No. 23-1239

IN THE

Supreme Court of the United States

JANICE HUGHES BARNES, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ASHTIAN BARNES, DECEASED,

Petitioner,

v.

ROBERTO FELIX, JR., *et al.*,

Respondents.

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

BRIEF FOR RESPONDENT, OFFICER ROBERTO FELIX, JR., IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the District Court's determination that Felix's conduct up to and including his brandishing his weapon was reasonable, based on the totality of the circumstances—a ruling Petitioner initially appealed and then abandoned—and the District Court's independent determination that Felix's use of deadly force was also reasonable—demonstrates that the review Petitioner seeks has largely been conducted, making this case inappropriate for review.

2. Whether Petitioner's abandonment of her claim that Felix's conduct of jumping onto the door sill was a separate Fourth Amendment violation precludes her from asking this Court to consider that conduct in reviewing the reasonableness of Felix's conduct or makes review inappropriate.

3. Whether applying the moment of threat doctrine in deadly force cases when (1) the officer's conduct up to that point has been judicially determined to be reasonable and (2) the officer must make a split-second decision to react to the threat is consistent with this Court's precedent.

4. Whether review by this Court is necessary or appropriate because Felix will be entitled to qualified immunity whether or not he violated the Fourth Amendment in using deadly force.

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INTRODUCTION

This case involves the decision by Ashtian Barnes ("Barnes") to flee a lawful traffic stop on the shoulder of a busy public toll road. Harris County Deputy Constable Roberto Felix, Jr. ("Felix") pulled over the vehicle Barnes was driving because the license plate indicated the car had a history of toll road violations. Barnes was unable to provide Felix with any identification. Barnes initially turned off the vehicle and put the keys near the gear shift, but exhibited nervous behavior and continued to reach around the interior of the car even though Felix asked him repeatedly to stop doing so. When Felix asked Barnes to get out of the vehicle, and opened the driver's side door, rather than comply, Barnes quickly grabbed his keys, turned the car back on, and began to flee. Barnes failed to comply with Felix's continued warnings of "Don't fucking move!" and accelerated towards the lane of traffic on the high-speed controlled access highway. Because he believed himself to be in danger of being dragged or run over by the car, Felix instinctively jumped onto the door sill, and when Barnes sped up, he fired two shots into the car, killing Barnes.

The District Court, when deciding whether this deadly force was excessive, reviewed Felix's conduct during the moment of threat—after Felix jumped on the door sill, and found that Felix did not violate Barnes's Fourth Amendment rights in using deadly force.

Petitioner presented this writ as a circuit split, and asks this Court to require all the circuits to use the "totality of the circumstances" review, rather than the moment of threat, primarily relying upon *Graham v.*

Connor, 490 U.S. 386 (1989) and *Tennessee v. Garner*, 471 U.S. 1 (1985). Petitioner asserts this case is the appropriate vehicle to assess the purported circuit split on what conduct can be viewed by a court in determining whether the deadly force constituted a Fourth Amendment violation. She asserts that if a *Graham/Garner* totality review had been performed below, including a review of Felix's conduct in jumping onto the door sill when Barnes' began to flee, a Fourth Amendment violation would have been found.

But there is no reason to grant certiorari in this case. First, Petitioner abandoned her request to have Felix's decision to jump on the door sill reviewed as a separate Fourth Amendment violation in the District Court, but she received a robust review of all of Felix's other conduct. The District Court conducted a complete and detailed analysis of that issue, considering the totality of the circumstances, and found no constitutional violation—a ruling that Barnes chose not to appeal. If the actions of Felix were constitutionally reasonable up until he brandished his weapon, then his decision to use that weapon when Barnes unexplainedly tried to flee the traffic stop, must also be constitutionally reasonable. To the extent that Barnes is now trying to focus on the specific act of Felix in standing on the door sill, she abandoned the opportunity to have that claim separately reviewed in the District Court.

Because the District Court conducted an independent reasonableness review of all the facts through and including the point where Felix brandished his weapon—and because Petitioner's abandoned any Fourth Amendment claim that stepping onto the door sill of the car constituted a separate

constitutional violation—this case is distinguished from typical claims against a law enforcement officer facing a suspicious suspect suddenly driving away on a high-speed, multilane road. To the extent that there is an intercircuit conflict, the case has limited value to the nation's jurisprudence because the issues are so narrow and the District Court has already made factual determinations regarding Felix's pre-shooting conduct.

Second, even if this Court grants review, concludes that the Fifth Circuit erred, and remanded the case for further proceedings, the inevitable outcome of this case is that Felix is still entitled to qualified immunity under clearly established law and he cannot be liable for his conduct based on well-established existing law.

Third, the Fifth Circuit's review of the deadly force claim is not wrong and is not contrary to the precedent established by this Court and the Fifth Circuit. To the contrary, the Fifth Circuit's approach closely follows this Court's guidance regarding the proper scope of factual review and what prior officer conduct can be considered in determining whether the deadly force was excessive.

JURISDICTION

Petitioner filed its Writ of Certiorari on May 22, 2024. The Court extended Felix's Brief in Opposition filing deadline up to and including August 14, 2024.

STATEMENT OF THE CASE

This Petition stems from a summary judgment in favor of Felix and Respondent Harris County, Texas,

concluding that Felix's use of deadly force did not violate Barnes's Fourth Amendment rights.

A. The Traffic Stop

As detailed in the District Court's March 31, 2021 order granting summary judgment in favor of Respondents, Felix was patrolling the Sam Houston Tollway, a busy multi-lane freeway, on April 28, 2016, as a traffic enforcement officer for Harris County Constable, Precinct Five. Pet. App. at 18a. At about 2:40 p.m., he heard a radio broadcast from the Harris County Toll Road Authority regarding a prohibited vehicle on the Tollway. *Id.* He asked for more information and was provided the license plate number. *Id*. When he located the vehicle, he pulled behind it, activated his emergency lights, and initiated a lawful traffic stop. *Id*. Barnes pulled over to the left shoulder of the tollway, with the driver's door next to the concrete median separating the two sides of the tollway. *Id*., Video.[1]

As can be seen on the dash cam video, the entire encounter between Barnes and Felix lasts less than three minutes. Pet. App. at 17a. Felix exited his vehicle at approximately 2:43 p.m. and approached Barnes's vehicle. Pet. App. 18a. He asked for Barnes's license and proof of insurance, but Barnes replied that he did not have his license and that the vehicle had been rented a week earlier in his girlfriend's name. *Id*. Beginning at 2:45:13 p.m.,

1. As stated in the Petition on p. 5, note 1, this dash cam video is available online here:
https://youtu.be/9gbM_22fUby Citations to "Video" in this brief that are not accompanied by a citation to the District Court's March 31, 2021 Order, are facts observable in the video.

Felix witnessed Barnes reaching around the vehicle and rummaging through some papers and Felix repeatedly asked Barnes to "stop digging around." *Id.* Felix then told Barnes that he smelled marijuana, asked Barnes if he had anything in his car Felix should know about, and told Barnes to "stop digging around" three more times.[2] Pet. App. at 18a; Video. Felix asked Barnes if he had any identification on him and Barnes said it might be in the trunk. Video. Felix told Barnes to pop the trunk open, and the trunk opened at 2:45:30 p.m. Pet. App. 26a. Immediately after the trunk popped open, the left turn signal light stopped blinking, indicating that Barnes had turned off the vehicle. Pet. App. at 18a, Video. Felix saw Barnes turn off the vehicle and place the keys by the gear shift. Pet. App. at 18a-19a.

At about 2:45:43 p.m. Felix then asked Barnes to "go ahead and step out for me" and Felix opened the driver's side door. Pet. App. at 19a, 26a; Video. Felix had his right hand guarding his holster as the driver's side door opened. Pet. App. at 19a. Instead of complying with the officer's request, Barnes grabbed his keys and turned on the vehicle, an action seen by Felix and confirmed in the dash

2. Although Petitioner states that "No marijuana, other drugs or any kind of drug paraphernalia were ever found in the car" (Pet. at 5), that was not known by Felix at the time that Barnes tried to flee. Because that fact was not known by Felix, it does not enter into the factual analysis. Similarly, Petitioner concedes that a gun was actually later found in the car Barnes was driving. Pet. at 6, note 2. Barnes's general nervousness after being stopped for a relatively minor reason, his ceaseless searching around the inside of the despite repeated instructions from Felix not to do so, and his unexpected and unexplained decision to flee, could rationally and reasonably be seen as indications of something more severe and serious than toll violations.

cam video by the left signal light blinking again. Pet. App. at 19a; Video. Felix, seeing that Barnes was going to flee, and who was standing next to the open driver's side door, brandished his weapon and yelled "Don't fucking move!" When the car started to move forward, the driver's door swung back, hitting Felix on his left side, and Felix jumped onto the door sill of the vehicle.[3] Pet. App. at 19a; video. Felix briefly withdrew his right hand and weapon out of the vehicle and looked to see where the car was heading, as he continued to yell, "Don't fucking move!" and then reinserted the weapon into the vehicle. *Id.*; Video. Felix stated that when he reinserted his weapon into the vehicle, he felt pressure against it. Pet. App. 29a, n.3. Still holding onto the moving vehicle, Felix shot once at 2:45:52 p.m., and felt that the vehicle was speeding up, and then shot again. Within two seconds, the vehicle rolled to a stop, with the right side of the vehicle partially in the left lane of traffic. Pet. App. at 19a, 27a; Video.

Felix immediately yelled "Shots fired!" into his radio and waited for backup. *Id.* Barnes was subsequently pronounced dead at the scene. *Id.*

B. The Lawsuit

After the event, the Homicide Division of the Houston Police Department investigated the incident and presented a report to the Harris County District Attorney's office. Pet. App. at 19a. The District Attorney's Office presented the report to a grand jury on August 26, 2016 and August 31, 2016. *Id.* A "no bill" was returned by the grand jury.

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3. The District Court stated it is unclear whether that occurred before or after the vehicle had already begun accelerating. Pet. App. at 19a.

Id. Harris County Precinct Five conducted its own investigation and determined that no violations of the Standard Operating Procedures had occurred. Pet. App. 20a.

Janice Hughes Barnes ("Petitioner") and Tommy Duane Barnes[4] filed suit in Harris County District Court on behalf of Ashtian Barnes against both Harris County, Texas and Felix alleging violations of 42 U.S.C. § 1983. The case was removed by Felix and Harris County to federal court.

C. The First Summary Judgment Order

Felix and Harris County sought summary judgment motion on the deadly force claim brought by Petitioner under 28 U.S.C. § 1983. The District Court granted that motion on March 31, 2021, finding Felix's use of deadly force "presumptively reasonable" under controlling Fifth Circuit's precedent, when "the officer has reason to believe that the suspect poses a threat of serious harm to the officers or to others." Pet. App. at 24a.

The District Court observed that under clear Fifth Circuit precedent, when an officer in this Circuit reasonably believes he has encountered a threat of serious harm to the officer or others, there is no constitutional violation and the § 1983 claim ends there, citing *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009). Pet. App. at 25a.

This required the District Court to "view the act 'from the perspective of a reasonable officer on the scene, rather

4. Mr. Barnes was a plaintiff in the courts below but is not a Petitioner.

than with the 20/20 vision of hindsight,' taking into account 'that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving,'" citing *Darden v. City of Fort Worth*, 880 F.3d 722, 729 (5th Cir. 2018). Pet. App. at 25a-26a.

The District Court viewed the facts in the light most favorable to the Petitioner, noting that the Petitioner had cited no evidence to obfuscate the events depicted in the dash cam recording. Pet. App. at 27a. The District Court then reviewed the actions in the dash cam, second by second. *Id*. In doing so, the District Court determined that the moment of threat was after Felix jumped on the door sill, in the two seconds before he fired his first shot. Pet. App. at 29a. "At that moment, Felix was still hanging onto the moving vehicle and believed it would run him over." *Id*.

