No. 19-753

IN THE
Supreme Court of the United States

MICHAEL HUNTER, MARTIN CASSIDY, CARL CARSON,
Petitioners,

v.

RANDY COLE, KAREN COLE, RYAN COLE,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A Fifth Circuit panel twice concluded that petitioners' interlocutory appeal is premised on improper assertions of fact that exceed appellate jurisdiction and that, affording the required deference to Judge O'Connor's factual determinations, qualified immunity was properly denied at this stage. The Fifth Circuit then reviewed this interlocutory appeal *en banc* and, again, concluded petitioners are pressing an "alternative set of facts" that is "in the teeth of those found by the district court," and that qualified immunity was properly denied. The petition continues this abuse of interlocutory review. It does not meaningfully address the certiorari criteria and instead repeats what the *en banc* court described as petitioners' "evolving" story, derived in part from their own perjured testimony. The questions are:

1. Whether the petition's first question lies within the Court's interlocutory jurisdiction, given its disregard for the district court's determinations of what a jury could find from the 3500-page record in this case.

2. Did the district court and eleven-judge majority of the Fifth Circuit err by concluding an officer violates clearly established law by shooting a seventeen-year-old boy who is unaware of the officers' presence, has his back turned with a gun to his own head, and has made no threatening movements?

3. Did the district court and all eighteen judges of the *en banc* Fifth Circuit err by concluding it violates clearly established law to deliberately fabricate a cover-up story, falsify evidence, and commit perjury to frame someone for a crime that he did not commit?

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COUNTERSTATEMENT REGARDING JURISDICTION

As the panel opinions and *en banc* court concluded, petitioners' first question is beyond the scope of appellate jurisdiction. Pet. App. 17a, 23a. Established jurisdictional rules limit interlocutory review of qualified immunity to issues which accept "the facts that the district court assumed when it denied summary judgment." *Johnson v. Jones*, 515 U.S. 304, 319 (1995). The *en banc* Fifth Circuit found petitioners' first question is premised on an "alternative set of facts" that is "in the teeth of those found by the district court." Pet. App. 23a. The petition does not assert any error in the *en banc* court's conclusion that their argument is "beyond [its] jurisdiction," Pet. App. 23a, yet repeats the same "alternative" facts. This Court thus lacks jurisdiction over that issue for the same reason the *en banc*

Fifth Circuit concluded it did. *See infra* Part I.[1]

COUNTERSTATEMENT OF THE CASE

I. Ryan Walks Away From Other Officers, Without Confrontation, With His Gun Pointed At His Own Head.

Seventeen-year-old Ryan Cole was a junior in high school. Pet. App. 5a, 122a. On the morning of October 25, 2010, Ryan visited his friend carrying two handguns, one of which he voluntarily gave to his friend. Pet. App. 122a. Before leaving his friend's house, Ryan asked his grandparents to pick him up at a nearby drugstore. Pet. App. 122a. After the friend's father informed police that Ryan had a gun, some officers found Ryan in the neighborhood and ordered him to stop. Pet. App. 122a. Ryan took the gun from his waistband and placed it against his own head. Pet. App. 122a; ROA.15-10045.3201. No confrontation ensued—Ryan walked away, gun to his head, toward a wooded area on the way to meet his grandparents. Pet. App. 122a; ROA.15-10045.3201.

II. Petitioners See Ryan Facing Away, Unaware Of Their Presence, Gun To His Head, Making No Threatening Or Provocative Movements, And They Shoot Him From Behind.

Petitioner Michael Hunter responded to the vicinity and his fellow officers said he "could leave as [they] had things under control." Pet. App. 6a; ROA.15-10045.2757. Instead, petitioner Hunter decided to go find Ryan at the location described in a dispatch.

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[1] The petition does not suggest the Fifth Circuit's application of these jurisdictional rules, a prerequisite to addressing their first question, warrants this Court's review.

ROA.15-10045.2757. Petitioner Hunter "did not know the specifics" of the call, only that Ryan had voluntarily given up another gun to his friend. *Id.*

Upon arriving at the location, petitioner Hunter saw two officers following Ryan, who was walking away with his gun to his head. Pet. App. 95a. Petitioner Hunter told another officer, petitioner Carl Carson, to join him in circling behind a wooded area to intercept Ryan on the other side. Pet. App. 6a-7a. Petitioner Martin Cassidy met them there, knowing only that a teenager had "recently been seen walking away" with a handgun to his head. *Id.*[2]

Ryan, who had simply walked away from the earlier officers without confrontation and continued on to meet his grandparents, was unaware these three officers were looking for him. Pet. App. 201a-05a; ROA.15-10045.3201-02, 3245. Petitioners heard a radio report that as Ryan neared their side of the woods, he continued holding his gun to his head. ROA.15-10045.3201-02. As petitioners waited for Ryan to walk out of the woods, they concealed themselves in vegetation along an embankment, with their guns drawn. Pet. App. 7a. Petitioner Hunter then watched Ryan

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[2] Petitioners repeatedly assert that petitioners Hunter and Cassidy "were aware" of alleged threats by Ryan. Pet. 6-7. As the *en banc* majority and panel opinions explained, that is sharply disputed. Pet. App. 24a. Petitioners Hunter and Cassidy's contemporaneous reports stated they "did not know the specifics" and knew only that Ryan had voluntarily given up one of his guns and "had been seen walking away" with the other one; neither officer professed knowledge of any threats. Pet. App. 6a; ROA.15-10045.2757. Petitioners only claimed to have known about threats *four years later*, long after they had given false statements and perjured testimony. Pet. App. 6a-7a, 95a.

emerge and stand facing away from petitioners, with his gun to his own head. Pet. App. 129a, 202a-03a; ROA.15-10045.3202.

Petitioner Hunter watched Ryan for about five seconds. ROA.15-10045.3273. During this time, Ryan faced away, unaware of petitioners' presence, and kept his gun to his head "the entire time." Pet. App. 201a, 203a, 206a; ROA.15-10045.3243-45. Ryan never made any "threatening or provocative gesture." Pet. App. 206a. Petitioners "had the time and opportunity" to announce themselves or give an order providing an opportunity to disarm, but stayed concealed. Pet. App. 204a-06a; ROA.15-10045.3237, 3245, 3273. Petitioner Hunter then shot multiple rounds at Ryan. Pet. App. 204a-06a; ROA.15-10045.3237. The first bullet struck Ryan while he was oriented away from petitioner Hunter at a 90-degree angle, piercing through his left arm into his left back area, breaking a rib, puncturing his lung and stopping atop Ryan's liver. Pet. App. 203a; ROA.15-10045.3238-39. This was "instantly incapacitating." ROA.15-10045.2961. As Ryan collapsed, his body turned toward petitioners and one of petitioners Hunter or Cassidy fired another round, hitting Ryan's left shoulder. Pet. App. 203a. As an involuntary reflex to being shot, Ryan pulled the trigger of his gun, causing it to discharge a bullet into the right side of his skull and brain. *Id.*; ROA.15-10045.3243-44.

