No. _____

In the

Supreme Court of the United States

SANTOS ARGUETA; BLANCA GRANADO;
DORA ARGUETA; JELLDY ARGUETA;
THE ESTATE OF LUIS FERNANDO ARGUETA,
Petitioners,

v.

DERRICK S. JARADI,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court held that unarmed, nondangerous suspects fleeing officers can't simply be shot. But the decision didn't address whether an armed suspect running away can be seized through deadly force. The courts of appeals have generally answered "no" and require additional signs of dangerousness, such as being wanted for a violent crime, moving toward officers, fighting, ignoring commands, verbal threats, and the like. In this case, however, a closely divided Fifth Circuit (2-1 and 10-7 denying rehearing en banc) reversed a district court and held that simply fleeing with something that might be a gun justified deadly force – the fatal shooting of an eighteen-year-old in the back, with no warning, as he ran away from officers. The majority also treated as legal rather than factual the question whether Argueta's flight actually posed a grave and immediate threat to officers or bystanders, contrary to this Court's observation in *Graham v. Connor*, 490 U.S. 386 (1989), and the practice of other circuits.

Accordingly, the questions presented are:

1. Whether the Fourth Amendment permits police to shoot a fleeing suspect who might be holding a gun but exhibits no other signs of dangerousness.
2. Whether the level and immediacy of the threat actually facing officers on the scene is a question of fact for jurors or a legal issue assigned to the court.

PARTIES TO THE PROCEEDING

Petitioners are Santos Argueta, Blanca Granado, Dora Argueta, Jelldy Argueta, and the Estate of Luis Fernando Argueta. Petitioners were plaintiffs in the district court and appellees in the Fifth Circuit.

Respondent is Derrick S. Jaradi, who was a defendant in the district court and appellant in the Fifth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioners state that they and Respondent are not nongovernmental corporations.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Argueta v. Jaradi*, No. 22-40781 (5th Circuit) (order denying petition for panel rehearing and rehearing en banc, with dissenting opinions, issued February 29, 2024);
- *Argueta v. Jaradi*, No. 22-40781 (5th Circuit) (opinion reversing judgment of district court, with dissenting opinion, issued November 17, 2023); and
- *Argueta v. City of Galveston*, No. 3:20-cv-367 (S.D. Tex.) (order denying summary judgment, issued November 14, 2022).

There are no other proceedings in state or federal trial or appellate courts or in this Court directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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INTRODUCTION

Sometime around 3:00 a.m. on June 25, 2018, eighteen-year-old Luis Argueta and his girlfriend Mary Ann Luna left a Whataburger restaurant in Galveston, Texas, and stopped at a convenience store on their drive to Luna's house. When they pulled out of the store's parking lot, a police car driven by Galveston Police Department officer Derek Jaradi followed them. Minutes later, Jaradi activated his cruiser's lights and stopped Argueta on a residential street. Argueta wasn't wanted for anything or suspected of any crime. Instead, Jaradi later claimed Argueta ran stop signs and drove with his lights off, though dashcam video directly refutes this.

What happened next is largely disputed, but the facts must be viewed in Petitioners' favor at this stage. In that light, Argueta opened his car door and took off running *away* from Jaradi and his partner toward an empty lot. He may have been holding a pistol in his right hand or perhaps had it in his pocket, but he never raised the gun or turned back toward the officers as if to confront them or shoot. Jaradi didn't see the gun in the darkness and admitted that the way Argueta's right arm was moving – it was partially obscured from the officer's view – could be consistent with just running. But just running was enough – Jaradi shot Argueta in the back without warning, killing him. The whole encounter took five seconds. Even Jaradi's partner said he didn't know why Jaradi shot Argueta. Neither did Argueta. "Why did you shoot me?" he asked officers on the scene before he died.

The district court denied Jaradi's motion for summary judgment. It found that fact disputes exist as to whether Jaradi warned Argueta before firing, whether Jaradi could see that Argueta held a gun, whether Argueta ever raised the gun or made any other threatening motion with it, and whether Argueta's short sprint away from the officers toward an empty lot posed a threat to officers or others. All these disputes are material, the court concluded, to whether Jaradi's use of deadly force was reasonable.

