to distinguish *Peterson* by stating that they provide "independent evidence" pointing to the custom alleged. Dkt. 188-1 at 64 n.359. Plaintiffs assert that the Office of Police Monitor ("OPM") concluded that "APD officers too often improperly escalated confrontations, resulting in the unnecessary use of force." *Id.* at 64. The OPM reports are more equivocal than Plaintiffs contend. In the 2005 Report highlighted by Plaintiffs, OPM stated only that: "It may benefit the Department to more closely examine compliance with policy and procedure and perhaps explore de-escalation tactics for use in the [downtown] Sector as well as the other Sectors that experienced increases in complaints from 2004 to 2005." Dkt. 186-37 at 3. Similarly, the 2015 Report states that, in reviewing a use of force incident, the Citizen Review Panel recommended that APD "define more effective methods to de-escalate situations such as this one" and "look for ways to apply a measured use of force and balance that with de-escalation methods." Dkt. 186-45 at 15. These recommendations are insufficient to show that the City had a pattern of condoning excessive force that was "so common and well-settled as to constitute a custom that fairly represents municipal policy." *Peterson*, 588 F.3d at 852.

Considering the entire record, the Court finds that Plaintiffs have not carried their burden to establish that the City had an unofficial custom or practice of condoning excessive force. The Court recommends that summary judgment be granted on this claim.

C. Failure to Enforce Intervention Policy

Plaintiffs also argue that although the City has a written policy of requiring officers to intervene when witnessing excessive force, it has not enforced this policy for ten years. In support, Plaintiffs provide the same list of prior incidents involving the use of force,[4] noting that other officers were present but did not intervene and were not investigated. Plaintiffs also submit evidence that APD investigated the other officers present only once among the 89 times APD itself found violations of its excessive force policy. Dkts. 188-1 at 29, 188-5. This evidence is supported by the testimony of Brian Manley, APD Police Chief at the time of Ambler's death, and Jason Staniszewski, now Assistant Police Chief, who testify that APD has never disciplined or investigated an officer for failure to intervene. Manley Tr. at 191:18-25, 195:4-12, Dkt. 186-53 at 9-10; Staniszewski Tr. at 92:18-94:8, Dkt. 186-11 at 24-26.

As stated above, the City presents significant evidence of its policies and procedures governing the use

4. The incidents involving David Joseph and Breaion King are not considered here because Plaintiffs do not allege that another officer was present at the scene to intervene. *See* Dkt. 188-1 at 15-16, 19.

of force. The record shows that when an officer reported using force, APD conducted a "review of and inquiry into every reported use of force to determine whether it comported with APD's policies." Dkt. 165-1 (Chacon Dec.) ¶ 10. The City does not provide any evidence suggesting that APD extended its investigation into other officers' responses when witnessing excessive force. Nor is there evidence that APD monitored officer's compliance with its intervention policy in any other way. The Court finds that Plaintiffs have offered sufficient evidence to show that APD's lack of investigation and discipline of officers who were potentially liable as bystanders was so uniform as to constitute an official policy.

Plaintiffs also must show that the City's failure to enforce its intervention policy constituted deliberate indifference. *James v. Harris Cnty.*, 577 F.3d 612, 617 (5th Cir. 2009). Proving deliberate indifference "ordinarily" requires the plaintiff to prove a pattern of prior constitutional violations. *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 409, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997).

The City argues that several incidents do not constitute evidence of a pattern because APD investigated them and found no policy violations. This reasoning was rejected in *Peterson*, 588 F.3d at 852. But the Court agrees that incidents in which juries found that officers did not use excessive force should be excluded.[5] The Court also

5. Byron Carter, Caroline Callaway, Grady Bolton, and Justin Scott.

finds that incidents involving individuals believed to have a gun are too dissimilar from the facts here to constitute evidence of a pattern.[6]

The Court finds that Plaintiffs submit evidence of 14 incidents describing conduct by an officer that would, as alleged, constitute failing to intervene in another officer's use of excessive force.[7] These generally involve officers needlessly escalating interactions with individuals before, during, and after their arrest while other officers stood by or participated in using force. Plaintiffs also offer evidence that the City would have been aware of several of these incidents because they resulted in lawsuits or discipline of other involved officers. *See, e.g.*, Dkts. 186-62, 186-73.

Based on this evidence, the Court finds that Plaintiffs have shown a pattern of prior incidents involving officers' failure to intervene in another officer's use of excessive force sufficient to support a finding of deliberate indifference at the summary judgment stage. *See Sanchez v. Gomez*, No. EP-17-CV-133-PRM, 2020 U.S. Dist. LEXIS 36199, 2020 WL 1036046, at *15 (W.D. Tex. Mar. 3, 2020) (finding eight incidents sufficient to establish a "pattern of use of excessive force against mentally ill victims").