These injuries caused "profound mental and physical disabilities." Pet. App. 175a-76a. A substantial portion of the right side of Ryan's brain was destroyed and the left side of his body is paralyzed. ROA.15-10045.959. Ryan has virtually no use of his left arm

and limited use of his left leg. *Id.* He also suffers severe seizures. *Id.* The injuries caused permanent and significant disfigurement to his body, including his face, head, arm, and back. ROA.15-10045.960. Ryan will require constant specialized medical care and assistance for basic daily living for the remainder of his natural life. *Id.*

III. Petitioners Walk Investigators Through A Fabricated Story And Commit Perjury, Leading To False Charges Against Ryan.

It is undisputed that after the shooting, petitioners approached Ryan's body, but aside from calling an ambulance, none provided first aid or assistance of any kind, despite his youth. Pet. App. 100a; ROA.15-10045.3203.

Standard procedure following a police shooting required petitioners to remain separate from one another "to ensure the independence of their recollection of the events and to protect them from any claim that they had collaborated in advance as to their recollection." Pet. App. 100a; ROA.15-10045.3204. Petitioners violated that procedure, leaving the scene together for a considerable time. Pet. App. 141a.

When City of Garland police detectives arrived, they asked petitioners to conduct a "walk-through" of the crime, wherein each officer explained his actions with reference to specific locations or physical evidence. ROA.15-10045.1998, 2028, 3204-05. Unaware that Ryan's firearm had discharged in his own head upon being shot, petitioners Hunter and Cassidy falsely reported that Ryan "suddenly" turned to face petitioner Hunter and pointed his weapon at petitioner Hunter when they shot him. Pet. App. 205a-

06a; ROA.15-10045.1412, 2759, 3202-03, 3215, 3243; ROA.15-10045.623. The Garland detectives documented petitioners' story by taking photographs depicting their reported positions. ROA.15-10045.3204-05, 3241. Based on petitioners' reports and perjured statements, Ryan was charged with aggravated assault on a public servant, a felony, and placed on house arrest, incapacitated in intensive care. Pet. App. 9a-10a.

A month later, investigators received a ballistics report from the crime lab that was incompatible with the petitioners' sworn statements. Pet. App. 10a, 22a-23a. Forensic evidence confirmed petitioner Hunter had, in fact, shot Ryan when he was facing away. Pet. App. 212a; ROA.15-10045.2956, 3216, 3246. It also confirmed Ryan was not pointing his gun at petitioner Hunter, but rather at his own head and involuntarily discharged it into his temple. Pet. App. 10a, 212a-13a; ROA.15-10045.3243, 2956, 3246. The district attorney dropped the aggravated assault charge, and accepted a plea to misdemeanor unlawful carry of a weapon. Pet. App. 10a.

When these discrepancies came to light, petitioners Hunter and Cassidy attempted to change their story. They claimed first that the Garland investigators "did not receive specific approval" to take photographs and, second, that the investigators did not accurately document their positions. Pet. App. 187a; ROA.15-10045.2024, 2186-87, 3290. However, petitioners' new account remained inconsistent with the physical evidence, including the locations of shell casings and the pool of Ryan's blood. Pet. App. 187a-88a; ROA.15-10045.2949-51.

Petitioners Hunter and Cassidy also offered inconsistent stories about whether they gave Ryan commands before shooting him. Petitioner Hunter initially reported that Ryan "suddenly" turned and pointed his gun, so petitioner Hunter shot "before [he] had a chance to give any commands." Pet. App. 9a; ROA.15-10045.2759. Petitioner Hunter later changed his story, stating he could no longer "say whether [he] did or [did] not" give commands before shooting. ROA.15-10045.3174-75. Petitioner Cassidy first reported that he *did* hear petitioner Hunter give a command, but was "unaware of what that command was." Pet. App. 9a; ROA.15-10045.1264, 1412. Years later, petitioner Cassidy claimed he watched petitioner Hunter give a specific command, "drop it," and then wait, giving Ryan "sufficient time . . . to comply" before shooting. ROA.15-10045.3299-3302. This was inconsistent with petitioner Hunter's body microphone, which confirmed he gave no command. ROA.15-10045.3216, 3237.

Petitioner Carson, who did not fire any shots, initially reinforced the false story, saying Ryan pointed a gun at his fellow officers who then "let loose" on him. ROA.15-10045.1413, 2155-57. Petitioner Carson later claimed he did not see what Ryan was doing immediately before the shooting. Pet. App. 9a n.17; ROA.15-10045.3202-03.

IV. The District Court Proceedings.

Plaintiffs filed this action under 42 U.S.C. § 1983 alleging that petitioners Hunter and Cassidy used excessive force in violation of Ryan's Fourth Amendment rights, and that all three petitioners fabricated evidence in violation of Ryan's Fourth and Fourteenth Amendment rights. ROA.15-10045.630, 638.

A. The District Court Denies Petitioners' Motion To Dismiss The Excessive Force And Fabrication Claims.

District Judge Reed O'Connor denied petitioners' motion to dismiss the excessive force and fabrication claims. With respect to fabrication, he observed that the complaint alleged each officer engaged in deliberate fabrication of evidence and false statements, and conspired to violate Ryan Cole's constitutional rights. Pet. App. 246a-47a. The court rejected petitioners' "highly conclusory assertion" of qualified immunity, holding that any reasonable officer would know "deliberately fabricating evidence and framing individuals for crimes they did not commit" is unlawful. Pet. App. 247 n.8 (citation omitted).

Petitioner Carson sought interlocutory appeal of the denial of qualified immunity as to fabrication of evidence. Petitioner Hunters and Cassidy never appealed the denial of immunity as to fabrication, and the excessive force claim against them proceeded to summary judgment.[3]

B. At Summary Judgment, Petitioners Continue To Attest They Saw Ryan Pointing His Gun At Them.

At summary judgment, the parties' evidence offered starkly different accounts of the events leading to Ryan's permanent disabilities.

Petitioners Hunter and Cassidy maintained, with great specificity, that they watched Ryan turn and

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[3] The fabrication claims against petitioners Hunter and Cassidy are therefore beyond the scope of this appeal. Pet. App. 11a, 29a n.1, 125a.

point a gun at petitioner Hunter. Petitioner Hunter testified that Ryan backed out of the woods with his back to petitioner Hunter and then turned in "a fluid motion" until he was "facing [petitioner Hunter], full on." ROA.15-10045.1995, 1999. Ryan then raised "a dark colored handgun" up from "no higher than his waist" and "pointed it directly at" petitioner Hunter. ROA.15-10045.1999-2000. Only after Ryan "raised the gun up from below," petitioner Hunter reported, did he shoot Ryan. ROA.15-10045.2000. Petitioner Cassidy echoed this story, stating that he watched Ryan back out of the wooded area, turn toward petitioner Hunter, and then "direct[] the gun toward Hunter." ROA.15-10045.2016-2017.