But the Fifth Circuit reversed, 2-1. The panel majority conceded that these factual disputes exist but found them immaterial because Argueta's flight was supposedly like when a suspect makes a "furtive gesture" to draw a gun and shoot at officers. Ignoring the district court's conclusion and Jaradi's own admission that Argueta's arm movement could be consistent with just running, the majority characterized Argueta as "suspiciously concealing his right arm as he fled," which justified Jaradi in shooting. Judge Haynes dissented. The court then denied rehearing en banc, with seven judges voting to rehear the case.

This Court should grant the petition because, to quote Judge Elrod, the panel majority's decision produces a "sweeping expansion" of the leeway officers have to use deadly force under the Fourth Amendment. In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court held that fleeing, nondangerous suspects can't simply be shot, but *Garner* didn't involve someone with a weapon. Nonetheless, other courts of appeals expressly require other indicia of dangerousness from a fleeing or even stationary

suspect who has a gun, such as moving toward officers, brandishing the weapon, being wanted for a violent crime, verbal threats, ignoring commands, or something else. Any other warning sign will do, actually. But just having or holding a gun – or in this case, moving in a way that might connote holding an object that could be a gun – isn't enough. The panel majority's decision therefore "foments inconsistency in the case law," as Judge Douglas put it, and creates a circuit split on the vitally important question of when people actually or seemingly carrying guns can expect to face deadly force.

The majority's decision also splits with sister circuits by treating as a legal question the level and immediacy of a suspect's on-the-scene threat to officers and bystanders. Other circuits view this as factual, which matters because, under *Johnson v. Jones*, 515 U.S. 304 (1995), courts of appeal lack jurisdiction to review a district court's factual determinations underlying the denial of summary judgment in qualified immunity cases.

These issues are worthy of review because one circuit's decisions commonly influence Fourth Amendment law nationally, since all courts of appeals look to a "robust consensus" of out-of-circuit decisions to clearly establish the law absent binding precedent. And "furtive gesture" incidents are routine; excessive force cases very commonly turn on circumstances similar to those here. Nor should confusion persist about the scope of appellate review when qualified immunity is rejected before trial.

Moreover, the majority's decision is directly relevant to and cuts against the growing trend of

openly carrying firearms for personal protection, confirmed as one feature of Americans' Second Amendment rights only two terms ago in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 32 (2022). The majority called Argueta "armed and dangerous" simply because he was found holding a gun, but to automatically equate the two renders firearm possession inherently suspect – a notion *Bruen* should have permanently laid to rest. This area of law at the intersection of the Fourth and Second Amendments is rapidly evolving at a time when police increasingly encounter people legally and openly carrying guns. The Court should address whether just running with one can justify being shot in the back.

Alternately, this Court should summarily reverse the decision below because it directly flouts *Tolan v. Cotton*, 572 U.S. 650 (2014), as well as *Johnson*, as the dissenting judges below point out. *Tolan* instructs lower courts to construe the facts on summary judgment in the non-movant's favor in excessive force cases no less than others. But the majority's decision treats the key facts of this incident – particularly those bearing on Argueta's physical positioning and direction – in Jaradi's favor, overriding the district court. Under *Johnson*, this factual reexamination exceeded the court's appellate jurisdiction, especially given the majority's acknowledgement that the video evidence doesn't contradict either side's account. This Court has often summarily decided petitions in qualified immunity cases arising from uses of deadly force, and should do so here. Petitioners' case should be decided by a jury.

OPINIONS BELOW

The Fifth Circuit's order denying rehearing and dissenting opinions are reported at 94 F.4th 475 (App. C). The Fifth Circuit's opinions are reported at 86 F.4th 1084. (App. A). The district court's opinion is unpublished. (App. B).

JURISDICTION

The Fifth Circuit issued its decision on November 17, 2023 and denied a petition for panel rehearing or rehearing en banc on February 29, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution and 42 U.S.C. § 1983 are reproduced at App. D.

STATEMENT OF THE CASE

A. Factual Background

Nearly every important fact concerning Jaradi's fatal shooting of Argueta is disputed. Their encounter occurred at approximately 3:00 a.m. on June 25, 2018. Jaradi testified that he noticed a man in the car Argueta was driving talking to a woman he thought was a prostitute in the parking lot of a Galveston convenience store. App. 2, 23. Mary Ann Luna, Argueta's companion in the car, testified that there was no such woman and no conversation occurred. App. 2. She explained that Argueta simply entered the store to buy something and returned to their car. App. 2. Jaradi asserted that Argueta then "sped off 'at a really high rate of speed.'" App. 2. Luna testified

that they left the parking lot "super slowly." App. 2, 23.