The District Court noted that Petitioner contended Felix caused the danger himself by jumping onto the door sill, but this fact was not considered, since the Fifth Circuit does not consider "what had transpired up until the shooting itself." Instead, the District Court held that Felix's use of deadly force was presumptively reasonable, the force was not excessive, and no constitutional injury was found. It based its opinion on other Fifth Circuit precedent, holding "[r]egardless of what had transpired up until the shooting itself, [the suspect's] movements gave the officer reason to believe, at that moment, that there was a threat of physical harm." Pet. App. at 25a. Because the District Court held that the Petitioner failed to demonstrate a genuine issue of material fact as to a constitutional injury, her § 1983 claim failed "even without considering Felix's qualified immunity defense." Pet. App. at 30a. For that same reason, it also dismissed the claims against Harris County.

D. The Abandoned First Appeal and Second Summary Judgment Order

Petitioner filed a Notice of Appeal from the March 31, 2021 order but subsequently dismissed that appeal.

Petitioner then filed an Opposed Motion for Clarification, asserting that the District Court had not addressed her other Fourth Amendment claims—including Felix's jumping onto the door sill—concerning Felix's conduct prior to the deadly force. Resp. App. at 1a-24a. But Petitioner ultimately only asked the District Court to rule on one of those separate Fourth Amendment claims—Felix's brandishing of his weapon—and abandoned the claim regarding Felix's jumping on the door sill. Resp. App. at 21a.

Petitioner asked that the District Court either amend its March 31, 2021 order to reflect that is was a partial summary judgment order, or enter a final judgment in a separate document. Resp. App. at 2a-3a, 23a. The District Court agreed and allowed this allegation to be heard.

Felix and Harris County then filed a second summary judgment motion on this only remaining and asserted excessive force claim, which alleged that Felix's "drawing his firearm and pointing it directly at and inches away from [Barnes'] head" was excessive and "without any reasonable suspicion that [Barnes] posed a threat." The District Court reviewed all of the relevant facts, starting at the time Felix heard the initial radio broadcast until Barnes turned on the car and began accelerating and Felix yelling at Barnes not to move. Resp. App. at 31a.

Based on this review, the District Court found that Felix did not draw his weapon until after Barnes had turned his vehicle back on despite Felix's order for Barnes to exit the vehicle. Resp. App. at 37a. Determining that the Petitioner offered no lawful explanation for Barnes restarting his car after Felix had ordered him to exit the vehicle, the District Court held "it was not objectively unreasonable for Felix to believe that Barnes was attempting to flee when Barnes turned his car on despite Felix's order to exit the vehicle" and "the Court cannot say that Felix pointing his weapon at Barnes when Barnes turned on his vehicle despite Felix's order was unreasonably excessive in violation of the Fourth Amendment." Resp. App. at 38a. The District Court granted summary judgment for Felix and Harris County and dismissed all of Plaintiffs' remaining claims in a second and final order, dated August 29, 2022. Resp. App. at 39a.

E. The Present Appeal

Although Petitioner filed a Notice of Appeal to the Fifth Circuit on both the March 31, 2021 order and the August 29, 2022 summary judgment orders, and the Petitioner stated in her Reply Brief that she was appealing both orders, the Fifth Circuit noted, in footnote 4, that "Appellants only appeal the first grant of summary judgment, not the subsequent August 8, 2022 (sic) order."[5] Pet. App. at 6a.

The Fifth Circuit affirmed the District Court's March 31, 2021 order, holding that the District Court properly

5. The second order was actually dated August 29, 2022. Resp. App. at 29a.

applied the "moment of threat" test to find that Felix did not violate Barnes's Fourth Amendment rights. Justice Higginbotham concurred, expressing disagreement with the "moment of threat" test.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. Petitioner received a totality review by the District Court regarding Felix's brandishing his weapon (which again found his conduct to be reasonable) and could have, but chose not to, have that same review of Felix's decision to jump on the door sill—yet makes the failure to review that conduct the lynchpin of her Petition.

This case is hardly the clean presentation of the purported split presented by Petitioner. First, Petitioner had the ability to have the District Court perform a totality review on her separate Fourth Amendment claim about Felix jumping on the vehicle but abandoned that opportunity. Second, a totality review was done on her other separate Fourth amendment violation—the brandishing of the gun—which again found no violation by Felix. Inexplicably, Petitioner dropped her appeal of that second order. Due to this procedural history, certiorari should be denied.

After the March 31, 2021 order holding that the deadly force was justified (on appeal here), Petitioner appealed, dismissed that appeal, and filed an Opposed Motion for Clarification in the District Court. Resp. App. at 1a-24a. That motion contended that Petitioner's claims about Felix's prior conduct were independent Fourth Amendment

claims and needed to be heard. She specifically asserted two actions—the conduct of Felix's jumping on the door sill, and his brandishing his weapon—as two of those separate Fourth Amendment claims. Resp. App. at 5a, 9a, 14a, 18a. However, the motion concluded with a request for the District Court to rule on *only* the brandishing claim, not Felix's decision to jump on the door sill, (Resp. App. at 21a) and the Reply does not even mention the door sill. Resp. App. at 25a-27a. This opportunity to have the decision to jump on the door sill reviewed was thus squandered, as the District Court granted the motion, and allowed a second summary judgment to be heard on only the issue of brandishing the weapon.

Petitioner thus abandoned her opportunity to have the District Court review the very conduct that is the basis for her Petition—why she asserts this Court should grant certiorari and use this case to resolve the purported circuit split. Because Petitioner abandoned her opportunity to have that conduct reviewed as a Fourth Amendment violation, making the affirmative choice not to pursue a review of that conduct by the District Court, this is not the "perfect vehicle" for determining Petitioner's asserted circuit split. Petitioner should not be able to ignore that procedural history.

Second, the District Court did allow a second round of briefing on Petitioner's allegation that Felix's brandishing his weapon as a separate Fourth Amendment violation. In the ruling on this issue, the District Court performed the totality review that Petitioner seeks here. The District Court reviewed all of the circumstances up to and including Felix drawing his weapon, and again,

found no constitutional injury. Resp. App. at 29a-39a.[6] It stands to reason that if it was reasonable under all the circumstances for Felix to draw his weapon, that the use of deadly force was also reasonable.

The District Court, in ruling on the brandishing claim, used the dash cam video as well as Felix's affidavit. It started the review at 2:40 p.m., when Felix first heard the radio broadcast about the prohibited vehicle, and ended when he brandished his weapon. Thus, the District Court took all of the circumstances into account, including the behavior of Barnes. In its order, the District Court stated it considered the following facts: Barnes turned the vehicle back on after Felix ordered him to exit the vehicle, and reached down after Felix opened the car door. On August 29, 2022, the court held, "Regardless of whether Felix brandished his weapon before or after the vehicle started moving, Plaintiffs offer no lawful explanation for Barnes turning his car back on after Felix ordered him to exit the vehicle . . . Moreover . . . it was not objectively unreasonable for Felix to believe that Barnes was attempting to flee when Barnes turned his car on despite Felix's order to exit the vehicle." Resp.

6. Initially, Petitioner appealed both summary judgment orders—the March 31, 2021 order as well as the August 29, 2022 order (regarding the brandishing claim). Petitioner failed to address the second ruling in her Fifth Circuit briefing, and Felix's counsel asserted that she had waived that argument, but Petitioner's Reply Brief stated she is appealing both orders. But the Fifth Circuit's opinion notes that "Appellants only appeal the first grant of summary judgment, not the subsequent August 8, 2022 (sic) order." Pet. App. at 6a, n. 4. The second grant was actually entered on August 29, 2022. Regardless, Petitioner can no longer challenge the August 29, 2022 order.

App. at 37a-39a. "As such, the Court cannot say that Felix pointing his weapon at Barnes when Barnes turned on his vehicle despite Felix's order was unreasonably excessive in violation of the Fourth Amendment." Resp. App. at 38a. This second summary judgment order, the appeal of which was abandoned, shows that Felix's reviewed conduct was at no time unlawful.

In conclusion, this procedural history illustrates three points. First, and, most importantly, if the situation was such that Felix's drawing his weapon was reasonable, the use of that weapon was also reasonable. Second, Petitioner's request for this Court to review the same conduct which she either received at the District Court or abandoned at the District Court or Fifth Circuit should be denied. Third, due to the procedural complications, this case should not be utilized to resolve an alleged circuit split involving every circuit court.

II. This case is not the appropriate vehicle to resolve the purported circuit split, because even if a broader review of Felix's conduct is performed, and even if a Fourth Amendment violation is found, Felix would still be entitled to qualified immunity under clearly established law.

Petitioner's stated issue is whether courts should apply the moment of threat doctrine when evaluating an excessive force claim under the Fourth Amendment. Petitioner argues that the purported circuit split should be resolved by requiring all the circuits to use the "totality of the circumstances" review (including the conduct by the officer prior to the use of deadly force), primarily

relying upon *Graham v. Connor,* 490 U.S. 386 (1989) and *Tennessee v. Garner,* 471 U.S. 1 (1985).[7]

Petitioner asserts that this case is the appropriate vehicle because she argues that Felix's conduct in jumping onto the door sill when Barnes' began to flee was the cause of the danger. She contends that a totality review under *Graham* and *Garner* would include that conduct, and would prove a violation of the Fourth Amendment. Felix disagrees with that assertion, but finds Petitioner's argument to be a red herring—since even if such a violation is found, Felix is still entitled to qualified immunity under clearly established law.

A. Felix's conduct did not violate Barnes's Fourth Amendment rights—even viewing all the circumstances.

As the District Court and Fifth Circuit held below, Barnes's Fourth Amendment rights were not violated by Felix. Based on Fifth Circuit precedent, the District Court looked at the moment of threat, which it determined was after Felix jumped on the door sill to avoid being run over or dragged when Barnes started to flee. Based on that threat, the District Court held that "the use of deadly force is 'presumptively reasonable when the officer has reason

7. Many of the cases cited by Petitioner to prove that the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. circuits follow *Graham* and *Garner* were decided prior to 2015, and even more are prior to 2017. This means that the cases prior to 2015 did not have the benefit of this Court's decisions in *City and County of San Francisco, Calif. v. Sheehan*, 575 U.S. 600 (2015), and those prior to 2017, did not have the benefit of *County of Los Angeles v. Mendez*, 581 U.S. 420 (2017).

to believe that the suspect poses a threat of serious harm to the officer or others.'" *Id.* (citing *Ontiveros v. City of Rosenberg, Tex.*, 564 F.3d 379, 382 (5th Cir. 2009)). Pet. App. at 24a.

Again, the District Court review of Felix's conduct up to and including the brandishing of his weapon found no Fourth Amendment violation. That review shows the conduct of Felix up to the second or two prior to his use of deadly force was not unlawful. This determination, which was not appealed, belies Petitioner's assertion that "Felix's use of deadly force began before Felix placed himself in danger." Pet. at 27-28. In fact, Barnes's reaching around in the vehicle, and then turning the car back on in order to flee is what put Felix in danger, not Felix's actions. As the District Court stated in its second summary judgment order, "the Court cannot say that pointing a weapon at a driver who 'reaches down' for an unknown reason after the officer orders the driver to exit the vehicle is unreasonably excessive." Resp. App. at 36a-37a. Moreover, it held "it was not objectively unreasonable for Felix to believe that Barnes was attempting to flee when Barnes turned his car on despite Felix's order to exit the vehicle." Resp. App. at 37a. This also demonstrates the inaccuracy of Petitioner's assertion that Felix used deadly force simply because of outstanding toll violations. Pet. at 32.