Petitioner Hunter admitted that if Ryan never attempted to point the gun at him and he nevertheless shot Ryan, it would have been a knowing violation of the law. *See* ROA.15-10045.3184 (admitting he "would not have justification [for shooting Ryan] if a gun was not pointed at [him]").

C. Respondents Proffer Forensic Evidence That Belies Petitioners' Story.

Respondents introduced forensic evidence that contradicted petitioners' account, including the analysis of former Oklahoma City Police Captain and crime scene reconstructionist Tom Bevel, and former Chief of Police and police-investigation expert Timothy Braaten. Pet. App. 183a-91a; ROA.15-10045.3196-98, 3234-35. Both experts concluded petitioners' story was "impossible." ROA.15-10045.3216, 3219, 3243. They described the following problems with the officer' account:

- Captain Bevel's trajectory analysis showed Ryan could not have been facing petitioners when he was shot. ROA.15-10045.3239, 3245-46. Chief Braaten also found Ryan was "facing *away*" from petitioner Hunter, making petitioners' account "impossible." ROA.15-10045.3215-16.
- Captain Bevel found petitioners' claim that Ryan pointed his gun at petitioner Hunter "not consistent" with the physical evidence, including the "stippling"[4] on Ryan's head, and found Ryan's handgun must have been pointed at his own head when shot. ROA.15-10045.3243.
- Captain Bevel found Ryan would not have seen petitioners based on the orientation of his body and no evidence Ryan was aware of petitioners' presence when shot. ROA.15-10045.3245.
- Chief Braaten rejected that Ryan was rotating when petitioner Hunter shot him. *See* ROA.15-10045.3289. According to the physical evidence, any rotation to back out of the woods ended "prior to the shooting" and Ryan likely was not moving when Hunter shot him. *Id.* Captain Bevel indicated that even if he "further accepts Officer Hunter's account that [Ryan] was turning," it would make things worse. Accounting for the "reaction time" of 1.5 to 2 seconds between the decision to shoot and pulling the trigger, that would mean petitioner Hunter decided to shoot when Ryan had his back *even more*

[4] "Stippling" is injury to skin caused when a firearm is discharged in close proximity. ROA.15-10045.3205.

turned and Ryan reached the 90-degree position only after petitioner Hunter made the decision to shoot (all the while unaware petitioners were even present). ROA.15-10045.3244-45.

- Captain Bevel and Chief Braaten found petitioners had sufficient time to give a warning. ROA.15-10045.3273, 3220.
- Captain Bevel's analysis of body microphones confirmed petitioners never gave any warning before shooting Ryan. ROA.15-10045.3245.

D. The District Court Determines A Jury Could Find Petitioners Shot Ryan Without Warning When He Was Facing Away, Unaware Of Their Presence, Making No Movements That Could Be Perceived As Threatening.

Judge O'Connor denied petitioners Hunter and Cassidy's motion for summary judgment based on qualified immunity. The court recognized the evaluation of clearly established law cannot occur at an "abstract" level, but requires "a more particularized sense" and must be done "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Pet. App. 198a, 200a.

After considering "the motions, related briefing, [and] evidence," Pet. App. 175a, the court found the "factual circumstances present immediately before and during the shooting are highly contested" and there remained "genuine issues of material fact" regarding both Ryan's "actions" and petitioners' "conduct during the incident," Pet. App. 197a, 202a. Judge O'Connor concluded a reasonable jury could find the following:

First, contrary to petitioners' sworn statements and testimony, Ryan "never pointed a weapon at the Officers." Pet. App. 203a.

Second, Ryan was "pointing a gun the entire time at his own head." Pet. App. 201a, 203a, 206a.

Third, petitioners shot Ryan when he "was unaware of [their] presence." Pet. App. 204a.

Fourth, Ryan "never made a threatening or provocative gesture toward" petitioners. Pet. App. 206a.

Fifth, petitioners "had the time and opportunity to give a warning and yet chose to shoot first instead." Pet. App. 204a-05a.

Sixth, Ryan "was first shot by the Officers" when he was "initially facing away from the Officers at a 90 degree angle." Pet. App. 203a. After Ryan was shot, his body "was turning toward the Officers, [and] one of the officers shot him with the second bullet." Pet. App. 203a.

The court concluded that, given all the evidence in the record, "[a] jury could find that it would not have been reasonable for the Officers to believe that they were being threatened." Pet. App. 203a-04a. Viewing the case "in a particularized sense," the disputes over whether petitioners shot Ryan without warning, when he was unaware of their presence and facing away, and in the absence of even a perceived threat, were material to whether petitioners were entitled to immunity. Pet. App. 198a, 206a-07a.

Petitioners Hunter and Cassidy filed an interlocutory appeal of the district court's ruling.

V. The Proceedings On Interlocutory Appeal.

The Fifth Circuit consolidated petitioner Carson's interlocutory appeal as to fabrication and petitioners Hunter and Cassidy's interlocutory appeal as to excessive force.

A. The Panel's First Opinion.

Judges Higginbotham, Clement, and Higginson issued a unanimous opinion agreeing that qualified immunity was properly denied at this stage for respondents' excessive force and fabrication claims. Pet App. 121a. With respect to excessive force, the panel relied principally on Fifth Circuit caselaw to conclude that the disputes of fact identified by Judge O'Connor were material, including Fifth Circuit caselaw involving the specific context of "a suicidal person who has a gun to his head." Pet. App. 130a-32a, 138a-39a. The court held it lacked jurisdiction over petitioners' argument, noting petitioners did "not argue that they were justified in shooting Ryan" based on Judge O'Connor's factual determinations and instead premised their appeal on Ryan being warned and then making "some threatening motion towards officers." Pet. App. 133a-34a.

With respect to fabrication of evidence, the panel held "no 'reasonable law enforcement officer would have thought it permissible to frame somebody for a crime he or she did not commit'" and to rule otherwise "would make a mockery of" due process. Pet. App. 165a.[5]

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[5] The panel held respondents' fabrication claim was properly asserted under the Fourteenth Amendment and reversed as to the Fourth Amendment. Pet. App. 142a-44a, 165a-66a.

B. This Court's GVR Following *Mullenix*.

Following the panel's first opinion, this Court decided *Mullenix v. Luna*, 136 S. Ct. 305 (2015), which held the Fifth Circuit erred in denying qualified immunity to an officer who made the tactical decision to fire at a car, rather than rely on spike strips, "in order to disable it" during the high-speed chase of a dangerous fugitive who had directly communicated threats "to shoot at police officers." *Id.* at 306-07. This Court held the Fifth Circuit approached qualified immunity at too high a level of generality by asking only whether there had been a "sufficient threat" to warrant deadly force and failing to consider the "*particular* conduct" at issue. *Id*. at 308-09.