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6. Nathaniel Sanders and Sir Smith, Jawhari Smith, Richard Munroe, Jason Roque, and Landon Nobles.

7. Alan Licon, Carlos Chacon, Pete Hernandez, Hunter Pinney, Joseph Cuellar, Adrian Aguado, Armando Martinez, Gregory Jackson, Joe McDonald, Abel Soto-Torres, Joseph Figueroa, Justin Grant, Michael Yeager-Huebner, and Paul Mannie.

To prove that this policy was a "moving force" behind the alleged violation of Ambler's constitutional rights, Plaintiffs must show "direct causation." *Peterson*, 588 F.3d at 848. This means that "there must be a direct causal link" between the policy and the violation, not merely a "but for" coupling between cause and effect. *Id.* (citation omitted). "Numerous courts have held that a policy of lack of discipline and protection plausibly emboldens officers to engage in misconduct." *Vess v. City of Dallas*, 608 F. Supp. 3d 434, 454 (N.D. Tex. 2022) (collecting cases). To prove "moving force" causation, at a minimum, a plaintiff must provide evidence that the officer was aware of the City's policy. *James*, 577 F.3d at 618-19.

Plaintiffs rely on Nissen's deposition testimony that he could not recall any instance of another officer being investigated for failing to intervene. Nissen Tr. at 201:16-202:8, Dkt. 186-2 at 57. The Court finds that this creates a fact issue as to whether Nissen was aware of a lack of enforcement. Plaintiffs also offer Nissen's deposition testimony, in which he stated that he did not intervene because he "wouldn't want another officer telling me what force to use because ultimately I'm the one who has to decide whether or not that's reasonable, I wouldn't want to tell another officer what to do because of the same reason." *Id.* at 174:1-16, Dkt. 186-2 at 52. From this evidence, a reasonable jury could conclude that the City's failure to enforce its intervention policy was the moving force in the constitutional violation.

D. Failure to Train

Plaintiffs argue that the City improperly trained Nissen to use excessive force based on the police academy's teaching techniques and its failure to teach de-escalation tactics. The City responds that Plaintiffs have not shown that the training is inadequate, the City was deliberately indifferent in adopting the training program, or the training was the moving force in the constitutional violation.

The Court agrees with the City that Plaintiffs have not met their high burden to show municipal liability for failure to train. It is undisputed that the training the City provides to its officers exceeds minimum requirements in Texas. *See Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 171 (5th Cir. 2010) (finding that compliance with state training minimums "counsels against" finding a failure to train). Although Plaintiffs assert that the City provides no training on de-escalation tactics, the evidence they cite does not support their claim. The 2005 OPM Report does not address what de-escalation training the City had in place and so cannot support Plaintiffs' claim that OPM "recommended APD rethink its missing de-escalation training." Dkts. 188-1 at 33, 186-37 at 4. Without such evidence, Plaintiffs' failure to train claim fails. *See Roque v. Harvel*, No. 1:17-CV-932-LY, 2020 U.S. Dist. LEXIS 204618, 2020 WL 6334800, at *9 (W.D. Tex. Mar. 23, 2020) (granting summary judgment for the City on failure to train claim where it met minimum state requirements and provided specific training in areas at issue), *aff'd*, 993 F.3d 325 (5th Cir. 2021); *Hernandez v. City of Austin*, No.

A-14-CV-492 LY, 2015 U.S. Dist. LEXIS 155593, 2015 WL 7301180, at *6 (W.D. Tex. Nov. 17, 2015), *R. & R. adopted sub nom. Hernandez v. Sanchez*, 2015 U.S. Dist. LEXIS 182325, 2015 WL 12670886 (W.D. Tex. Dec. 21, 2015) (finding that recommendation City revise aspects of use of force policy does not show training is inadequate).

Nor does Plaintiffs' evidence of a "toxic" culture at the police academy establish that the training was inadequate. Dkt. 188-1 at 2. In 2020, the City retained Kroll Associates, Inc. to review and evaluate the extent to which racism, bigotry, and discrimination are present in APD protocols, practices, and behaviors. Dkt. 186-32 at 4. Plaintiffs highlight Kroll's findings that the training academy "remains a predominantly paramilitary training model" that often taught cadets a "warrior mentality." *Id.* at 7, 28.