Jaradi testified that Argueta violated traffic laws – driving with his lights off and failing to observe stop signs – as he and his partner followed Argueta's car in an alley and back onto a residential street. App. 23. Videotape tells a different story, as the district court noted: "The video from the officers' dash camera indicates that Argueta at least stopped momentarily at all stop signs and drove at a moderate speed. Argueta's lights were on at least while his vehicle was in motion." App. 24. After Jaradi activated his police lights, Argueta pulled over within two blocks. App. 24.

Argueta's car was parked on a street with the curb to its right (passenger) side. Jaradi stopped his police car behind and slightly to the left of Jaradi's. The dashcam video shows that Argueta got out of his car and ran to his left, across the street and toward a vacant lot on the other side. App. 3, 33. Because the officers were initially to Argueta's left and then behind him as he ran, his right arm was not fully visible to them. App. 3, 32.

What happened during the crucial moments before the shooting is also contested. Jaradi testified that Argueta ran "towards my location" while, as the district court noted:

> The video footage indicates that Argueta was running *away* from the officers and towards an abandoned lot. The autopsy report also indicates that Argueta was running away rather than towards the officers: both shots struck Argueta in the

> back. A reasonable jury could find that Argueta was retreating from the officers when he was shot.

App. 33-34 (emphasis added). Jaradi testified that he shouted at Argueta to "get his hand out of his pocket," but Luna didn't remember this, two witnesses recalled hearing something else, and the videotape has no audio. App. 36. Thus, the district court concluded: "Given the very rapid pace of events, the inconsistency of testimony regarding commands, and the lack of audio in the recording, a reasonable jury could find that Argueta did not receive a warning before Jaradi shot him." App. 36.

In addition, the parties dispute whether Argueta showed a gun. Jaradi testified that he saw a gun in Argueta's right hand and that Argueta made an upward motion. Yet the video doesn't bear this out. Instead, it casts doubt on "whether Jaradi could see Argueta's weapon. The street was very dark. It happened very quickly… Jaradi faced Argueta's left side, and Argueta held a gun in his right hand. Therefore, a reasonable jury could find that Jaradi did not know or reasonably suspect Argueta was armed when he fired." App. 32-33.

Whether Argueta did anything that might suggest he intended to use a gun is also disputed. The dashcam video simply shows Argueta running away with his right arm down and obscured, while video from Jaradi's body camera shows Jaradi well behind Argueta when he fired. Jaradi acknowledged that he never saw Argueta point a gun at him, that "Argueta's motion was not consistent with how he would raise his arm to shoot a gun and that Argueta could have just

been swinging his arm while running. Therefore, a reasonable jury could find that Argueta did not point his weapon at the officers." App. 35. Asked in his deposition whether the physical movement of Argueta's right arm would "have been consistent with running," Jaradi answered: "It could have been." 5th Cir. ROA 658. In any case, he also testified that it was seeing a gun that put him in fear of harm, not how Argueta's right arm moved. 5th Cir. ROA 659.

The autopsy determined that Argueta was shot twice in the back. App. 25. As Jaradi and Larson approached him after the shooting, Argueta was lying on his back and holding a gun in his right hand, which he let go of. App. 24. The officers searched and handcuffed Argueta and called for medical assistance, but Argueta died shortly after. App. 25. Jaradi's partner testified that he didn't know why Jaradi shot Argueta. App. 46.

Construing these disputed facts in the non-movants' – Petitioners' – favor, then, as is required at this stage, *see Tolan*, 572 U.S. at 656-57, the summary judgment evidence establishes:

- Argueta was not wanted for any crime, let alone a violent one;
- Argueta was obeying traffic laws and thus was stopped without reasonable suspicion;
- Argueta left his car, ran away from the officers toward an abandoned lot, and was ahead of them when Jaradi shot him in the back;

- The officers didn't warn Argueta before Jaradi fired;
- Jaradi didn't see a gun in Argueta's hand before he shot, because no weapon was visible; and
- Argueta didn't point a gun at Jaradi, turn back toward the officers, or otherwise make any sudden motion indicating he intended to use a gun. The movement of his right arm was consistent with just running.