Following *Mullenix*, petitioners filed a certiorari petition noting that the panel in this case "expressly cited its decision in *Luna [v. Mullenix]*" in its analysis. Pet. for Certiorari, *Hunter v. Cole*, 137 S. Ct. 497 (2016) (No. 16-351), 2016 WL 4987324, at *23.[6] Consistent with ordinary practice, the Court GVR'd to allow the Fifth Circuit to reconsider in light of this Court's decision in *Mullenix*. Pet. App. 118a.

C. The Panel's Second Opinion.

On remand, the panel ordered new briefing and argument. Having reconsidered the record, the parties' arguments, jurisdictional constraints, and applicable

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[6] The panel cited the Fifth Circuit's *Mullenix* opinion for general statements of the law, Pet. App. 127a-28a, and reasoned that this case involved a "less severe and immediate threat" than *Mullenix*, and did not involve a "split-second judgment" during a high-speed chase in which officers were aware an armed suspect "explicitly threatened to shoot police officers," Pet. App. 137a.

caselaw, including *Mullenix*, the panel again unanimously concluded that petitioners' interlocutory appeal was premised on arguments beyond the court's jurisdiction and that, crediting Judge O'Connor's factual determinations, qualified immunity was properly denied.

The panel recognized that in *Mullenix* a Fifth Circuit panel had "defined the applicable rule with too much 'generality'" by considering the "sufficiency" of the immediate threat. Pet. App. 108a-09a. The panel emphasized that *Mullenix* "repudiates" such indeterminate legal rules, which "cannot be 'clearly established,' because a reasonable officer attempting to interpret and apply them in particularized circumstances will face legal uncertainty" and "cannot be on notice of the proper course of action." Pet. App. 109a-10a.

The panel reconsidered whether "given these facts, Cassidy and Hunter violated clearly established law." Pet. App. 108a. It reiterated that on interlocutory review, its jurisdiction was "confined to the materiality of factual disputes identified by the district court" and explained that the determination of whether an officer violated clearly established law must be confined "to those facts knowable to the officers at the time." Pet. App. 106a-07a. Revisiting those facts, the panel explained it must assume that although Ryan "possessed a handgun, he did nothing to threaten the officers." Pet. App. 107a-08a. Rather, "[b]oth officers knew that [Ryan] had walked away from two police officers without violent confrontation." Pet. App. 107a. They then "took cover," knowing Ryan "was unaware of their presence" and "facing away from" them pointing his gun at his own head. Pet. App. 107a-08a. They

then "opened fire before [Ryan] had turned to face them, and before he registered their presence." Pet. App. 108a. Thus, under the district court's determinations, petitioners shot a seventeen-year-old boy who "posed no threat to the officers or anyone else at the time." Pet. App. 107a.

The panel accordingly resolved only whether officers who "reasonably perceive no immediate threat" can shoot someone. Pet. App. 110a. The panel explained that while "*Mullenix*, and several other decisions of th[is] Court" repudiated an indeterminate rule requiring officers facing an immediate threat to "gauge the 'sufficiency' of the threat relative to the use of force," Pet. App. 112a, this Court has also "repeatedly explained" that its decision in *Tennessee v. Garner*, 471 U.S. 1, 2 (1985), continues to provide clearly established law in the "obvious case," Pet. App. 111a-13a. According to the panel, this, at a minimum, includes *Garner*'s most "bright-line" rule that an officer cannot shoot someone who "poses *no immediate threat* to the officer and *no threat to others*." Pet. App. 11a (quoting *Garner*, 471 U.S. at 11) (emphasis in original). In addition, the panel explained, this narrow and obvious rule had been recognized in Fifth Circuit caselaw particularized to shooting an armed victim who took no action that could reasonably be perceived as an immediate threat to officers or anyone else. Pet. App. 111a-12a, 113a-14a.

The panel recognized that "[i]mmunity from trial is an important component of qualified immunity," but concluded that the sharply contested facts in this record require "a jury to resolve what happened" and "whether Cassidy and Hunter are or are not entitled to the defense." Pet. App. 117a. The court reiterated

that "denial at this stage does not necessarily deprive the officers of the immunity defense as to liability." Pet. App. 117a.[7]

D. The Fifth Circuit's *En Banc* Opinion.

Following the panel's second opinion, a majority of active judges voted to review this interlocutory appeal as a full court. Pet. App. 257a. The *en banc* court ordered new briefing and argument. Upon considering the record, the parties' arguments, the jurisdictional constraints on interlocutory review, and applicable caselaw, the *en banc* court reached the same conclusion as the district court and two panel opinions. An eleven-judge majority agreed that petitioners premised this interlocutory appeal on arguments beyond the court's jurisdiction and that, affording the required deference to Judge O'Connor's determinations, qualified immunity was properly denied at this stage.[8] All eighteen judges of the *en banc* court agreed qualified immunity was properly denied as to respondents' fabrication of evidence claim. Pet. App. 13a-14a, 29a n.1.

In a detailed, reasoned opinion, the *en banc* court concluded it must be "for a jury, and not judges, to resolve the competing factual narratives as detailed in the district court opinion and the record as to [respondents'] excessive-force claim." Pet. App. 5a. The

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[7] The panel held *Mullenix* did not bear on its earlier analysis of petitioners' fabrication of evidence claim. Pet. App. 105a.

[8] The eleven judges who agreed qualified immunity should be denied as to excessive force were Chief Judge Stewart and Judges Higginbotham, Dennis, Clement, Elrod, Southwick, Haynes, Graves, Higginson, Costa, and Engelhardt.

court emphasized the obligation to afford the protection of qualified immunity "at the earliest stage of litigation at which the defense's application is determinable." Pet. App. 2a. However, it reasoned, qualified immunity is not "the absolute immunity enjoyed by prosecutors and judges, but a qualified immunity." *Id.* Thus, in some cases involving "competing factual narratives," immunity must be resolved by a jury. Pet. App. 3a. Even in that situation, the court emphasized, defendants have the opportunity to present their immunity defense to the jury, which "may foreclose liability" on that basis. *Id.*

The court observed that on interlocutory review of qualified immunity, a court "cannot challenge the district court's assessments regarding the sufficiency of the evidence—that is, the question whether there is enough evidence in the record for a jury to conclude that certain facts are true." Pet. App. 14a-15a. Moreover, the court "must view the facts and draw reasonable inferences in the light most favorable to the plaintiff." Pet. App. 15a. It observed that this Court "has summarily reversed [the Fifth Circuit] for failing to take the evidence and draw factual inferences in the non-movants' favor at the summary judgment stage," including in the specific context of deciding whether the law is clearly established. *Id.* (discussing *Tolan v. Cotton*, 572 U.S. 650, 660 (2014)). At the same time, the court explained, it must heed "the guidance provided by the Supreme Court in *Mullenix*" wherein the Fifth Circuit was summarily reversed because it "defined the applicable rule with too much 'generality.'" Pet. App. 15a-16a (discussing *Mullenix*, 136 S. Ct. at 308-12).