Proof that an injury "could have been prevented if the officer had received better or additional training cannot, without more, support liability." *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005). The City's decision to commission the Kroll Report undermines any claim that it was deliberately indifferent in adopting its training; instead, it suggests that the City sought to improve its training through Kroll's review and recommendations. Accordingly, the Court recommends that the District Court grant summary judgment for the City on Plaintiffs' failure to train claim.

E. Ratification

Plaintiffs briefly argue that the City ratified Nissen's conduct because the City has taken the position Nissen violated no APD policies. It is established that "a policymaker who defends conduct that is later shown to be unlawful does not necessarily incur liability on behalf of the municipality." *Peterson*, 588 F.3d at 848; *see also Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 169 (5th Cir. 2010) ("Good faith statements made in defending complaints against municipal employees do not demonstrate ratification."). And the Fifth Circuit has limited the ratification theory to "extreme factual situations" far worse than those here. *See Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985).

F. Americans with Disabilities Act

The City argues that it is entitled to summary judgment on Plaintiffs' ADA claim because the exigent circumstances exception set forth in *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000), applies. The City also contends that there is no evidence the alleged discrimination was intentional, and that under recent Sixth Circuit precedent, the City cannot be vicariously liable for an agent's violation of the ADA. Plaintiffs respond that summary judgment is inappropriate because the scene was secure and therefore the exigent circumstances exception does not apply, Nissen intentionally discriminated against Ambler by failing to accommodate his disability despite his knowledge that his conduct would be deadly, and the City can be held vicariously liable.

Appendix D

1. Exigent Circumstances Exception

The City argues that this case falls within the exigent circumstances exception because the incident occurred on a public street, "presenting a danger to the APD officers on the scene as well as the public at large," and that Nissen's decision to assist was "a quick discretionary decision made for the safety of those at the scene." Dkt. 165 at 21.

Title II of the ADA "does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents prior to the officer's securing the scene and ensuring that there is no threat to human life." *Hainze*, 207 F.3d at 801. Officers need not consider whether their actions will comply with the ADA "prior to securing the safety of themselves, other officers, and any nearby civilians." *Id.* at 801. Once an area is secure and there is no safety threat, officers have a duty to reasonably accommodate disability. *Id.* at 802.

Courts consistently find that a scene is not secure where officers have reason to believe that the plaintiff is armed and still a threat. *See, e.g., Munroe v. City of Austin*, 300 F. Supp. 3d 915, 931 (W.D. Tex. 2018) (finding that exception applied when plaintiff was "waiving" an "exact replica of a real handgun" in officers' direction); *DeLeon v. City of Alvin Police Dep't*, No. H-09-1022, 2010 U.S. Dist. LEXIS 126116, 2010 WL 4942648, at *4 (S.D. Tex. Nov. 30, 2010) (same where victim was bleeding from knife wound and stated that plaintiff would attack again unless she was arrested). In contrast, the court found a

genuine issue of material fact as to whether circumstances presented "any serious threat, let alone threat of human life," or there was a need to secure the scene in *Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 741 (S.D. Tex. 2011). In that case, an officer responded to a parent's 911 call saying that her adult son was "violent" and "delusional," but lacked access to any weapons. After entering the house, the son ran toward the officer "flailing" his arms, striking the officer on his arms. *Id.* at 742.

Considering all the evidence, the Court finds that there are genuine issues of material fact as to whether the scene was secure once Ambler was out of his vehicle and surrounded by multiple officers.

2. Intent

Although intent is a necessary element of a damages claim under the ADA, the Fifth Circuit "has hesitated to delineate the precise contours of the standard for showing intentionality. But the cases to have touched on the issue require something more than 'deliberate indifference,' despite most other circuits defining the requirement as equivalent to deliberate indifference." *Cadena v. El Paso Cnty.*, 946 F.3d 717, 724 (5th Cir. 2020) (cleaned up). For example, intentional discrimination has been found when a county deputy knew that a hearing-impaired suspect could not understand him, rendering his chosen method of communication ineffective, and the deputy did not try to adapt. *Delano-Pyle*, 302 F.3d at 575-76.

As stated, Ambler's obesity was apparent, and Plaintiffs submit evidence that and Ambler informed

the officers he had congestive heart failure and could not breathe. Plaintiffs also submit evidence that APD's restraint policies permit officers to use alternatives to handcuffing an arrestee behind the back "in the case of advanced age, injury, physical disability, or other circumstances where arrested persons are incapable of placing their hands behind their back," and Nissen was trained to consider these alternatives. Dkt. 186-7 at 2; Stanizsewski Tr. at 119:2-120:3, Dkt. 186-11 at 34-35. The Court finds that Plaintiffs' evidence that Nissen knew of Ambler's disability and did not alter his behavior establishes a question of fact on the element of intent.