But even if the District Court and Fifth Circuit had reviewed the totality of circumstances, including Felix's decision to jump on the door sill, Felix's conduct did not violate Barnes's Fourth Amendment rights, pursuant to then-existing Fifth Circuit and Supreme Court precedent.

Brosseau v. Haugen, 543 U.S. 194 (2004) (per curiam) involves a factually similar situation. Officer Brosseau had heard a report that men were fighting in Haugen's mother's yard and Brosseau responded. *Id*. at 195. When Brosseau arrived, she saw two men attempting to force Haugen into a pickup truck. *Id*. at 196. Brosseau's arrival on the scene created a distraction, enabling Haugen to run away. *Id.* A search ensued, and Brosseau pursued Haugen on foot. *Id.* Haugen jumped into a Jeep parked close by and closed and locked the door. *Id*. Brosseau believed Haugen was attempting to locate a weapon, and when Brosseau approached the Jeep, she pointed her gun at Haugen, and commanded him to exit the vehicle. Haugen ignored her command and continued to look for the keys to the vehicle. *Id*. After repeating her commands multiple times, Brosseau broke the window on the driver's side, unsuccessfully tried to grab the keys and struck Haugen in the head with her gun. *Id*. Haugen was still able to start the vehicle, and as the Jeep started or shortly after it began to move, Brosseau jumped to the back, and shot through the rear window. *Id*. at 197. Haugen was hit but survived. *Id*.

The Court determined that the precedent that was presented by Haugen did not clearly establish that Haugen's Fourth Amendment rights were violated. *Id.* at 201.

Brosseau, in place in April of 2016 when Felix encountered Barnes, is factually similar and demonstrates that no Fourth Amendment right was violated by Felix. Moreover, if a totality review was conducted, the District Court would be required to take into account all of the

conduct, including that of Barnes, who failed to comply with commands, acted nervous, kept reaching down and "digging around" in the vehicle, and who made the decision to re-start the vehicle and flee. There would be no different outcome if that review was engaged.

It is also important to note that this Court's precedent at the time Felix encountered Barnes recognized that nervousness of the suspect is a factor in reasonableness of an officer's actions. *See, e.g., Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000). In *District of Columbia v. Wesby*, 583 U.S. 48, 60 (2018), citing *Wardlow*, this Court reiterated that "[o]ur cases have also recognized that nervous, evasive behavior [by the suspect] is a pertinent factor in the assessment of the reasonableness of an officer's actions determining reasonable suspicion. [citations omitted.]" *Id.* In *Wardlow*, the Court further held that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Wardlow,* at 124. If a broader view is taken, Barnes's nervous behavior observed by Felix should be taken into account. Felix's actions were, in part, based on his observations of Barnes.

Felix observed that Barnes showed nervous behavior and was constantly searching through the vehicle for something but not knowing what Barnes was trying to find. It was presumably not Barnes's driver's license because Barnes said the license might be in the trunk. Barnes's conduct seems excessive and irrational for a traffic stop for unpaid tolls in a rental car. It would have been objectively reasonable for an experienced officer like Felix to have a heightened sense of concern based

on Barnes's reaction to what should have been a minor traffic stop. As testified to by Felix's expert witness, this heightened concern was reasonable. Although Felix was not aware of the presence of the gun at the time of the stop, the way Barnes was acting was not appropriate for unpaid tolls. Barnes's decision to flee was also emblematic of this behavior, and immediately elevated the seriousness of the potential charges against him.

In addition to considering Barnes's nervousness and refusals to comply with orders, a totality review, if needed, should include that Felix pulled his gun hand out of the vehicle momentarily and looks toward where the car was heading to assess the danger of the situation prior to using deadly force. Pet. App. at 27a. Objectively, this action demonstrates that Felix considered the situation surrounding the moving vehicle before firing his weapon.

Fifth Circuit precedent supports a finding that Felix's conduct was reasonable as well. In *Davis v. Romer*, 600 Fed.Appx. 926 (5th Cir. 2015) (per curiam), the plaintiffs argued that Officer Romer caused the danger by jumping onto the running board of the vehicle. *Id.* at 929. They argued, as does the Petitioner here, that the officer "caused the dangerous encounter." *Id.* at 929, 930. The Fifth Circuit rejected this argument, citing the "dangerous and threatening situation on the street" and these rapidly occurring, chaotic and dangerous events did not support a holding that Romer's conduct was objectively unreasonable under clearly established law at the time of the incident. *Id.* at 930-931. *See also*, *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985) (holding no Fourth Amendment violation when an officer fatally shot

a driver suspected drug transaction who attempted to flee in his vehicle, but after his car was blocked he was reaching down to the seat and floorboard of the car, and the officer believed the driver was reaching for his gun).

B. Felix is entitled to qualified immunity under then-existing, clearly established law. Even if a Fourth Amendment violation is found, the outcome of this case would not change.

Under Fifth Circuit and this Court's precedent, an officer "is entitled to qualified immunity if there is no violation, *or* if the conduct did not violate law clearly established at the time." *Cole v. Carson,* 935 F.3d 444, 451 (5th Cir. 2019), *as revised* (August 21, 2019), *cert. denied sub nom. Hunter v. Cole*, 141 S.Ct. 111, 207 E. Ed. 2d 1051 (2020) (citing *Tolan v. Cotton*, 572 U.S 650, 655-56 (2014) (per curiam) (emphasis added). Pet. App. at 22a. Accordingly, regardless of the potential existence of a Fourth Amendment violation, he is entitled to qualified immunity under clearly established law. As a result, even if this case is reversed, Felix would remain protected by qualified immunity.

In determining whether an officer is entitled to qualified immunity, this Court has held that *Graham* and *Garner* only apply when the case is "obvious," but that those situations are rare. *See*, *Wesby*, 583 U.S. at 64 (holding the "[o]f course, there can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances."); *White v. Pauly*, 580 U.S. 73, 79-80 (2017) (per curiam) ("we have held that

Garner and *Graham* do not by themselves create clearly established law outside an 'obvious case.'").[8]

In cases that are not obvious, like the case here, the plaintiff must present clearly established precedent that the officer's conduct was unlawful. "[T]o show a violation of clearly established law, [the plaintiff] must identify a case that put [the officer] on notice that his specific conduct was unlawful." *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 8 (2021) (per curiam); *see also, City of Tahlequah, Okla. v. Bond*, 595 U.S. 9, 12 (2021) (per curiam).

In *Mullenix v. Luna*, 577 U.S. 7 (2015) this Court held "'[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate,'" (citing *Ashcroft v. al–Kidd,* 563 U.S. 731, 741 (2011)). "Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix*, 577 U.S. at 12, (citing *Malley v. Briggs,* 475 U.S. 335, 341 (1986)).

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8. *Kisela v. Hughes,* 584 U.S. 100, 105-106 (2018) (per curiam), held that an obvious case is one in which "any competent officer would have known that shooting [the suspect] to protect [the officer] would violate the Fourth Amendment." It also held "*Garner* and *Graham* do not by themselves create clearly established law outside an 'obvious case.'" *Id.* (citing *White*, 550 U.S. at 80). *See also, City of Escondido, Cal. v. Emmons*, 586 U.S. 38, 42–44, (2019) (per curiam) (this concept is "particularly important in excessive force cases," because "'[a]n officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'").

In the lower courts, Petitioner had every opportunity to cite such clearly established precedent and did not do so. Petitioner attempted to provide precedent that would deprive Felix of qualified immunity in its briefing before the Fifth Circuit, but each case she cited was decided *after* the encounter between Barnes and Felix in 2016—which, according to this Court's precedent, renders them useless, as held in *Plumhoff v. Rickard*, 572 U.S. 765 (2014) (where this Court held "*Brosseau* makes plain that as of February 21, 1999—the date of the events at issue in that case—it was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger. We did not consider later decided cases because they 'could not have given fair notice to [the officer].'" *Id*. at 779-780) and *City of Tahlequah v. Bond*, 595 U.S. at 12 (where this Court rejected precedent decided after the events at issue in that case, as it is "of no use in the clearly established inquiry.")[9]

Felix has nonetheless identified a number of then-existing clearly established precedent which demonstrates that Felix's actions were not unlawful.[10]

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9. Petitioner's response to the summary judgment below cited to *Lytle v. Bexar County,* 560 F.3d 404 (5th Cir. 2009) and *Tennessee v. Garner*, *supra*, but the former is not helpful (it holds that if the suspect's vehicle had been moving toward the officer was undisputed, the police officer "would likely be entitled to qualified immunity" based on the "threat of immediate and severe physical harm." 560 F.3d at 412) and the latter is factually distinguishable as it involved a suspect fleeing on foot. Neither case was cited in support of denying Felix's qualified immunity in the Fifth Circuit.

10. See Section I.A, *supra,* citing *Brosseau v. Haugen*, 543 U.S. 194 (2004), *Illinois v. Wardlow*, 528 U.S. 119 (2000), *Davis v. Romer*, 600 Fed.Appx. 926 (5th Cir. 2015), and *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985).

Felix is entitled to qualified immunity under the clearly established law in effect at the time he stopped Barnes. Therefore, the existence *vel non* of a Fourth Amendment violation is an unnecessary exercise. Because the non-liability of Felix is readily established by his entitlement to qualified immunity, there is no compelling reason to take this case on the Fourth Amendment issue and certiorari should be denied.

III. The Fifth Circuit is not wrong, and its precedent more closely follows this Court's precedent concerning the importance of giving allowance to the moment when split-second judgments are required.

Petitioner's assertion that the Fifth Circuit's approach is wrong fails to give proper deference to *Graham's* holding that "[w]ith respect to a claim of excessive force, the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' [citation omitted] violates the Fourth Amendment." *Graham*, 490 U.S. at 396-97. It recognized that the "calculus for reasonableness must embody allowance 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.* Moreover, *Garner* held "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11. This threat can happen in an instant.

Moreover, the cases below indicate this Court pays heed to the moment of threat as opposed to prior conduct, whether alleged to be reckless or a separate Fourth Amendment violation, in determining the reasonableness of deadly force.

A. In 2015, *Sheehan* held that prior bad tactics cannot be considered.

In *City and County of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 603 (2015), the officers were called to assist in taking Sheehan, who was acting irrationally at a mental health group home, to a secure facility. *Id.* Upon arrival, the officers went to Sheehan's room, saying they wanted to help her. *Id.* at 604. When she failed to open the door, the officers were provided a key and used it to enter the room. *Id.* Sheehan reacted violently, grabbed a kitchen knife and moved toward and threatened the officers. The officers, who did not have their weapons drawn, retreated. *Id.* The officers then began to worry that Sheehan, out of their site, was gathering more weapons or might try to flee. *Id.* They knew she was acting unstable, had threatened violence, and had a weapon. *Id.* at 604-605. Without considering Sheehan's disability and how it could be accommodated, and because the officers believed that the situation required immediate attention, the officers chose not to wait for backup, and entered the room a second time. *Id.* at 605. Sheehan again brandished a knife and acted in a threatening manner. *Id.* When pepper spray did not cause her to drop the knife, one of the officers used deadly force. *Id.*

The plaintiff claimed that the officers' second opening of Sheehan's door failed to accommodate her disability and

provoked Sheehan, thus violating the Fourth Amendment. *Id.* at 606, 607. But, this Court, viewing the prior conduct of the officers, held that a plaintiff cannot "establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." *Id.* at 615. It also held that *Graham* was a "non-starter," factually distinguishable, and that the officers involved were entitled to qualified immunity. *Id.* at 610-612, 614.