With these principles in mind, the *en banc* court revisited the district court's binding record determinations: petitioners saw Ryan Cole facing away from them, "unaware of the Officers' presence" and "holding his handgun pointed to his own head, where it remained." Pet. App. 7a-8a. Although petitioners "'had the time and opportunity to give a warning' for Ryan to disarm himself" and Ryan "never made a threatening or provocative gesture towards [the] Officers," they shot Ryan from behind. Pet. App. 8a. Thus, crediting the district court's determinations, petitioners Hunter and Cassidy shot Ryan from behind without warning knowing that "Ryan posed no threat to the officers or others." Pet. App. 18a.

The *en banc* court held this violated clearly established law for two reasons. First, it recognized that although this Court has cautioned against relying on *Garner* at too high a level of generality, it has also "repeatedly stated that this rule can be sufficient in obvious cases." Pet. App. 18a. Applying that guidance, the court explained that shooting Ryan from behind without warning and without any action that could be perceived as a threat to safety "is an obvious" violation of the law. Pet. App. 17-18a.

Second, the *en banc* Fifth Circuit concluded that its own particularized precedent "established clearly that Cassidy's and Hunter's conduct—on the facts as we must take them at this stage—was unlawful." Pet. App. 18a (discussing *Baker v. Putnal*, 75 F.3d 190, 193 (5th Cir. 1996)). The court identified the facts of *Baker* that were particularized to this case: (i) officers were looking for someone who had been seen with a gun; (ii) the officer perceived the plaintiff to be holding a handgun and later claimed the plaintiff had "pointed it at"

him; and there was evidence indicating that (iii) the plaintiff "took no threatening action"; (iv) the officer "issued no warning"; (v) the plaintiff "may have barely had an opportunity to see" the officer; (vi) the plaintiff "was not facing" the officer; and (vii) the officer shot the plaintiff. Pet. App. 18a-20a. The court summarized: "The circumstances of the officers' encounter with Ryan, as in *Baker*, remain heavily disputed: as to whether Ryan was aware of the officers, whether and how he turned and aimed his gun, and whether Hunter warned Ryan to disarm himself." Pet. App. 22a.

The court explained that petitioners refused to "engage on the facts as [the court] must take them" and instead "repeatedly argu[ed] from a different set of facts" outside the court's interlocutory jurisdiction. The court gave examples. First, petitioners distorted the district court's determination that petitioner Hunter shot Ryan when he "was initially facing away from the officers" into an "armed turn towards Officer Hunter." Pet. App. 22a. Second, petitioners distorted the determination that Ryan "kept his gun aimed at his own head" into Ryan holding the gun "below his head" and just pointing it upward. *Id*. Third, petitioners distorted the determination that Ryan was "not given" a command into Ryan being "warned to disarm before being shot." Pet. App. 23a. According to the *en banc* Fifth Circuit, petitioners simply "echoed" these arguments "in the teeth of" the district court's determinations to create an "alternative set of facts" and create the impression they acted in self-defense. Pet. App. 23a. The court thus concluded that petitioners had premised their interlocutory appeal on facts "beyond [the court's] jurisdiction to consider" and that the

district court and two panel opinions had correctly concluded qualified immunity was "for a jury to resolve" on this record. Pet. App. 23a, 26a.

Judge Elrod, joined by several other judges in the majority, authored a concurrence emphasizing there was "no new law being made or old law being ignored" by the court's decision. She explained the decision was simply an application of "longstanding" rules governing jurisdiction and qualified immunity to the district court's factual determinations in this case, and took "no position on the public policy issues of the day regarding policing and the mentally ill." Pet. App. 27a. Rather, "[a]s the able district court determined, the facts are very much in dispute." *Id*.

All eighteen judges agreed that respondents' fabrication of evidence claim must proceed. Pet. App. 13a; *see also* Pet. App. 29a n.1. (Jones, J., dissenting) (explaining the dissenters "do not challenge the majority's decision to leave in place fabricated evidence charges against these two officers and Officer Carson"). The *en banc* court adopted the panel's earlier analysis that it violates clearly established law to falsify evidence and frame someone for a crime they did not commit, and rejected petitioners' argument that *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), excluded such claims from due process. Pet. App. 13a n.25.

Judge O'Connor has set trial for October, for these two claims and the others outside the scope of this appeal, including the fabrication claims against petitioners Hunter and Cassidy.

REASONS FOR DENYING THE PETITION

I. As The *En Banc* Fifth Circuit Concluded, Petitioners' Argument Presupposes Facts "In The Teeth Of Those Found By The District Court" And Is Beyond Interlocutory Jurisdiction.

In every appeal, "the first and fundamental question is that of jurisdiction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). Appellate courts have jurisdiction only from "final decisions" of district courts. 28 U.S.C. § 1291. Pretrial appeal of qualified immunity falls within this jurisdiction if the issue asserted is a "collateral order" that is "completely separate" from the merits and factual disputes to be decided at trial. *Johnson v. Jones*, 515 U.S. 304, 310-12 (1995). Specifically, jurisdiction lies provided the issue challenges "not which facts the parties might be able to prove," but only whether "certain given facts showed a violation of 'clearly established' law." *Id.* at 311 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)). In addition to respecting jurisdictional limits, this reduces the risk interlocutory appeals threaten "delay, adding costs and diminishing coherence," and reflects the "comparative expertise of trial and appellate courts, and wise use of appellate resources." *Id.* at 309, 317.

Thus, to assert an issue within collateral-order jurisdiction, petitioners had to "claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment" entitled them to qualified immunity. *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). As the panel twice concluded and the *en banc* court confirmed, petitioners'

argument outstrips jurisdiction. Upon taking this appeal, petitioners "repeatedly" refused to "engage on the facts as [the court] must take them" and proceeded on their "different set of facts." Pet. App. 22a.

The petition continues this abuse. It never addresses whether immunity is proper under the district court's determinations—*i.e.*, if petitioners saw a teenager "facing away," "unaware of [their] presence," "never ma[king] a threatening or provocative gesture toward" anyone and then shot him from behind. Pet. App. 202-03a, 204a, 206a. Instead, petitioners repeat their "alternative" facts to conjure the reasonably perceived threat that the district court and Fifth Circuit disclaimed. Pet. App. 23a.

The petition's continued disregard is brazen. Consider the *en banc* court's three examples and the petition's complete indifference:

1. The *en banc* court found petitioners improperly transformed the district court's determination that petitioners shot Ryan when he was initially facing away into an "armed turn towards Officer Hunter." Pet. App. 22a. The petition does not contest that impropriety, yet what does it say? It repeatedly asserts entitlement to immunity on an "armed turn to face Officer Hunter." Pet. 10; s*ee also*, *e.g.*, Pet. i, 7, 8, 10, 12, 26, 32 (same).