B. Proceedings Below

1. Argueta's parents, sisters and estate sued Jaradi and the City of Galveston alleging that Jaradi used excessive force in violation of the Fourth Amendment and 42 U.S.C. § 1983. Following discovery, Jaradi moved for summary judgment on grounds of qualified immunity. App. 25-26.

The district court denied Jaradi's motion because it found four disputes of material fact precluding summary judgment: "(1) whether Jaradi could see that Argueta held a weapon; (2) whether Argueta's flight posed any risk to the officers or the public; (3) whether Argueta raised the gun or otherwise made a threatening motion towards the officers; and (4) whether either officer warned Argueta before firing." App. 31-32.

On the first factual question, the court held that the darkness at the scene; the quick succession of events, which transpired in only five seconds; the fact that officers were initially on Argueta's left, unable to

see his right arm; and the absence of a gun on videotape could all lead a jury to find that Jaradi didn't see Argueta with a gun. App. 32-33. "It should go without saying that it is unreasonable for an officer to 'seize an unarmed, nondangerous suspect by shooting him dead,'" the court wrote, quoting *Poole v. City of Shreveport*, 13 F.4th 420, 425 (5th Cir. 2021) (quoting *Garner*, 471 U.S. at 11). App. 32.

On the second factual issue, the district court concluded that the video shows Argueta retreating from officers by running past and away from them toward an abandoned lot. App. 33-34. The autopsy confirmed this, establishing that Argueta was shot in the back. App. 33. Accordingly, the district court determined that "it is not clear whether Argueta's flight posed any risk to the officers or the public." App. 33.

On the third factual question, the district court found "it is not clear that Argueta threatened the officers with his weapon" because Jaradi testified the gun was never pointed at him, Argueta's motion wasn't consistent with raising his arm to shoot, and Argueta could just have been moving his arm as one normally would while running away, as Jaradi admitted. App. 34.

Finally, the district court made note of the factual question concerning "what, if any, warnings the officers gave Argueta" before the shooting, determining that a jury could find none occurred. App. 35-36. "The Fifth Circuit frequently cites the failure to give or heed warnings as a factor in determining whether deadly force was justified," the court added. App. 35.

2. The Fifth Circuit reversed in a 2-1 decision. The panel majority acknowledged that review was "limited to examining the *materiality* (*i.e.*, legal significance) of factual disputes the district court determined were genuine, not their genuineness (*i.e.*, existence)," while also noting "an exception" to this rule permitting review of genuineness "where, as here, video evidence is available." App. 5 (emphasis in original). The panel also observed, however, that the video evidence in this case does not "blatantly contradict" the parties' accounts and "serve[s] only to confirm the existence of such fact disputes." App. 8 n. 3 (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). The majority then considered the four factual disputes identified by the district court.

Taking the first, the majority agreed with the district court that "a reasonable jury could conclude that Argueta's weapon was not visible to Jaradi before or at the moment he used deadly force." App. 9. The same went for the third question: "the video does not clearly reflect that Argueta showed the gun during his flight." App. 9. The majority also concurred that the video doesn't show Argueta making any motion toward the officers. App. 9-10. On the fourth factual issue, the majority deemed the video inconclusive due to the absence of audio and therefore deferred to the district court's assessment that a jury could find no warning was given. App.10. Lastly, the majority treated the second factual dispute – whether Argueta's flight threatened the officers or the public – as a "question of law left to the court" rather than a fact issue for jurors. App. 10, 15.

The panel majority then considered the materiality of these factual disputes. Describing the case as one where officers "confronted an individual whose actions suggested that he or she possessed, and might in that moment access, a firearm," though none was actually visible, the court likened the facts here to its "'furtive gesture' line of cases." App. 11, 12-15. These are cases where suspects made sudden movements suggesting they were about to draw a gun and fire on officers. App. 11-15. In this instance, the majority found, Argueta ran with a gun and supposedly needed only a "slight turn to begin firing on the officers from close range." App. 14. He kept "his right arm purposefully and unnaturally pressed along his right side and out of sight as he ran away," the majority asserted, which it viewed as tantamount to concealment that could reasonably lead an officer to believe Argueta was reaching for a weapon. App. 14. Whether Jaradi could see Argueta actually holding a gun was immaterial, the majority reasoned, because by running in a way that could be interpreted as holding something Argueta supposedly committed "a furtive gesture akin to reaching for a waistband." App. 15.