B. In 2017, *Mendez* struck down the Ninth Circuit's provocation rule.

Two years later, in *County of Los Angeles, Ca. v. Mendez*, 581 U.S. 420, 423 (2017), this Court struck down the Ninth Circuit's "provocation rule," which allowed prior Fourth Amendment violations by the officer to be used in determining whether the deadly force was reasonable. In *Mendez*, the plaintiffs complained of an unreasonable search and the officer's failure to announce their presence prior to entering and prior to the deploying excessive force. *Mendez,* 581 U.S. at 425. The Ninth Circuit held that the warrantless entry violated clearly established law and denied the officer's claim of qualified immunity.

The Court granted certiorari and held that the provocation rule was fundamentally flawed because it was an "unwarranted and illogical expansion of *Graham*" and used "another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." *Id.* at 427. This Court held "The provocation rule may be motivated by the notion that it is important to hold law enforcement officers liable for the

foreseeable consequences of all of their constitutional torts [citation omitted]. However, there is no need to distort the excessive force inquiry in order to accomplish this objective." *Id.* at 430. Indeed, the plaintiff can, subject to qualified immunity, generally recover damages caused by independent Fourth Amendment violations. *Id.*

Mendez concluded that the Fourth Amendment provides no basis for the Ninth Circuit's provocation rule, holding that a separate Fourth Amendment violation "cannot transform a later, reasonable use of force into an unreasonable seizure." *Id.* at 422-423 (abrogating *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002)).

Petitioner's argument that Felix's prior conduct should be considered is similar to the application of the provocation rule by asserting that that the lower courts should have considered what had transpired "up until the shooting itself in assessing the reasonableness of an officer's use of deadly force." Pet. at 7, citing Pet. App. 29a-30a. Significantly, Petitioner pleaded that this conduct was a separate Fourth Amendment violation below,[11] as to which *Mendez* would be determinative. But even if Petitioner can now argue that this conduct was not a separate violation, but "prior conduct" that should be considered, *Mendez* is relevant.

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11. Petitioner asserted that Felix's jumping on the door sill was an independent Fourth Amendment violation in her Opposed Motion for Clarification, but then only asked that the District Court rule on the weapon-brandishing excessive force claim, which it did. Resp. App. at 21a.

C. In 2021, *Bond* reiterated that clearly established law is the test for qualified immunity without the necessity of reviewing prior allegedly reckless conduct, and specificity is especially important in the Fourth Amendment context.

In *City of Tahlequah v. Bond*, 595 U.S. at 11, the plaintiffs had alleged that the officer's conduct prior to the use of deadly force should be viewed in the deadly force assessment. The Tenth Circuit, using the "totality of circumstances" test in *Graham*, held that officers can be liable for shooting a suspect even if, viewed in isolation, the shooting was objectively reasonable under the Fourth Amendment, as the "officers' reckless and deliberate conduct in creating a situation requiring deadly force may result in a Fourth Amendment violation." *Bond v. City of Tahlequah, Ok*, 981 F.3d 808, 818 (10th Cir. 2020).

The City of Tahlequah sought review in this Court asserting that the Tenth Circuit's decision was emblematic of the Ninth and Tenth Circuits' continuing to take into account prior behavior of an officer, even after *Mendez*. *Petition for Writ of Certiorari, City of Tahlequah v. Bond*, at 1. Petitioner City of Tahlequah asked this Court to clarify "whether courts may 'tak[e] into account' whether 'unreasonable police conduct prior to the use of force ... foreseeably created the need to use it.'" *Id.* (citing *Mendez*, 581 U.S. at 432, n. *). In *City of Tahlequah*, the officer's prior conduct was alleged to be "reckless" but seemingly not an independent Fourth Amendment violation.

The Court granted certiorari, and reversed the Tenth Circuit, finding no constitutional injury. *City of Tahlequah*, 595 U.S. at 13. While this Court did not specifically decide

whether "recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment," (*Id.* at 12) the Court held that the formulation of a rule that "reckless preseizure conduct can render a later use of force excessive" is "much too general to bear on whether the officer's particular conduct here violated the Fourth Amendment." *Id.* at 12. Instead, the Court looked to whether the petitioner had presented clearly established precedent showing the officer's actions violated the Fourth Amendment under similar circumstances. *Id.* at 13-14. This Court found no such violations and reversed the holding of the Tenth Circuit.

This Court also made the point that specificity is of utmost importance in the Fourth Amendment context, "where it is 'sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" *Id.* (citing *Mullenix,* 577 U.S. at 12, (internal quotation marks omitted)).

These cases demonstrate that the Fifth Circuit's approach is consistent with this Court's guidance concerning prior conduct of the officer.

D. This Court's precedent involving fleeing suspects further supports the Fifth Circuit's approach.

On at least four occasions over the last twenty years in cases involving fleeing suspects and high-speed chases, this Court has signaled a clear move away from the broad, amorphous approach of *Graham* and toward the

more focused moment of confrontation. This shift was summarized in *Mullenix*, which held that "[t]he correct inquiry, the [*Brosseau*] Court explained, was whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the "'situation [she] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.'" *Mullenix*, 577 U.S. at 12-13 (citing *Brosseau*, 543 U.S. at 199-200).

In *Mullenix*, this Court also held that the Fifth Circuit's holding—that the use of deadly force against a fleeing felon who does not pose a sufficient threat is prohibited— was too broad and that *Garner's* "general test" for excessive force was "mistaken." *Id.* at 12-13. It held that the Fifth Circuit's holding was too broad, and directly contradicted this Court's precedent which had considered and rejected that formulation.

In 2004, in *Brosseau*, 543 U.S. at 199, which involved a suspect shot in the back while attempting to flee in his vehicle, *supra*, this Court stressed the importance of undertaking any inquiry into the use of force in light of the specific context of the case, not as a broad general proposition. *Brosseau* at 199 (citing *Saucier, supra,* at 201). Quoting *Saucier* once again, it held that "'there is no doubt that *Graham v. Connor, supra*, clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness . . . [*y*]*et that is not enough.*'" *Brosseau*, 534 U.S. at 199 (emphasis in original). This Court reiterated that in determining qualified immunity, rather than the highly generalized test set out in *Graham*

and *Garner*, "'the right the official is alleged to have violated must have been 'clearly established' in a more particularized and hence more relevant, sense.'" *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "The contours of that right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*

In 2007, in *Scott v. Harris*, 550 U.S. 372, 380-381 (2007), the suspect involved in a high-speed car chase was shot and killed. Like in the instant case, there was a video capturing the events. Justice Scalia, writing for the Court, held that it was "quite clear" that the officer did not violate the Fourth Amendment in using deadly force. *Id.* at 381. The Respondent in that matter urged the Court to analyze this case as it analyzed *Garner*, making sure that the officer met certain "preconditions," including whether the suspect posed an immediate threat of serious physical harm to the officer or others, which it claimed were established in *Garner. Id.* But the Court held that *Garner* "did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Id.* at 382. Instead, the Court held it was bound to determine reasonableness based on the facts. *Id.* And in doing this analysis, the Court discounted the officer's prior actions, stating that it was, "after all, [the suspect] who intentionally placed himself and the public in danger." *Id.* at 384. It laid down a "sensible rule" that a "police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Id.* at 386. The Court also held that *Garner* was factually dissimilar, and in response

to the respondent's argument that the officer should have simply ceased pursuit (much like Petitioner argues here), the Court held. "[w]e think the police need not have taken that chance and hoped for the best." *Id.* at 384-85.

Plumhoff v. Rickard, 572 U.S. at 775, involved a high-speed car chase in which this Court held that although the totality must be viewed, the Court "'allow 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,'" (citing *Graham*). However, this Court ultimately based its holding that there was no Fourth Amendment violation on "circumstances at the moment when the shots were fired, all that a reasonable officer could have concluded was that Rickard was intent on resuming his flight . . . once again pos[ing] a deadly threat for others on the road."). *Id.* at 777.

The Fifth Circuit's approach in reviewing only the events immediately prior to the use of deadly force, as opposed to other, prior conduct, follows this Court's guidance in *Graham* which acknowledged that courts must accommodate the moment where split-second decisions must be made by officers when confronted with dangerous situations. It follows *Garner*'s holding that deadly force is not unreasonable when an officer's or others' lives are in danger. And it also follows this Court's more recent precedent, which have trended away from determining excessive force based on an officer's prior conduct, whether it be imperfect or even a separate Fourth Amendment violation. For these reasons, certiorari should be denied.

E. The Court has thus provided guidance to the circuits in its prior opinions, obviating the need for further review.

In the cases cited above, it is demonstrated that this Court has provided guidance to the circuits with regard to how to apply the holdings of *Graham* and *Garner*. Further clarification should not be necessary, and certiorari should be denied for that reason. This is a case in which Barnes was attempting to flee, and this Court's precedent in that circumstance has been clear as well. It appears that all circuits review the conduct of the officer to determine if the officer had a reasonable fear of serious harm to the officer or others when evaluating excessive force claims under the Fourth Amendment. Therefore, any differences between the circuits is not as broad as suggested by Petitioner, does not merit review, and, as argued above, would not have changed the outcome of this case.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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August 14, 2024

APPENDIX

TABLE OF APPENDICES

APPENDIX A — PLAINTIFFS' OPPOSED MOTION FOR CLARIFICATION IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED AUGUST 13, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Case No. 4:18-CV-725
The Honorable Alfred H. Bennett
U.S. District Judge

JANICE HUGHES BARNES, *et al.*,

Plaintiffs,

v.

ROBERTO FELIX JR., *et al.*,

Defendants.

PLAINTIFFS' OPPOSED MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, RULE 59(e) MOTION TO AMEND THE COURT'S MARCH 31, 2021 ORDER

This is a deadly force case. It is about the shooting death of Ashtian Barnes by Harris County Deputy Constable Roberto Felix Jr. during a routine traffic stop in which Deputy Felix created the very danger that led to his blindly firing two shots at an unarmed Ashtian at

point blank range as Ashtian drove, less than two-and-a-half minutes after initiating the stop.

This is also an excessive force case. It is about Deputy Felix's conduct leading up to his fatally shooting Ashtian—by drawing his firearm and pointing it directly at and inches away from Ashtian's head without any reasonable suspicion that Ashtian posed a threat—acts that are separately and independently unconstitutional.

On March 31, 2021, this Court granted complete summary judgment to Defendants and dismissed the case in its entirety, solely on the basis that Deputy Felix's use of *deadly force* was not objectively unreasonable. But Defendants never challenged—and therefore the Court never had before it or addressed in its Order—Plaintiffs' excessive force claim regarding Deputy Felix's conduct prior to his pulling of the trigger.

Plaintiffs' excessive force claim still lives. But, as discussed further below, the parties' summary judgment briefing should have more clearly outlined the contours of the claims at issue. Plaintiffs therefore ask this Court to clarify that its March 31 Order only disposed of Plaintiffs' deadly force claim, and left their excessive force claim—regarding Officer Felix's conduct prior to his use of deadly force—untouched.[1] Alternatively, Plaintiffs ask this Court, pursuant to Rule 59(e), to amend its March 31 Order to grant only partial summary judgment to

1. For ease of reference, Plaintiffs herein refer to this claim as their "pre-deadly force claim."

Defendants on Plaintiffs' deadly force claim. This relief is necessary for Plaintiffs—Ashtian's mother and father—to ensure a "more robust examination" of Deputy Felix's conduct leading up to Ashtian's death in order to redress at least some of the force directed at their son. Dkt. 49 at 12. Lastly, if the Court disagrees with Plaintiffs' position, Plaintiffs minimally ask the Court to enter a final judgment in a separate document, in accordance with Rule 58(a).

I. Factual Background

Ashtian Barnes was fatally shot less than two-and-a-half minutes after Deputy Felix initiated a routine traffic stop for unpaid tolls on the rental car Ashtian was driving on April 28, 2016. He is survived by his mom, Janice, who he spoke to every day. He is survived by his dad, Tommy, who he consulted for guidance on manhood. He is survived by two younger sisters Anaya and Ale'dra who he lovingly protected. Plaintiffs' filed the instant Motion on the eve of what would have been Ashtian's 30th birthday.