2. The *en banc* court found petitioners improperly transformed the district court's determination that Ryan "kept his gun aimed at his own head" into Ryan holding the gun "below his head" and just pointing it upward. Pet. App. 22a. The petition does not contest the impropriety, yet again asserts Ryan's gun was not

to his head, just "pointed upward in the direction of his head." Pet. 8.

3. The *en banc* court found petitioners improperly transformed the district court's determination that Ryan was "not given" a command into Ryan being "warned to disarm before being shot." Pet. App. 23a. The petition does not contest the impropriety, yet repeatedly suggests petitioners gave a command, and declined to "shout another warning." Pet. 25; *see also* Pet. 26, 27, 28 (same).

As the *en banc* majority found, petitioners are attempting to change the district court's determinations from seeing a suicidal teenager oblivious to anyone's presence and then shooting him from behind, to facts concerning the force permitted when an officer reasonably perceives the need for self-defense. Pet. App. 21a-23a. As Judge Elrod explained, the latter question was decidedly beyond the court's jurisdiction and therefore not implicated by its decision. Pet. App. 27a.

This is fatal to the petition for several reasons. First, petitioners are presenting a question the Fifth Circuit never decided and, indeed, explicitly disclaimed. The decision below does not present the petition's first question in any meaningful sense. Second, petitioners do not even attempt to argue that the Fifth Circuit's application of its jurisdictional limits to their argument implicates any conflict or otherwise warrants this Court's review—indeed, their "reasons for granting certiorari" never mention any issue regarding the scope of interlocutory review. Third, petitioners provide no reason to think this Court would reach a different conclusion than that which the three-judge panel twice reached and the *en banc* court reached

again. The petition is the *twelfth* appellate brief petitioners have filed since initiating this interlocutory appeal, repeating the same alarmist facts. Based on those representations, a majority of active Fifth Circuit judges voted for plenary review, only for an eleven-judge majority to conclude that petitioners' narrative was "beyond [the court's] jurisdiction." Pet. App. 23a. Petitioners do not explain why this Court would suddenly credit their "alternative set of facts" and reach their first question.

II. The *En Banc* Fifth Circuit Correctly Resolved Both Claims.

A. The Decision Below Correctly Applied The Summary Judgment And Qualified Immunity Standards To The Excessive Force Claim.

This Court has cautioned lower courts that in determining whether an officer has violated clearly established law at summary judgment, they must "take care not to define a case's 'context' in a manner that imports genuinely disputed factual proposition." *Tolan*, 572 U.S. at 656-57. Indeed, it has unanimously, summarily reversed the Fifth Circuit for failing to "adhere to th[is] axiom." *Id*. at 651.

Upon reviewing the district court's determinations and the 3500-page record, the *en banc* court found the critical facts "heavily disputed." Pet. App. 22a. This includes which facts preceding the shooting "were known to Hunter and Cassidy," particularly given their fabricated accounts and shifting narratives. Pet. App. 24a. And it includes the events immediately preceding the shooting, such as "whether Ryan was aware of the officers, whether and how he turned and

aimed his gun, and whether Hunter warned Ryan to disarm himself." Pet. App. 22a. Based on respondents' evidence, a jury could find petitioners shot Ryan from behind even though he "made no threatening or provocative gesture to the officers" from which they could have reasonably perceived a threat. *Id*. Considering the facts and drawing all inferences in respondents' favor, the *en banc* majority correctly concluded this violates clearly established law.

Petitioners' contention that the Fifth Circuit erred blatantly contravenes *Tolan* and the summary judgment standard. In particular, having committed to a false story where they watched Ryan raise "a dark colored handgun" from his waist and point it "directly at" them, petitioners ask this Court to split the difference between that cover-up and respondents' evidence. Petitioners tell the Court to find that although Ryan was "not immediately aware of the officers' presence," he later engaged in an "armed turn to face Officer Hunter," requiring petitioners to forgo "*additional* verbal warnings" and stop Ryan's gun from pointing "directly at" Officer Hunter. Pet. 7, 10, 22, 28 (emphasis in original).

This is meritless. A jury could, of course, choose to credit petitioners' false story that Ryan pointed the gun at them, or it could choose to overlook petitioners' perjury and split the difference between the parties' evidence. But this Court does not do that at summary judgment. *Tolan*, 572 U.S. at 656-57.

Viewing the facts in respondents' favor, petitioners' conduct violated clearly established law under both this Court's precedent and Fifth Circuit caselaw:

1. First, as the eleven-judge majority concluded, "[t]his case is obvious when we accept the facts as we must." Pet. App. 18a. According to Judge O'Connor's binding determinations, a jury could find petitioners shot a teenage boy from behind who was oblivious to their presence, without warning, and without any movement they could have reasonably perceived as threatening. This Court has repeatedly maintained that in such "an obvious case," *Garner* can "'clearly establish' the answer, even without a body of relevant case law." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (same); *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (same).

Petitioners argue that the *en banc* majority should be reversed because in *Mullenix* this Court "rejected" the plaintiff's reliance on *Garner*. Pet. 30. But, as the *en banc* majority reasoned, *Mullenix* was a very different case. There, lower courts did not dispute the defendant reasonably perceived an immediate threat to the public and himself from the high-speed flight of a dangerous fugitive who had directly communicated threats "to shoot at police officers"; however, they held the officer violated clearly established law because the threat was not "sufficient." *Id.* at 307. This Court held that requiring officers to assess a "sufficient threat" is too "general" a principle to draw from *Garner*.

Following *Mullenix*, every circuit to consider the issue has held it violates clearly established law to use deadly force where there is *no* threat. *See Russell v. Richardson*, 905 F.3d 239, 252 (3d Cir. 2018) (holding *Garner*'s "obvious case" is "where the circumstances reflect 'the absence of a serious threat of immediate harm to others'"); *McCoy v. Meyers*, 887 F.3d 1034,

1052-53 (10th Cir. 2018) (holding it "obvious" and "clearly establish[ed]" that "the Fourth Amendment prohibits the use of force . . . when a subject poses no threat"); *Patridge v. City of Benton*, 929 F.3d 562, 567 (8th Cir. 2019); *Jacobs v. Alam*, 915 F.3d 1028, 1041 (6th Cir. 2019); *Strand v. Minchuk*, 910 F.3d 909, 916 (7th Cir. 2018); *Foster v. City of Indio*, 908 F.3d 1204, 1211 (9th Cir. 2018); *Sexton v. Mangiaracina*, 657 F. App'x 928, 932 (11th Cir. 2016).

It should not be surprising courts consider conclude that a victim who proves he was shot in the absence of *any* threat survives summary judgment as to whether the officer violated clearly established law. But as Judge O'Connor, the panel, and the *en banc* court recognized, this case is even easier. Accepting Judge O'Connor's determinations, this is not a case in which petitioners perceived an imminent threat but erred as to its "sufficiency" (the level of generality rejected in *Mullenix*), and petitioners did not only use deadly force where there was no threat (the rule adhered to in every circuit). Here, a jury could find petitioners made the decision to shoot Ryan from behind without even a "*reasonably perceived threat*." Pet. App. 16a, 110a, 204a. At its narrowest—and most unassailable—*Garner* establishes that the officer violates the law by shooting someone where he "*could not reasonably have believed* that [the suspect] . . . posed any threat." 471 U.S. at 21 (emphasis added).