For essentially the same reason, the third factual dispute – whether Argueta touched the gun or made a threatening gesture with it – was also deemed immaterial:

> Even if Argueta never touched his gun and his gun remained completely concealed from the moment he exited the vehicle until after he was shot, that fact is immaterial: Argueta did not need to

> raise (or even show) his gun or make a threatening motion towards the officers because, by suspiciously concealing his right arm as he fled in a way that objectively suggested he was armed and dangerous, he engaged in a furtive gesture justifying deadly force.

App. 16-17. Additionally, the last dispute about whether Jaradi warned Argueta was held immaterial because no caselaw had clearly established that officers can't shoot suspects who make furtive gestures without first issuing a warning. App. 17-18.

Judge Haynes dissented. She noted that cases where suspects' "furtive gestures" justified deadly force include other indicia of dangerousness not present here, such as verbal threats, physical resistance, disobeying orders, and so on. App. 18-20. She pointed out the materiality of facts ignored by the majority, including whether Jaradi had reasonable suspicion to stop Argueta, whether Argueta fled toward an empty lot, and the lack of a warning. App. 20-21. If jurors view the evidence in Petitioners' favor, she concluded, "Officer Jaradi violated Argueta's clearly established right to be free from unreasonable seizure." App. 20-21.

Petitioners sought panel rehearing and rehearing en banc, but the Court denied their petition, 10-7. App. 41. Judge Elrod dissented from the denial, joined by Judges Stewart, Graves, Higginson, and Douglas. App. 41. Like Judge Haynes, Judge Elrod pointed to the other factors supporting reasonable perceptions of danger in the Fifth Circuit's "furtive gesture" cases besides simply how the suspect moved

his hands or arms. App. 41-42. She noted, too, the panel majority's disregard for this Court's precedent "by failing to draw all inferences in favor of Argueta, the non-moving party," citing *Tolan*. App. 42.

Judge Douglas also wrote a dissenting opinion which Judges Graves and Higginson joined in full and Judge Elrod joined in part. App. 43 and n. *. She began by highlighting the decision's failure to follow *Tolan*, which required the majority to construe the facts in Petitioners' favor. App. 45-47. Next and "[p]erhaps most egregiously," Judge Douglas wrote, the panel erred in analogizing Argueta's simple act of running to a furtive gesture reaching for a gun. App. 47-48. Like Judge Haynes, Judge Douglas also pointed to the materiality of the officers' lack of reasonable suspicion to stop Argueta and the dispute over the warning. App. 48-50. Finally, Judge Douglas observed that the panel majority failed to defer to the district court's finding of a factual disagreement about whether Argueta posed a threat to officers by reconceiving that question as one of law. App. 50-51. In actuality, key disputed facts prevent any "legal" holding of sufficient endangerment, and all judges agree that the video fails to conclusively resolve the matter. App. 51-52.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Decision Creates a Circuit Split Over a Question Left Open in *Tennessee v. Garner*: Whether Police Can Shoot a Suspect Who Might Be Holding a Gun as He Flees But Exhibits No Other Signs of Dangerousness

The panel majority's opinion sweepingly expands the classic "furtive gesture" justification for deadly force, as Judge Elrod recognized. App. 43. By extending that concept to include simply running away in a manner that suggests holding something in one's hand, with no other indicia of dangerousness, the decision also creates a significant circuit split.

1. This Court held in *Tennessee v. Garner*, 471 U.S. 1 (1985), that shooting a fleeing, unthreatening suspect violates the Fourth Amendment. In that case, an officer shot and killed a burglar he believed to be unarmed after the suspect ran across a backyard, ignored a command to halt, and tried to escape by climbing a fence. *Id.* at 3-4. "A police officer may not seize *an unarmed*, nondangerous suspect by shooting him dead," the Court held. *Id.* at 11 (emphasis added). On the other hand, where the suspect "poses a threat of serious physical harm" to police or bystanders, deadly force is constitutional. *Id.* "Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Id.* at 11-12. The

Court acknowledged that "the armed burglar would present a different situation." *Id.* at 21.