In the months before Deputy Felix shot Ashtian as he drove along a toll road, Ashtian was building a successful future. In early 2016, he was enrolled in the Medical Assistant and Barber Programs at Remington College while also providing and caring for his girlfriend and her daughter. On April 28, 2016, Ashtian was driving to pick up his girlfriend's daughter from school in a car rented by his grandmother through the "On Time Car Rental" agency.

Appendix A

At approximately 2:40 p.m. the Harris County Toll Road Authority Dispatch made a general radio broadcast to the Harris County Constable Office, Precinct Five, informing that a vehicle had outstanding toll violations and was traveling southbound on the tollway. Deputy Constable Roberto Felix received the call, located the vehicle, and conducted the traffic stop. The instant that Deputy Felix turned on his lights and siren, Ashtian responded by immediately pulling his vehicle over to the left shoulder of the road.

The following took place in less than two-and-a-half minutes: After both vehicles pulled over to the shoulder of the tollway, Deputy Felix stepped out of his vehicle and approached Ashtian's driver's side window. Ashtian rolled down the window at the outset of the stop. Deputy Felix then asked Ashtian for his driver's license and insurance, prompting Ashtian—in compliance with Felix's direction—to attempt to look for his identification in a stack of papers on the passenger side of the vehicle, while simultaneously explaining to Deputy Felix that the vehicle he is driving is a rental car. After stating he "understand[s]" that the vehicle is rented, Deputy Felix again asks Ashtian for his driver's license. As Ashtian continues looking for his papers, Deputy Felix states "I smell marijuana, is there marijuana in your vehicle?" Felix's right hand then quickly moves to his holstered firearm as he exclaims, "stop digging around" several times, despite having already asked Ashtian to produce his identification twice. Deputy Felix then asks Ashtian a third time if he has any identification. Ashtian informs Deputy Felix that he thinks his driver's license is in his

trunk. At Felix's command, Ashtian then opens the trunk for Officer Felix.

Rather than proceed to the rear of the car to inspect the trunk, Deputy Felix opens the driver-side door of the vehicle and instructs Ashtian to step out. Approximately five seconds after Deputy Felix opens the door, he pulls his gun and points it within a few inches of Ashtian's head. Deputy Felix later testified that he drew his gun because after opening the driver's side door, Felix was positioned in "a more open area where [Ashtian] could do something to me . . . easier. . . . So when he started reaching down is when I drew my weapon." Dkt. 44-3 at 10:14-20. In other words, Deputy Felix claimed to be afraid of the vulnerable position he had placed himself in of his own volition. Deputy Felix pointed his weapon at Ashtian's head and, at the same time, shouted "Don't fucking move!"

With a gun pointed toward his head in point blank range, Ashtian begins driving away. In that moment, Deputy Felix makes the bad situation he created even worse. With his gun still pointed at Ashtian, Deputy Felix springs fully up onto the door frame of the vehicle with both feet and grips the roof of the car with his left hand as the car accelerates.

Deputy Felix then briefly pulls his gun out of the open driver's door frame before sticking it back inside towards Ashtian and firing twice, blindly and in rapid succession. Both shots strike Ashtian. Somehow, despite being mortally wounded, Ashtian manages to stop his car and place it in park. And though he clearly presents

no threat at that time, neither Deputy Felix nor anyone else even attempt to render aid to Ashtian until at least five minutes after other officers arrive on the scene. By that time, it is too late to save Ashtian's life. Ashtian had already succumbed to his gunshot wounds.

II. Procedural History

Plaintiffs—Ashtian's mother Janice, individually and as representative of Ashtian's estate, along with his father Tommy—filed this action in Harris County District Court on December 29, 2017. Dkt. 1-2. In their petition, Plaintiffs advanced distinct Fourth Amendment harms under a single claim for relief. *Id.* ¶¶ 35–42. They alleged that specifically enumerated instances of Deputy Felix's conduct "resulted in and *independently amounted to* excessive force and/or unreasonable seizure" in violation of Ashtian's Fourth Amendment rights. *Id.* ¶ 38 (emphasis added). Plaintiffs therefore styled this claim for relief as an "Unconstitutional Use of Excessive *and* Deadly Force" by Deputy Felix. *Id.* at page 24 (of 59) (emphasis added). Simply put, Plaintiffs alleged distinct Fourth Amendment violations beyond just Deputy Felix's use of deadly force.

Several months after filing, Defendants Felix and Harris County removed the case to this Court, on March 7, 2018. Dkt. 1. After a period of discovery, on July 30, 2019, Defendants filed a Consolidated Motion for Summary Judgment. In their motion, Defendants asserted that they were entitled to summary judgment on three core bases: (1) "Deputy Felix's use of deadly force against Barnes on April 28, 2016 was justified and did not violate

Barnes' Fourth Amendment rights[;]" (2) that Deputy Felix was entitled to qualified immunity irrespective of any constitutional violation; and (3) because Deputy Felix did not violate the Fourth Amendment, Harris County was not municipally liable under any of the theories Plaintiffs advanced. *See* Dkt. 15 at 10; 18–29; 29–40 (of 42). Defendants' briefing also explicitly acknowledged the existence of other live Fourth Amendment claims, but Defendants opted not to develop any argument challenging those claims. *Id.* at 29.

Plaintiffs responded on August 20, 2019, directly addressing the substance of Defendants' challenges. Dkt. 18. They asserted that Deputy Felix's deadly force was objectively unreasonable under the circumstances and was therefore not qualifiedly immune, and that Harris County could be held municipally liable. *Id.* at 14–26; 26–40. Defendants filed their reply on August 27, 2019. The Court then held a hearing on the motion on January 24, 2020.

At the hearing, the Court ordered supplemental briefing as to any applicable policies of the Constable regarding fleeing suspects. Defendants then submitted a policy not previously produced in discovery—despite its clear relevance and applicability to Plaintiffs' discovery requests—describing Constable Precinct 5 "guidelines for fresh pursuit[.]" Dkt. 31 at 1. Plaintiffs responded to Defendants' supplemental briefing on February 7, 2020, Dkt. 33, and several days later, on February 11, 2020, moved for sanctions based on Defendants' failure to disclose the Fresh Pursuit policy. Dkt. 36.

Appendix A

On February 26, 2020, the Court held a hearing on the Motion for Sanctions, in which it "confirmed" Defendants had not timely produced evidence that "could affect the evidentiary posture of this case and the parties' legal positions[.]" Dkt. 39 at 2. The Court accordingly granted additional interrogatories to Plaintiffs and denied Defendants' pending Motion for Summary Judgment, with leave to re-file after the newly re-opened discovery period closed.

On July 31, 2020, Defendants moved anew for summary judgment, filing a motion identical to their original July 30, 2019 Consolidated Motion for Summary Judgment. *Compare* Dkt. 42 *with* Dkt. 15. Defendants once again only sought summary judgment on Plaintiffs' deadly force claim, while briefly nodding at, but declining to develop, arguments against Plaintiffs' other Fourth Amendment claims. *See id.* at 26, 29. Plaintiffs responded to the substance of Defendants' challenge on August 20, 2020, Dkt. 44, and Defendants replied, Dkt. 45.

On March 31, 2021, the Court entered summary judgment for Defendants and dismissed this case. Dkt. 49. In its Order, the Court focused solely on resolving whether Deputy Felix's use of deadly force amounted to a constitutional violation. At the heart of that question, according to the Court, was whether the Court could take into account "the officer's conduct precipitating the shooting—which included jumping onto a moving vehicle and blindly firing his weapon inside—in determining whether the officer used excessive force in violation of the Fourth Amendment." Dkt. 49 at 1. Answering in the

negative, the Court concluded that Fifth Circuit precedent foreclosed the consideration of conduct predicate to a use of deadly force because, in deadly force cases, the objective reasonableness inquiry is limited to examining "whether the officer or another person was in danger *at the moment of the threat* that resulted in the officer's use of deadly force." Dkt. 49 at 7 (quoting *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011)) (emphasis in original).

Applying this precedent, the Court held that Deputy Felix's use of deadly force was objectively reasonable because at the "moment of the threat"—the moment after "Felix jumped onto the door sill of Ashtian's car" as it began to move—Felix's safety was objectively at risk. *Id.* at 9-10. And because Fifth Circuit precedent narrows the reasonableness inquiry to foreclose the consideration of any conduct other than what was happening at that precise moment, the Court held Deputy Felix's use of deadly force to be "presumptively reasonable[.]" *Id.* at 11 (quoting *Ontiveros v. City of Rosenberg, Tex.*, 564 F.3d 379, 382 (5th Cir. 2009)). The Court granted Defendants' motion for summary judgment and dismissed the case, Dkt. 49 at 12, but its analysis only disposed of the deadly force claim.

Initially believing the Court's Order to be a "final decision[] of the district court[,]" 28 U.S.C. § 1291, Plaintiffs timely noticed an appeal to the Fifth Circuit on April 5, 2021, Dkt. 50. Then, on May 20, 2021, the Texas Civil Rights Project joined Fomby Law Firm as counsel for Plaintiffs. Upon further review and contemplation of the Court's Order, Plaintiffs' counsel determined that it

was unclear whether or not the Court's Order actually constituted a "final decision" because a live claim had not been formally disposed, and therefore the Court's Order potentially lacked the finality of a judgment appealable as of right. Separately, Plaintiffs also noticed that following the grant of summary judgment the Court did not enter a final judgment on a separate document as required by Rule 58.

Plaintiffs therefore dismissed their pending appeal and acted to pursue the instant relief in order 1) to preserve their ability to advance a live claim; 2) to reconcile their own lack of clarity regarding the Court's Order, which also had jurisdictional implications for the then-pending appeal, given that a final order is appealable while an interlocutory order is, generally speaking, not, *see* 28 U.S.C. §§ 1291, 1292; or, as a minimal alternative, 3) to ask the Court to cure the lack of entry of a final judgment on a separate document. *See Hanson v. Flower Mound*, 679 F.2d 497, 502 (5th Cir. 1982) ("If an appellant realizes that a final judgment has not been entered, or that there may be some doubt about it, he should take steps to obtain the entry of a certain final judgment, and then file a new notice of appeal."). Plaintiffs filed this motion to clarify or amend the Court's March 31, 2021 Order without delay.

The relief Plaintiffs seek is limited. This motion does not address or seek to disturb this Court's ruling on Plaintiffs' deadly force claim. However, a live "pre-deadly force" claim has not yet been briefed by the parties or resolved by the Court so Plaintiffs should be allowed to continue advancing that remaining claim.

Plaintiffs did their best to distinguish these claims in their Original Petition and response to Defendants' Consolidated Motion for Summary Judgment—focusing on the "unreasonableness" of Deputy Felix's conduct which precipitated his killing Ashtian, *see* Dkt. 1-2 at ¶¶ 35–38; Dkt. 44 at 18–21, 23–25 (of 41)—but Plaintiffs admit now that they could have highlighted this delineation more explicitly in their briefing. Plaintiffs hope to rectify that confusion through this motion while the Court is still empowered to take corrective action. The interest of justice counsels in favor of granting the motion. Ashtian's family should be permitted to continue seeking relief on their live pre-deadly force Fourth Amendment claim because Defendants never challenged that claim and because Plaintiffs never abandoned it.

III. Legal Standard

Rule 59(e) of the Federal Rules of Civil Procedure authorizes a "motion to alter or amend a judgment" if it is "filed no later than 28 days after the entry of the judgment." The motion "calls into question the correctness of a judgment." *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002). To prevail on a Rule 59(e) motion, movants "must clearly establish either a manifest error of law or fact or must present newly discovered evidence[.]" *Wright v. Spindletop Films, L.L.C.*, 845 F. Supp. 2d 783, 786 (S.D. Tex. 2012) (quoting *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003)).