Petitioners do not dispute it is an obvious violation of the law to shoot someone absent any immediate threat, or even any reasonably perceived threat. Indeed, petitioner Hunter "conceded that he would have had no basis to fire upon Ryan unless Ryan had been facing him and pointing a gun at him." Pet. App. 18a.

In other words, if—as Plaintiffs' forensic evidence indicates—petitioner Hunter chose to shoot Ryan knowing he was turned away, unaware, and made no threatening movement, then petitioner Hunter not only had "fair warning," he "*knowingly violate[d] the law*." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Respondents are not aware of any court that has granted qualified immunity where the defendant expressly acknowledged he would be in knowing violation of the law had he acted in a certain manner and the district court found a dispute as to whether he had, in fact, acted in that manner.

2. Second, the *en banc* Fifth Circuit correctly concluded its own precedent "established clearly that Cassidy's and Hunter's conduct—on the facts as we must take them at this stage—was unlawful." Pet. App. 18a. As the court explained, in *Baker v. Putnal*, 75 F.3d 190, 193 (5th Cir. 1996), the Fifth Circuit found a constitutional violation on facts highly particularized to this case, including:

> (i) officers were looking for someone who was seen with a gun;
>
> (ii) the shooting officer perceived the plaintiff to be holding a handgun and later claimed the plaintiff had "pointed it at" him;
>
> (iii) the plaintiff "may have barely had an opportunity to see" the officer;
>
> (iv) the plaintiff "was not facing" the officer;
>
> (v) the plaintiff "took no threatening action";
>
> (vi) the officer "issued no warning";
>
> (vii) the officer shot the plaintiff.

Pet. App. 18a-20a.[9]

Baker held these particularized facts, viewed in the plaintiff's favor, established a constitutional violation. These were "certainly issues of fact material to whether [the officer's] actions were excessive and objectively reasonable." 75 F.3d at 198.[10]

Before the *en banc* court, petitioners did not contest respondents' argument that *Baker* provided particularized notice if one credits the district court's determinations—they never even cited *Baker* in their reply. Instead, they relied exclusively on their alternative set of facts. Petitioners now dispute *Baker*'s relevance by questioning whether "circuit court precedent could clearly establish constitutional law." Pet. 31. But Petitioners never raised this argument to the *en banc* court and, indeed, explicitly invoked Fifth Circuit precedent to support their understanding of clearly established law. *See* Appellants' Br. 35-40.

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[9] As the *en banc* court noted, this case is more egregious than *Baker* in several respects, including that the officers in *Baker* "heard gunfire" on a crowded beach and the plaintiff was identified as the suspect; here, in contrast, petitioners were searching for "a suicidal teenager who they knew had already encountered fellow officers and walked away from them with his gun to his head, non-responsive, but without aggressive action." Pet. App. 18a-19a, 21a-22. Moreover, in *Baker* it was "undisputed that [the plaintiff] was turning to face" the officer; here, even that is disputed. Pet. App. 18a-19a.

[10] Upon concluding *Baker* clearly established this violation, the *en banc* court did not discuss other Fifth Circuit caselaw. Pet. App. 18a. The three-judge panel discussed other precedent, including earlier caselaw finding a violation of clearly established law in the specific context of "a suicidal person who has a gun to his head." Pet. App. 132a.

Petitioners' dispute with the application of *Garner* and *Baker* boils down to a dispute about the facts in this case. For instance, petitioners have consistently asserted Ryan was turning at the time petitioner Hunter made the decision to shoot, hoping appellate judges would picture a turn amounting to some sort of threatening movement. *E.g.*, Pet. 10. But as the *en banc* court explained, both "whether" Ryan turned when petitioner Hunter shot him and, if so, "how" he turned are disputed. Pet. App. 22a. The assertion that Ryan was turning when petitioners shot him derives from their own false and perjured accounts, which a jury could plainly reject. Respondents' expert, Chief Braaten, disputed petitioners' testimony that Ryan was turning when they shot him. *See supra* at 10; ROA.15-10045.3289 (answering "No" to whether Ryan was rotating when petitioner Hunter made the decision to shoot him). And Judge O'Connor accordingly determined petitioner Hunter fired the first bullet when Ryan was "initially facing away from the Officers" and Ryan's body "was turning toward the Officers" at the time of the second shot, after his body collapsed. Pet. App. 203a.

As the panel and *en banc* court recognized, even if one selectively credited petitioners' perjured testimony and assumed Ryan was turning when petitioner Hunter first shot him, it would still mean petitioners were watching a boy who is oblivious that anyone is around rotate his body, not conjure the threatening image petitioners hoped appellate judges would adopt in place of a jury. Indeed, under Captain Bevel's testimony, if one accepts petitioners' story that Ryan was turning, it would only indicate Ryan's back was *even*

more turned at the time the decision was made to shoot. *See supra* at 10-11.

Similarly, Judge Duncan would have assumed petitioners knew about various statements allegedly made by Ryan and others prior to the shooting. However, petitioners never claimed knowledge of *any* of those statements until *four years later*, long after their perjured statements had been exposed. As the *en banc* majority recognized, a jury would be entitled to discredit those statements and find petitioners "were not aware" of the events described by Judge Duncan. Pet. App. 24a.[11]

B. The Decision Below Correctly Denied Immunity On The Fabrication Claim.

The petition similarly misstates the facts relevant to the fabrication claim. Petitioners' second question is premised on an "officer who inaccurately reports his perceptions." Pet. i. However, respondents' complaint specifically alleges that petitioners "formed and carried out . . . a conspiracy to hide and cover up their respective wrongful conduct" and that their "false and fabricated testimony resulted in Ryan Cole being charged with a felony offense" and placed under house arrest. ROA.15-10045.623-24, 626. This issue arises on review of the pleadings and, despite having their argument rejected four times below, petitioners continue to misrepresent the allegations without explanation.

All nineteen federal judges to consider this claim agreed petitioner Carson is not entitled to qualified

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[11] Petitioners never even cited, let alone claimed knowledge of, many of the quotes discussed in Judge Duncan's narrative.

immunity because any reasonable officer would know it violates the law to falsify evidence and frame an innocent person. The petition observes this Court has held that a plaintiff who suffers post-legal-process deprivation "may bring a claim" under the Fourth Amendment. *Manuel*, 137 S. Ct. at 914, and from that infers fabrication of evidence causing pretrial deprivations cannot violate due process, Pet. 33-34. That is illogical, and the *en banc* court correctly rejected it. Pet. App. 13a n.25. Indeed, this Court recently considered the accrual of a fabrication claim "arising under the Due Process Clause." *McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019).