3. Vicarious Liability

The City's argument that it cannot be held vicariously liable for the actions of its agent is foreclosed by Fifth Circuit precedent that a "public entity is liable for the vicarious acts of any of its employees" because the ADA "specifically encompasses any agent of an employer covered by the statute." *Delano-Pyle*, 302 F.3d at 574-75 (citing 42 U.S.C. § 12111 (1995)). The Sixth Circuit case on which the City relies, *Jones v. City of Detroit*, 20 F.4th 1117, 1121 (6th Cir. 2021), is not persuasive.

G. Spoliation

Finally, Plaintiffs argue that an adverse inference should be drawn against the City because it failed to preserve video evidence from the camera crew that recorded Ambler's arrest for the television show Live PD. A party seeking an adverse inference based on spoliation of evidence must show:

> (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the evidence was destroyed with a culpable state of mind; and (3) the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Doe v. Northside I.S.D., 884 F. Supp. 2d 485, 496 (W.D. Tex. 2012).

Plaintiffs have not shown that the City ever had control over the evidence. As Plaintiffs allege in their Complaint, former Defendant Williamson County contracted with a private entity to produce Live PD and there is no evidence the City was involved. Dkt. 44 ¶ 26. The Court recommends that Plaintiffs' request for an adverse inference against the City at trial be denied.

V. Recommendation

For these reasons, this Magistrate Judge **RECOMMENDS** that the District Court **GRANT IN PART and DENY IN PART** Michael Nissen's Motion for Summary Judgment (Dkt. 167). The Court recommends that the District Court **GRANT** the motion as to Plaintiffs' deliberate indifference to a serious medical need claim and **DENY** it in all other respects. If the Court accepts this recommendation, Plaintiffs' claims against Nissen for excessive force as a participant and a bystander will remain for trial.

The Court further **RECOMMENDS** that the District Court **GRANT IN PART and DENY IN PART** Defendant City of Austin's Motion for Summary Judgment (Dkt. 165). The Court recommends that the District Court **GRANT** the motion as to Plaintiffs' claims that the City is liable for Nissen's Fourth Amendment violation based on its policy of condoning excessive force and failing to train its officers and **DENY** the motion as to Plaintiffs' claims for failure to enforce its intervention policy and violation of the Americans with Disabilities Act.

VI. Warnings

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except on grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 150-53, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

Appendix D

VII. Order

The Court **GRANTS** Plaintiffs' Unopposed Motion for Leave to File Sur-Reply in Opposition to the City's Motion for Summary Judgment, filed June 2, 2023 (Dkt. 198). The Clerk is **ORDERED** to file Dkt.198-1 on the docket.

SIGNED on July 31, 2023.

/s/ Susan Hightower
SUSAN HIGHTOWER
UNITED STATES MAGISTRATE JUDGE

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JANUARY 2, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-50696

JAVIER AMBLER, SR., *INDIVIDUALLY, ON BEHALF OF* ALL WRONGFUL DEATH BENEFICIARIES OF JAVIER AMBLER, II, *ON BEHALF OF* THE ESTATE OF JAVIER AMBLER, II, *AND AS NEXT FRIENDS OF J.R.A., A MINOR CHILD*; MARITZA AMBLER, *INDIVIDUALLY, ON BEHALF OF* ALL WRONGFUL DEATH BENEFICIARIES OF JAVIER AMBLER, II, *ON BEHALF OF* THE ESTATE OF JAVIER AMBLER, II, *AND AS NEXT FRIENDS OF J.R.A., A MINOR CHILD*; MICHELLE BEITIA, *AS NEXT FRIEND* J.A.A., *A MINOR CHILD*; JAVIER AMBLER, II, ESTATE OF JAVIER AMBLER, II,

Plaintiffs-Appellees,

versus

MICHAEL NISSEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:20-CV-1068

Appendix E

ON PETITION FOR REHEARING EN BANC

Before SMITH, WIENER, and DOUGLAS, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P. 35 and 5TH CIR. R. 35).

In the en banc poll, eight judges voted in favor of rehearing, Judges Jones, Smith, Richman, Ho, Duncan, Engelhardt, Oldham, and Wilson, and nine judges voted against rehearing, Chief Judge Elrod, and Judges Stewart, Southwick, Haynes, Graves, Higginson, Willett, Douglas, and Ramirez.