Though it is true that reconsideration "is an extraordinary remedy that should be used sparingly," *Templet v. Hydrochem Inc.*, 367 F.3d 473, 479 (5th Cir.

2004), "[a] district court has considerable discretion to grant or deny a motion under Rule 59(e)." *Estate of Brown v. Cypress Fairbanks Indep. Sch. Dist.*, 863 F. Supp. 2d 632, 633 (S.D. Tex. 2012) (quoting *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993)). Indeed, "Rule 59 gives the trial judge ample power to prevent what the judge considers to be a miscarriage of justice." 11 Charles A. Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice & Procedure § 2803 (3d ed.); *see Lekas v. Briley*, 405 F.3d 602, 614 n.8 (7th Cir. 2005) (Rule 59 is proper vehicle for "salvag[ing]" unchallenged claims dismissed in error).

IV. The Court Should Amend Its Summary Judgment Order in the Interest of Justice.

Because Plaintiffs pled an independent pre-deadly force claim that has not been briefed by either party or addressed by this Court, Plaintiffs respectfully request the Court clarify or, in the alternative, to amend pursuant to Rule 59(e), its March 31, 2021 Order to reflect a grant of partial summary judgment limited only to the deadly force claim. This result is necessary to prevent a miscarriage of justice for Ashtian's family: the inability to advance a live Fourth Amendment claim that was never challenged by Defendants, never addressed in the Court's order granting total summary judgment, and, candidly, not well-delineated by Plaintiffs' counsel in focusing their summary judgment briefing on refuting the explicit arguments around deadly force advanced by Defendants' motion.

Appendix A

a. Plaintiffs' Rule 59 Motion is Timely

As an initial matter, Plaintiffs' Rule 59 motion is timely because the Court did not contemporaneously set out its judgment dismissing the case in a separate document under Federal Rule of Civil Procedure 58(a). As a result, its judgment is not deemed "entered"—starting the clock for purposes of Rule 59, which requires a motion be filed "no later than 28 days after the entry of the judgment," Fed. R. Civ. P. 59(e)—until "150 days have run from the entry in the civil docket." *Id.* at Rule 58(c)(2)(B); *see Craig v. Lynaugh*, 846 F.2d 11, 13 (5th Cir. 1988) (motion filed five months after order deemed timely); *United States v. Redd*, 652 F. App'x 300, 303 & n.4 (5th Cir. June 20, 2016); *Britt v. Whitmire*, 956 F.2d 509, 515-16 (5th Cir. 1992); *cf. Freudensprung v. Offshore Tech. Servs., Inc.* 379 F.3d 327, 337 (5th Cir 2004) (an order lacking a required separate document was not deemed "entered" under Federal Rule of Appellate Procedure 4 and Federal Rule of Civil Procedure 58(b), and thus time to file notice of appeal did not begin to run until expiration of 150-day period); *United States v. Mtaza*, --- F. App'x ---, 2021 WL 911959, at *2 (5th Cir. Mar. 9, 2021). The Court entered the order setting out its judgment on March 31, 2021, and Plaintiffs filed the instant motion on August 13, 2021, which is well within this 150-plus-28-day timeframe. *See* Dkt. 49. This Court has jurisdiction over the instant motion.

b. Plaintiffs' Original Petition Raised Distinct Fourth Amendment Harms That Were Not Challenged by Defendants

Plaintiffs' petition alleged distinct Fourth Amendment harms separate from Deputy Barnes' ultimate use of deadly force. *See* Dkt. 1-2 at ¶¶ 35–42. They alleged that specifically enumerated instances of Deputy Felix's conduct "resulted in and *independently amounted to* excessive force and/or unreasonable seizure" in violation of Ashtian's Fourth Amendment rights. Dkt. 1-2 at ¶ 38 (emphasis added). That conduct included, for example, "[a]ggressively and dangerously drawing and pointing his weapon at Ashtian Barnes because the suspect was not complying, especially in close proximity to the suspect and members of the public." *Id.* ¶ 38, page 26 (of 59).

Plaintiffs' allegations track the Fifth Circuit's analytical approach to Fourth Amendment excessive force violations because "an 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." *Lytle v. Bexar Cty.*, 560 F.3d 404, 413 (5th Cir. 2009). In other words, courts are frequently tasked with analyzing mere instants in time to determine whether an officer's conduct was objectively reasonable. *See id.* at 414 (material fact dispute over whether "three to ten seconds" was enough time for officer "to perceive that the threat to him had ceased"); *see also Waterman v. Batton*, 393 F. 3d 471, 481 (4th Cir. 2005) ("[F]orce justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated.").

Plaintiffs therefore identified and enumerated each of these Fourth Amendment "moments" under a claim for relief styled as an "Unconstitutional Use of Excessive *and* Deadly Force" by Deputy Felix. Dkt. 1-2 at page 24 (of 59) (emphasis added). Under this claim, Plaintiffs would be entitled to relief if they could establish that any individual act or collection of acts by Deputy Felix amounted to *either* Excessive Force or Deadly Force. Plaintiffs thus pleaded a claim that was not constrained solely to Deputy Felix's use of deadly force, but also included distinct excessive force claims based on Deputy Felix's conduct leading up to the actual deadly act. *See County of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1548 (2017) ("The harm proximately caused by these two torts may overlap, but the two claims should not be confused."); *cf.* 10 Charles A. Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice & Procedure § 2657 (4th Ed.) ("[I]f the claims factually are separate and independent, then multiple claims clearly are present.").

In their Consolidated Motion for Summary Judgment, Defendants challenged *only* Plaintiffs' claim that Deputy Felix's use of *deadly* force violated the Fourth Amendment. *See* Dkt 42 at 10 (of 42) ("Deputy Felix's use of deadly force against Barnes on April 28, 2016 was justified and did not violate Barnes' Fourth Amendment rights"); 18–20 (addressing the legal standard for deadly force claims); 22–29 (only defending Deputy Barnes' use of deadly force); 30 (arguing against municipal liability for Harris County in part on the basis that Deputy Barnes' "use of deadly force was entirely justified"). Defendants' motion acknowledges Deputy Barnes's conduct leading up

to his shooting of Ashtian in passing, and solely for the purpose of arguing that Ashtian was the first to instigate any danger by attempting to flee—a material factual contention over which there was a genuine dispute. *Id.* at 28–29; *compare* Dkt. 42 at 29 (of 42) ("It was Barnes, the fleeing driver, who intentionally placed himself, Deputy Felix, and the public in danger and which produced the choice that Deputy Felix had to make.") *with* Dkt. 44 at 5 (of 41) ("Shortly after Felix drew his weapon and thrust it toward Barnes' head, Felix claims that Barnes grabbed his keys and began the process of fleeing.") *and* Dkt. 44-3 at 10:16–20 (Deputy Felix grand jury testimony that after opening the driver-side door to Ashtian's car, Felix drew his weapon "when [Ashtian] started reaching down.").

Even though the substance of Defendants' summary judgment challenge to Plaintiffs' Fourth Amendment claims focused exclusively on the deadly force claim, Defendants' motion nonetheless explicitly acknowledged—albeit mischaracterized—the separate pre-deadly force claims Plaintiffs alleged. In a throwaway line at the conclusion of their argument against the merits of Plaintiffs' deadly force claim, Defendants added "[t]o the extent that Plaintiffs allege that Deputy Felix stopped Barnes in violation of the Fourth Amendment, that claim must fail, as the stop was based on reasonable suspicion." *Id.* at 29 (of 42); *see also id.* at 26 ("Plaintiffs also contend that Deputy Felix engaged in other conduct which violated Barnes' Fourth Amendment rights."). Of course, a routine traffic stop is not rendered *per se* constitutional merely because an officer possessed reasonable suspicion at the outset—"a search which is reasonable at its inception may

violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry v. Ohio*, 392 U.S. 1, 18 (1968) (citing *Kremen v. United States*, 353 U.S. 346 (1977)). But merits of that argument aside, Defendants explicitly conceded the existence of other Fourth Amendment claims and declined to advance arguments in opposition to those claims in their motion.

In response, Plaintiffs directly addressed the substance of Defendants' challenge to Plaintiffs' deadly force claim. They asserted that Deputy Felix's deadly force was objectively unreasonable under the circumstances because Ashtian's conduct did not give Deputy Felix reason to believe Ashtian was a threat to him or others, and that Deputy Felix's conduct leading up to and including firing his weapon at Ashtian disqualified Defendants from summary judgment. Dkt. 44 at 17–25 (of 41). Two important conclusions about the objective reasonableness of Deputy Felix's actions were central to Plaintiffs' rebuttal—(1) that Ashtian's own behavior did not independently provide justification for Deputy Felix's use of deadly force, *id.* at 17–18; and (2) that Deputy Felix himself "unreasonably created the danger" that gave rise to Deputy Felix firing his gun blindly at Ashtian. *Id.* at 19–25; *see also id.* at 4–7.

Plaintiffs' response therefore aligned with the theory of constitutional harm alleged in their Original Petition—that Deputy Felix's independently unreasonable conduct leading up to firing his weapon at Ashtian and killing him also made Deputy Felix's use of deadly force objectively unreasonable. As Plaintiffs emphasized in their briefing,

"[w]hile an officer merely creating a risky situation is not sufficient to overcome qualified immunity, it is sufficient when an officer's actions 'unreasonably created' the danger." *Id.* at 18 (of 41) (quoting *Edmond v. City of New Orleans*, 20 F.3d 1170 (5th Cir. 1994)). Underscoring that point, Plaintiffs explained that "[t]he actions by Officer Felix, first in pulling his service weapon during a simple traffic stop and then jumping into and onto a vehicle he knew was preparing to leave the scene, unreasonably created the very danger that he relied upon to justify his use of deadly force." *Id.* at 19 (of 41); *see also* Ex. 1, Transcript, Hearing on Motion for Summary Judgment, Jan. 24, 2020, at 19:12-21 (the Court noting that Deputy Felix's actions prior to firing his weapon could have been unreasonable); *id.* at 36:3-9 ("Barnes was driving away because he was afraid of something, an action by Mr. Felix pulling his service weapon. . . . [T]here is no reason for the officer to have pulled his gun, in the first place, because there was no serious crime at foot at all."). Though this response was addressed to Defendants deadly force argument, Plaintiffs also viewed these as legally distinct moments for purposes of establishing the separate Fourth Amendment harms alleged in their Petition.

Defendants' reply provides further evidence—in addition to their explicit acknowledgment of the existence of other Fourth Amendment claims, *id.* at 22—that they understood Plaintiffs to be contending that Deputy Felix's conduct prior to the shooting was unreasonable in Fourth Amendment terms. In asking the Court to "scrutinize" Plaintiffs' contention that Deputy Felix's conduct leading up to the shooting was unreasonable, Defendants essentially asked the Court for a legal

determination—based on a disputed factual narrative cast in a light favorable to Defendants—that Ashtian's conduct in fleeing upon having a gun pointed at his head—and not Deputy Felix's conduct in drawing his weapon and pointing it at Ashtian's head because he saw Ashtian "start reaching down"—was reckless. Dkt. 45 at 4 ("[L]egally it is the fleeing driver and not the officer who has engaged in the reckless conduct."). This cuts to the core of Plaintiffs' claims regarding Deputy Felix's conduct: that his own independently unreasonable actions in drawing his weapon and pointing it at Ashtian's head while alongside the vehicle presented its own Fourth Amendment violation *and* "set the stage for what followed[.]" *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 493 (5th Cir. 2001); *see* Dkt. 44 at 19 (of 41).