Because petitioners Hunter and Cassidy did not appeal the denial of qualified immunity as to fabrication, those claims are not before this Court.

III. The Petition Does Not Even Purport To Raise A Question That Satisfies The Certiorari Criteria.

The petition does not contend the *en banc* court adopted any legal rule that conflicts with any other lower court. To the contrary, application of the qualified immunity standard was consistent with the law of every other circuit. *See supra* at 27-28. Moreover, petitioners acknowledge the *en banc* court's denial of qualified immunity for excessive force was premised in part on the *en banc* Fifth Circuit's interpretation of its own precedent and, to the extent they now challenge the *en banc* court's reliance on circuit precedent, they waived it below. *See supra* at 30. The application of Fifth Circuit precedent to the facts of this case does not warrant this Court's review.

At bottom, petitioners appear to believe this Court's intervention is warranted because the *en banc* court's application of the qualified immunity standard resulted in the denial of immunity. To quote one of the dissenters, the *en banc* majority should have appreciated "the Supreme Court's unflinching" application of qualified immunity, setting a "sky-high" bar that "makes qualified immunity sometimes seem like unqualified impunity." Pet. App. 58a, 59a, 63a (Willett, J., dissenting). Or, as other dissenters put it, the majority's outcome despite the "mountain of SUMREVs and GVRs" shows the eleven-judge majority "does not get it" and should have accepted as "obvious" that this Court GVR'd "because it agreed" with petitioners. Pet. App. 68a & n.1, 71a. Adopting this perspective, the petition characterizes the panel and *en banc* majority as recalcitrant judges who "refused to comply with this Court's direct mandate" and "doubled down" to "continue[] to deny immunity." Pet. i, 13.

This view of the law and the Fifth Circuit proceedings is unsound. The Fifth Circuit applies this Court's standard with equal or greater rigor than any other circuit, routinely granting qualified immunity where

officers used deadly force.[12] Indeed, this Court has unanimously, summarily reversed the Fifth Circuit for being too quick to grant qualified immunity in the context of deadly force at summary judgment. *Tolan*, 572 U.S. at 660. As the *en banc* court's opinion itself

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[12] *See, e.g.*, *Winzer v. Kaufman Cty.*, 916 F.3d 464, 476-77 (5th Cir. 2019) (granting qualified immunity in the context of deadly force); *Shepherd v. City of Shreveport*, 920 F.3d 278, 285 (5th Cir. 2019) (same); *Ratliff v. Aransas Cty., Texas*, 948 F.3d 281, 289 (5th Cir. 2020) (same); *Blanchard-Daigle v. Geers*, No. 18-51022, 2020 WL 730586, at *6 (5th Cir. Feb. 12, 2020) (same); *Valderas v. City of Lubbock*, 937 F.3d 384, 389-90 (5th Cir. 2019) (same), *cert. denied*, 140 S. Ct. 454 (2019); *Morrow v. Meachum*, 917 F.3d 870, 877 (5th Cir. 2019) (same); *Shumpert v. City of Tupelo*, 905 F.3d 310, 324 (5th Cir. 2018) (same), *cert. denied*, 139 S. Ct. 1211 (2019); *Hale v. City of Biloxi, Mississippi*, 731 F. App'x 259, 264-65 (5th Cir. 2018) (same); *Romero v. City of Grapevine, Texas*, 888 F.3d 170, 176-78 & n.3 (5th Cir. 2018) (same); *Vann v. City of Southaven, Mississippi*, 884 F.3d 307, 310 (5th Cir. 2018) (same); *Mazoch v. Carrizales*, 733 F. App'x 179, 181-84 (5th Cir. 2018) (same); *Guerra v. Bellino*, 703 F. App'x 312, 318 (5th Cir. 2017) (same), *cert. denied*, 138 S. Ct. 1283 (2018); *Orr v. Copeland*, 844 F.3d 484, 495 (5th Cir. 2016) (same); *Powell v. Ginger*, 669 F. App'x 778, 778-79 (5th Cir. 2016) (same); *Salazar-Limon v. City of Houston*, 826 F.3d 272, 279 (5th Cir. 2016) (same), *cert. denied*, 137 S. Ct. 1277 (2017); *Mendez v. Poitevent*, 823 F.3d 326, 334 (5th Cir. 2016) (same); *Cass v. City of Abilene*, 814 F.3d 721, 731-32 (5th Cir. 2016) (same); *Small ex rel. R.G. v. City of Alexandria*, 622 F. App'x 378, 382-83 (5th Cir. 2015) (same); *Davis v. Romer*, 600 F. App'x 926, 931 (5th Cir. 2015) (same); *Thompson v. Mercer*, 762 F.3d 433, 441 (5th Cir. 2014) (same), *cert. denied*, 135 S. Ct. 1492 (2015); *Thomas v. Baldwin*, 595 F. App'x 378, 380-83 (5th Cir. 2014) (same); *Rice v. ReliaStar Life Ins. Co.*, 770 F.3d 1122, 1134-35 (5th Cir. 2014) (same); *Royal v. Spragins*, 575 F. App'x 300, 302-05 (5th Cir. 2014) (same); *Harris v. Serpas*, 745 F.3d 767, 771-73 (5th Cir. 2014) (same), *cert. denied*, 135 S. Ct. 137 (2014); *Clayton v. Columbia Cas. Co.*, 547 F. App'x 645, 653 (5th Cir. 2013) (same).

suggests, the Fifth Circuit finds a factual dispute precluding pretrial immunity only on rare occasion. Pet. App. 2a-3a.

After this Court GVR'd for consideration of *Mullenix v. Luna*, 136 S. Ct. 305 (2015), the Fifth Circuit took the Court's direction to reconsider seriously: The three-judge panel ordered new briefing and argument; when the panel concluded immunity was not warranted, a majority of active judges voted to hear the case as a full court and, after more briefing and argument, concluded again that immunity was not warranted under the legal standard. That eleven judges of the Fifth Circuit agreed petitioners' first question was not actually presented, and all eighteen judges agreed petitioners' second question lacks merit, is not cause for intervention; it reflects considered application of "longstanding" legal rules to the particular facts of this case. Pet. App. 27a (Elrod, J., concurring). And it reflects that the standard is not one of "absolute immunity enjoyed by prosecutors and judges, but a qualified immunity." Pet. App. 2a.

Twelve federal judges and nineteen federal judges have concluded respondents' excessive force and fabrication claims, respectively, should proceed. Judge O'Connor has set trial for October on these two claims and other claims not before the Court, including the fabrication claims against petitioners Hunter and Cassidy. As the Court unanimously recognized in *Tolan* and the *en banc* Fifth Circuit concluded below, that jury should decide whether to credit petitioners' perjured account or the forensic evidence, or somehow split the difference.

CONCLUSION

For these reasons, the Court should deny the petition.

Respectfully submitted,

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MARCH 2020

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