The distinction between Plaintiffs' Fourth Amendment challenge to Deputy Felix's use of deadly force versus Deputy Felix's unreasonable conduct *prior* to his use of deadly force reflects Supreme Court precedent. In *County of Los Angeles, California v. Mendez*, a unanimous Supreme Court struck down the Ninth Circuit's "provocation rule," which permitted Fourth Amendment excessive force claims to proceed "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation." 137 S. Ct. 1539, 1546 (2017) (quoting *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002)). Rejecting the notion that an independent Fourth Amendment violation can be used to bootstrap an excessive force claim that could not "succeed on [its] own terms[,]" the Court held that Fourth Amendment claims "should be analyzed separately[,]" and that *Graham v.*

Connor, 490 U.S. 386 (1989) was the sole "framework for analyzing excessive force claims[.]" *Id.* at 1547.

Plaintiffs' intent from the beginning has been to advance these separate Fourth Amendment claims—both for excessive force prior to the use of deadly force and for the use of deadly force itself—individually and on their own (admittedly overlapping) merits. Because Defendants' Consolidated Motion for Summary Judgment only presented a frontal attack on the issue of Deputy Felix's use of deadly force, Plaintiffs' response addressed only that question, while drawing continued attention to the unreasonableness of Deputy Felix's pre-deadly force conduct. Candidly, Plaintiffs' counsel should have highlighted for the Court the separation between their two categories of claims and their belief that their excessive force claims remained live notwithstanding Defendants' motion. It was only after the Court entered its Order granting complete summary judgment to Defendants that Plaintiffs realized the effect their lack of clarity had on the issues addressed by the Court in resolving the motion for summary judgment. It is not too late for this Court to take corrective action and get this case on the proper course. And it is in the interests of justice to do so.

c. The Court Should Clarify or Amend its March 31, 2021 Order to Only Reflect a Grant of Partial Summary Judgment.

On March 31, 2021, this Court granted summary judgment to Defendants on the question of deadly force and dismissed the case in its entirety. Dkt. 49 at 12. It

did so without addressing Plaintiffs' pre-deadly force claims. This is unsurprising in hindsight, given the scope of the summary judgment briefing as outlined above, and because Plaintiffs' attempt in that briefing to distinguish their two categories of claims was not as clear as it could have been.

However, as the Court correctly recognized in the first paragraph of its Order, the key dispositive question in the summary judgment briefing was "whether the Court can consider the officer's conduct precipitating the shooting . . . in determining whether the officer used excessive force in violation of the Fourth Amendment." In the context of deadly force claims, the Court's answer was 'no.' But the Court also recognized that "limiting the focus of the judicial inquiry" in this way "stifle[s] a more robust examination of the Fourth Amendment's protections when it comes to encounters between the public and the police." Dkt. 49 at 1, 12.

A "more robust examination" is obtainable by permitting review of Deputy Felix's conduct prior to his use of deadly force. Accordingly, Plaintiffs ask the Court to recognize that Deputy Felix's actions in unreasonably drawing his weapon and pointing it at Ashtian's head independently amounted to a freestanding claim of excessive force. This is precisely in line with what Plaintiffs alleged in their Original Petition and what they attempted to delineate in their summary judgment briefing. *See Mendez*, 137 S. Ct. at 1547-48; *Lytle*, 560 F.3d at 413 (the reasonableness of an officer's conduct may change from moment to moment); *see also Abraham v. Raso*, 183 F.3d

279, 294 (3d Cir. 1999) ("A passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect"); *Amador v. Vasquez*, 961 F.3d 721, 730 (5th Cir. 2020) (same) (quoting *Abraham*).

Plaintiffs respectfully submit that amending the Court's Order to permit live pre-deadly force claims to proceed not only permits a "robust examination" to continue, but also reconciles the Court's Order with controlling Supreme Court and Fifth Circuit precedent that authorizes the examination of Deputy Felix's conduct prior to his use of deadly force as independently violative of the Fourth Amendment. This outcome additionally prevents manifest injustice to Ashtian's family by allowing them to press a claim for relief that was never addressed or disposed of by the Court nor properly challenged by Defendants. *See Pounds v. Katy Indep. Sch. Dist.*, 739 F. Supp. 2d 636, 641 (S.D. Tex. 2010) (granting a Rule 59 motion and amending summary judgment order because plaintiffs' motion "sharpened" the court's understanding of a claim the court previously disposed of in a footnote); *see also Cty. of McHenry v. Ins. Co. of the West*, 438 F.3d 813, 819 (7th Cir. 2006) (when a defendant "does not challenge one of plaintiff's claims and the district court dismisses the unchallenged claim in error, a Rule 59(e) motion may be an appropriate vehicle for correcting that error" if plaintiff minimally made a "'passing reference' to the overlooked claim in his response" (quoting *Lekas v. Briley*, 405 F.3d 602, 615 n.8 (7th Cir. 2005)); *Lone Mountain Processing, Inc. v. Bowser Morner, Inc.*, 94 F. App'x 149, 151-52, 158-59 (4th Cir. Apr. 8, 2004) (reviving contractual indemnification claim "unaddressed" by district court in grant of complete summary judgment

to defendant and subsequently rejected when raised in Rule 59(e) motion); *cf. Danow v. Borack*, 197 F. App'x 853, 856 (11th Cir. Sept. 19, 2006) (sua sponte dismissal of unchallenged claim was reversible error).

d. The Relief Plaintiffs Seek Is Narrow.

Plaintiffs do not ask the Court to disturb any portion of its March 31, 2021 Order, other than to amend the grant of full summary judgment to a grant of partial summary judgment. This motion is limited to the live claims that were never formally challenged or disposed of, and is geared towards the remaining path and sliver of justice for their son. Finally, if the Court disagrees with Plaintiffs' motion, then Plaintiffs minimally ask the Court to enter a separate document setting out the judgment in the Court's March 31, 2020 Order, in accordance with Rule 58(a).

Conclusion

For the foregoing reasons, Plaintiffs respectfully ask the Court to clarify that its March 31 Order only disposed of Plaintiffs' deadly force claim and left their excessive force claim—regarding Officer Felix's conduct prior to his use of deadly force—untouched. Alternatively, Plaintiffs ask this Court, pursuant to Rule 59(e), to amend its March 31 Order so it reflects a grant of only partial summary judgment to Defendants on Plaintiffs' deadly force claim. Finally, if the Court declines to take either of those steps, Plaintiffs request the Court enter a separate document setting out the judgment in the Court's March 31, 2020 Order, in accordance with Rule 58(a).

Appendix A

Date: August 13, 2021

Respectfully Submitted,

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APPENDIX B — REPLY TO PLAINTIFFS' OPPOSED MOTION FOR CLARIFICATION IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED AUGUST 24, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Case No. 4:18-CV-725
The Honorable Alfred H. Bennett
U.S. District Judge

JANICE HUGHES BARNES, *et al.*,

Plaintiffs,

v.

ROBERTO FELIX JR., *et al.*,

Defendants.

REPLY TO PLAINTIFFS' OPPOSED MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, RULE 59(e) MOTION TO AMEND THE COURT'S MARCH 31, 2021 ORDER

Defendants' opposition to Plaintiffs' motion focuses exclusively on their belief that Plaintiffs should not be able to "parse" their claims. Dkt. 67 at 1. But of course Plaintiffs are instructed to do this under Supreme Court and Fifth Circuit precedent. As Plaintiffs underscored in their motion, freestanding Fourth Amendment claims should be analyzed individually and on their own merits.

See Dkt. 66 at 15. That is precisely why the reasonableness of uses of deadly force are evaluated "at the moment of the threat" and without regard to antecedent conduct, *Bazan ex rel. Bazan v. Hidalgo Cty.*, 246 F.3d 481, 493 (5th Cir. 2001), while Fourth Amendment claims regarding other conduct must "succeed on their own terms." *Cty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1547 (2017).

Mason v. Lafayette City-Parish is illustrative. There, the Fifth Circuit concluded that in evaluating an incident where an officer fired seven shots in quick succession at a person, the district court did not "expressly address whether [the officer's] use of his firearm was justified throughout the encounter." *Mason v. Lafayette City-Parish Consol. Gov't*, 806 F.3d 268, 277 (5th Cir. 2015). The Court therefore parsed the conduct into two distinct moments—the first five shots, where the Court concluded conflicting testimony could affect the qualified immunity analysis and thus required further consideration from the district court; and the final two shots, where the Court outright reversed the district court's grant of qualified immunity to the defendant. *Id.* In other words, different moments—though closely linked in time—required distinct analyses under the Fourth Amendment's reasonableness framework. *See also Lytle v. Bexar Cty., Tex.*, 560 F.3d 404, 413–14 (5th Cir. 2009) (reasonableness of a use of force can change from moment to moment); *id.* at 415–16 (use of force to stop a suspect from fleeing in a vehicle is not *per se* reasonable) (collecting cases).

Plaintiffs' theory of liability here is on all fours with the Fifth Circuit's approach in *Mason*. They identified two legally distinct moments—the use of excessive force when

Appendix B

Deputy Felix drew his weapon and pointed it at Ashtian's head; and the use of deadly force when Deputy Felix fired his weapon at Ashtian while holding onto his moving car. Both moments deserve individual analysis. Defendants' contrary interpretation would render egregious conduct leading up to a use of deadly force—no matter how unreasonable—inactionable if the ultimate use of deadly force is *itself* not unreasonable. The Fourth Amendment supports no such "the ends justify the means" theory of reasonableness in use of force cases. Plaintiffs ask the Court to grant their motion.

Date: August 24, 2021

Respectfully Submitted,

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Appendix B

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APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED AUGUST 29, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:18-CV-725

JANICE HUGHES BARNES, *et al.*,

Plaintiffs,

vs.

ROBERTO FELIX JR., *et al.*,

Defendants.

Filed August 29, 2022

ORDER

Before the Court are Defendants' Second Motion for Summary Judgment (the "Motion") (Doc. #135), Plaintiff Janice Hughes Barnes' Response (Doc. #147), Defendants' Reply and Objections to Plaintiff Janice Hughes Barnes' Response (Doc. #150), Plaintiff Janice Hughes Barnes' Response to Defendants Objections (Doc. #153), Plaintiff Tommy Barnes' Response to the Motion (Doc. #155), and Defendants' Reply (Doc. #156). Having reviewed the parties' arguments and applicable law, the Court grants the Motion.

Appendix C

I. Background

On April 28, 2016, Roberto Felix Jr. ("Felix"), a traffic enforcement officer for the Harris County Precinct 5 Constable's Office, initiated a traffic stop of Ashtian Barnes ("Barnes") that ended in Felix fatally shooting Barnes. Doc. #135, Ex. 1 ¶¶ 4, 5. Full details of the events that led to Barnes' death can be found in the Court's March 31, 2021 Order, which granted summary judgment for Felix and Harris County, Texas (collectively "Defendants") on Plaintiffs Janice Hughes Barnes and Tommy Barnes' deadly force claims after finding that Felix's use of deadly force was not objectively unreasonable under established Fifth Circuit precedent that this Court is obligated to apply. Doc. #49. Defendants now move for summary judgment on Plaintiffs' remaining 42 U.S.C. § 1983 excessive force claims that are based on Felix "drawing his firearm and pointing it directly at and inches away from [Barnes'] head," allegedly "without any reasonable suspicion that [Barnes] posed a threat." Doc. #135 and Doc. #66 at 1. Unlike Plaintiffs' since-dismissed deadly force claim that was based on Felix shooting his gun, Plaintiffs' excessive force claim is based on Felix's decision to brandish his gun. *See* Doc. #49 and Doc. #66 at 1. Relevant to this claim are the following facts.

At about 2:40 p.m. on April 28,2016, Felix heard a radio broadcast from the Harris County Toll Road Authority regarding a prohibited vehicle on the Sam Houston Tollway. Doc. #135, Ex. 1 ¶ 4. At about 2:43 p.m., Felix located the vehicle and initiated the traffic stop. *Id.* ¶ 5; *Id.*, Ex. 2 at 00:49. The driver of the vehicle,

Barnes, pulled over to the left shoulder of the Tollway "within seconds" of Felix activating his emergency lights and Felix parked his car behind the vehicle. *Id.*, Ex. 2 at 00:51, Ex. 3 at 30:16-22. At 2:44, Felix exited his vehicle and approached Barnes, who had already rolled down his window. *Id.*, Ex. 2 at 01:30; Doc. #147, Ex. 3 at 34:1-10. When Felix asked for Barnes' driver's license and proof of insurance, Barnes informed him that he did not have his license and that he had rented the vehicle a week earlier in his girlfriend's name. Doc. #135, Ex. 1 ¶ 6. Barnes began reaching around the vehicle and rummaging through papers, which resulted in Felix warning Barnes to stop "digging around" multiple times. *Id.* ¶ 7, Ex. 2 at 02:30.

Barnes then told Felix he might have identifying information in the trunk of the vehicle. *Id.*, Ex. 2 at 02:40. Felix asked Barnes to open his trunk, which Barnes did before he took his keys out of the ignition and turned the vehicle off. *Id.* at 02:45-52. Before heading to the trunk, Felix asked Barnes to exit the vehicle and stepped in between Barnes and his now open driver side door. *Id.* at 02:56. After retrieving his keys, Barnes then turned his vehicle back on. *Id.* at 03:03. One second letter, Felix drew his firearm and pointed it at Barnes. *Id.* at 03:04. As Barnes' vehicle began moving, Felix yelled "don't fucking move" twice. *Id.* at 3:05. Because the excessive force claim is based solely upon Felix brandishing his firearm, the fatal events that followed the brandishing are not relevant to the claim or Motion now before the Court. *See* Doc. #135 and Doc. #66 at 1. Rather, Defendant's Motion argues that Felix is entitled to qualified immunity and because he did not use excessive force, all municipal liability claims against Harris County must fail as well. Doc. #135.

II. Legal Standard

a. Federal Rule of Civil Procedure 56

Summary judgment is proper if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56. When a public official raises "a good faith assertion of qualified immunity," the plaintiff has the burden of showing that the defense is not available. *Joseph on behalf of Est. of Joseph v. Bartlett*, 981 F.3d 319, 329-30 (5th Cir. 2020) (citing *Orr v. Copeland*, 844 F.3d 484, 490 (5th Cir. 2016)). To do so, the plaintiff must first demonstrate "that there is a genuine dispute of material fact and that a jury could return a verdict entitling the plaintiff to relief for a constitutional injury." *Id.* at 330. Once qualified immunity is involved, "the plaintiffs version of those disputed facts must also constitute a violation of clearly established law." *Id.*

As with any motion for summary judgment, the court "must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012) (quoting *Deville v. Marcantel*, 567 F.3d 156, 164 (5th Cir. 2009)). But the court will "assign greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene." *Id.* (quoting *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011)).

b. Section 1983

Section 1983 imposes liability for "deprivation of any rights, privileges, or immunities secured by the

Constitution and laws" caused by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983. The injured party may bring may a § 1983 claim against a state actor in their individual or official capacity or against a governmental entity of the state. *Salazar-Limon v. City of Houston*, 826 F.3d 272, 277 (5th Cir. 2016), *as revised* (June 16, 2016) (citing *Goodman v. Harris Cnty.*, 571 F.3d 388, 395 (5th Cir. 2009)). To prevail on a claim under § 1983, the plaintiff must establish (1) a violation of a right secured by federal law (2) that "was committed by a person acting under color of state law." *Id.* (quoting *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013)).

1. Qualified Immunity Defense

When a public official asserts qualified immunity against a § 1983 claim, the court must ask (1) whether the alleged conduct violated a constitutional right and (2) "whether the right in question was clearly established at the time of the alleged violation" as to put the official "on notice of the unlawfulness of his or her conduct." *Cole v. Carson*, 935 F.3d 444, 451 (5th Cir. 2019), *as revised* (Aug. 21, 2019), *cert. denied sub nom. Hunter v. Cole*, 141 S. Ct. 111, 207 L. Ed. 2d 1051 (2020) (citing *Tolan v. Cotton*, 572 U.S. 650, 655-56 (2014) (per curiam)) (internal quotation marks omitted). "The officer is entitled to qualified immunity if there is no violation, or if the conduct did not violate law clearly established at the time." *Id.* The Court's analysis proceeds under the first prong — whether Felix violated Barnes's constitutional right to be free from excessive force.

III. Analysis

Defendants move for summary judgment on Plaintiffs' Section 1983 excessive force claim, arguing in part that it was objectively reasonable for Felix to draw and point his weapon in light of Barnes' conduct. Any claim "that law enforcement officers have used excessive force deadly or not — in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989). To establish a Fourth Amendment violation based on an officer's use of excessive force, the plaintiff must show "(1) an injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." *Pena v. City of Rio Grande City*, 879 F.3d 613, 619 (5th Cir. 2018). "The second and third elements collapse into a single objective-reasonableness inquiry, guided by the following *Graham* factors: the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (cleaned up). Excessive force claims are necessarily fact-intensive; whether the force used is excessive or unreasonable depends on the facts and circumstances of each particular case." *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (quotation omitted). "The court must adopt the perspective of a reasonable officer on the scene, rather than judge with the 20/20 vision of hindsight." *Bros. v. Zoss*, 837 F.3d 513, 518 (5th Cir. 2016). "[T]he 'reasonableness' inquiry . . .

is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397.

Here, the dash cam video shows the following:

- At 2:45:28, Felix orders Barnes to open the trunk of his vehicle. At this time, Barnes' left blinker is still on, indicating that keys are still in the ignition.
- At 2:45:33, Barnes opens the trunk of the vehicle.
- At 2:45:36, Barnes' left blinker turns off.
- At 2:45:43, Felix asks Barnes to get out of the vehicle.
- At 2:45:44, Barnes' driver side door is opened.
- At 2:45:47, Barnes' left blinker turns back on.
- At 2:45:48, Felix draws his weapon.
- At 2:45:49, Felix points his weapon at Barnes and begins shouting "don't fucking move" as Barnes' vehicle begins moving.

Doc. #135, Ex. 2 at 02:45-03:05.

Appendix C

Plaintiffs have not cited any evidence that would obfuscate the events depicted in the dash cam recording. Rather, Plaintiffs point to Felix's inconsistent testimony regarding what conduct by Barnes prompted Felix to draw his weapon. It is undisputed that before Felix drew his weapon, Barnes had turned off his car and put his keys in the center console. Doc. #147 at 7, Ex. 4 at 74:20-25. As to what caused Felix to draw his weapon, Plaintiffs note that Felix: (1) stated in his 2016 witness statement that he drew his weapon after seeing Barnes reach for his keys, (2) testified to a grand jury that he drew his weapon when he saw Barnes reaching down, (3) testified at his deposition that he drew his weapon as Barnes was putting the key in the ignition, and (4) stated in his affidavit that he drew his weapon when Barnes grabbed his keys and turned on the vehicle. Doc. #147 at 7, 16. Though there are slight differences in this testimony, all four scenarios are consistent with the dash cam video, which shows that four seconds after Felix asked Barnes to exit the vehicle, Barnes was still in the vehicle and the vehicle's blinker turned back on. Doc. #135, Ex. 2 at 02:58-03:03.

Though Plaintiffs argue that "Barnes reaching down after Felix opened his door . . . is just as consistent with him preparing to leave the rental car as refusing Felix's order," they offer no explanation as to why a passenger would need to reach down before exiting a vehicle. *See* Doc. #147 at 15. Conversely, the Fifth Circuit has found that an officer was justified in fatally shooting a driver who "reached down to the seat or floorboard of his car" after the officer ordered the driver to exit the vehicle. *Young v. City of Killeen, Tex.*, 775 F.2d 1349, 1351, 1353 (5th

Cir. 1985). As such, the Court cannot say that pointing a weapon at a driver who "reaches down" for an unknown reason after the officer orders the driver to exit the vehicle is unreasonably excessive. *See id.*

Plaintiffs cite to two Fifth Circuit district court cases where qualified immunity was denied on an excessive force claim based on the brandishing of a firearm. The first is *Manis v. Cohen*, wherein the district court denied summary judgment based on conflicting testimony as to whether an officer pointed his gun at the head of a man lawfully towing the officer's car or pointed the gun at the vehicle itself. CIV.A.3:00CV1955-P, 2001 WL 1524434, at *1-2, *8 (N.D. Tex. Nov. 28, 2001). The second is *Flores v. Rivas*, wherein the district court denied a motion to dismiss an excessive force claim because the complaint alleged that an officer brandished a weapon at numerous children who had committed no crime, gave no reason to believe they had committed a crime, had not done anything to threaten the safety of the officer or general public, and did nothing to resist or evade arrest. No. EP-18-CV-297-KC, 2020 WL 563799, at *7 (W.D. Tex. Jan. 31, 2020). Both of these cases are easily distinguishable.

Here, the dash cam footage shows that Felix did not draw his weapon until Barnes turned his vehicle back on despite Felix's order to exit the vehicle. Doc. #135, Ex. 2 at 02:58-03:03. Regardless of whether Felix drew his weapon before or after the vehicle started moving, Plaintiffs offer no lawful explanation for Barnes turning his car back on after Felix ordered him to exit the vehicle. *See* Doc. #147 at 16; *cf. Manis*, 2001 WL 1524434, at *1

(explaining that the driver the officer pointed his gun at had the right to tow the officer's vehicle). Though Plaintiffs argue that there is only self-serving evidence that Barnes was attempting to flee, Plaintiffs do not offer any non-inimical explanation for Barnes's conduct. *See* Doc. #147 at 16. Moreover, even if such a reason exists, it was not objectively unreasonable for Felix to believe that Barnes was attempting to flee when Barnes turned his car on despite Felix's order to exit the vehicle. *Cf. Flores*, 2020 WL 563799, at *7 (noting that the children the officer pointed his weapon at did nothing to resist or evade arrest). As such, the Court cannot say that Felix pointing his weapon at Barnes when Barnes turned on his vehicle despite Felix's order was unreasonably excessive in violation of the Fourth Amendment.

Accordingly, because Plaintiffs have failed to demonstrate a genuine issue of material fact as to a constitutional injury, their § 1983 claim fails. *See Joseph*, 981 F.3d at 329-30. Barring a constitutional injury, Plaintiffs also cannot assert municipal liability against Harris County. *See Horvath v. City of Leander*, 946 F.3d 787, 793 (5th Cir. 2020), *as revised* (Jan. 13, 2020) (quoting *Rivera v. Hous. Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003)) ("Municipal liability under § 1983 requires proof of (1) a policymaker, (2) an official policy, and (3) a violation of constitutional rights whose moving force is the policy or custom.").

IV. Conclusion

The Court is cognizant of the very narrow question before it: is there a genuine issue of material fact as to whether Felix violated Barnes' Fourth Amendment rights when he pointed his firearm at Barnes? For the reasons explained above, the Court finds that the answer to that question is no. The Court continues to invite the Fifth Circuit to review its very narrow approach to deadly-force claims. *See* Doc. #49 at 12. Nevertheless, the only issue before the Court today was Felix's decision to brandish his gun, not his decision to shoot it. Because Barnes did not comply with Felix's order to exit his vehicle and instead turned his vehicle on, it was not excessively unreasonable for Felix to brandish his weapon in an attempt to stop Barnes from fleeing. Accordingly, the Motion is GRANTED. This case is hereby DISMISSED.

It is so ORDERED.

August 29, 2022
Date

/s/ Alfred H. Bennett
The Honorable Alfred H. Bennett
United States District Judge