While this Court has repeatedly cautioned that *Garner* enunciates a general principle usually unable, by itself, to adequately notify officers that their conduct in given situations is unconstitutional, its basic rule that only dangerous fleeing suspects may be targeted with deadly force remains good law. *See, e.g. Kisela v. Hughes*, 584 U.S. 100, 103-05 (2018). All circuit courts continue to cite and apply this fundamental teaching, including the Fifth, as the district court noted. App. 32 (quoting *Poole* quoting *Garner*); *Cole v. Carson*, 935 F.3d 444, 453 (5th Cir. 2019) (en banc), *cert. denied*, 141 S. Ct. 111 (2020). But *Garner's* repeated references to the burglar's lack of a weapon arguably left open whether police could shoot a fleeing suspect merely because he has a gun, or, put differently, whether "armed" is always and necessarily "armed and dangerous" under the Fourth Amendment. *See, e.g., Wilson v. Bastrop*, 26 F.4th 709, 714 (5th Cir. 2022) (noting *Garner's* reservation of question about fleeing, armed suspect).

2. Despite this ambiguity in *Garner*, courts of appeals generally hold that a suspect's holding a gun or having one readily at hand during an encounter with officers isn't, alone, sufficiently dangerous to justify deadly force – both while the suspect is fleeing and in stationary confrontations. For example, in *Malone v. Hinman*, the Eighth Circuit asked whether it was reasonable for officers to shoot an armed suspect after reports that he'd taken part in a fight in a crowd where the gun discharged. 847 F.3d 949, 951 (8th Cir.), *cert. denied*, 585 U.S. 870 (2017). An officer

saw the man fleeing toward another policeman and bystanders while holding the gun, and shot the suspect. *Id.* The court found the shooting reasonable to safeguard the officer and others in the armed suspect's path – but not to protect the shooting officer: "Viewing the facts in the light most favorable to [the suspect], he did not pose a threat of serious physical harm to Officer Hinman because he was running away from Officer Hinman." *Id.* at 954. *Cole Estate of Richards v. Hutchins*, 959 F.3d 1127 (8th Cir. 2020) is similar. In *Cole*, the court disapproved shooting a suspect holding a rifle who'd previously fought with his uncle but was retreating from his uncle's home and not moving toward officers. *Id.* at 1131. "It was clearly established [in 2016] that a person does not pose an immediate threat of serious physical harm to another when, although the person is in possession of a gun, he does not point it at another or wield it in an otherwise menacing fashion." *Id.* at 1134.

Likewise, in *Littlejohn v. Myers,* an officer sought qualified immunity for shooting a man suspected of armed robbery who was running away down an alley but presumed to be armed. 684 F.App'x 563, 568 (6th Cir. 2017). Although there were questions about whether the suspect truly had a gun, the Sixth Circuit assumed he did but still denied immunity for firing after the suspect "began to run," observing: "During his flight, Littlejohn did not reach to his side or make any comparable gesture that may have given a reasonable officer the impression that Littlejohn posed a serious threat. And the facts indicate that no one beside [the officer] was in the alley – removing any threat to an innocent bystander." *Id.* at 568. "[C]ourts have noted that the mere fact

that a suspect is armed is, by itself, not sufficient to warrant the application of deadly force." *Id.* The Sixth Circuit reached the same result after officers shot a retreating drug suspect holding a gun in his backyard because jurors "could conclude that his gun was always pointed at the ground, never directly at an officer, and that [the suspect] did not indicate, verbally or physically, an intention to harm the officers." *Naselroad v. Mabry*, 763 F.App'x 452, 461 (6th Cir. 2019).

Obviously, when a suspect faces or confronts an officer holding a gun or with one in reach, there is greater danger to the officer than when a suspect is out ahead and running away from him, with his back turned. Yet even in this more perilous, face-to-face scenario, courts of appeals repeatedly deny summary judgment because merely possessing or showing a gun isn't enough – there must be more to reasonably telegraph some threat.[1] As the Fourth Circuit observed, an officer "does not possess the unfettered

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[1] *See, e.g., Cook v. Bell*, __ F.App'x __, 2024 WL 889041 at * 4 (11th Cir. 2024) (domestic disturbance suspect who held gun but didn't point it at or advance toward officers); *Heeter v. Bowers*, 99 F.4th 900, 913-14 (6th Cir. 2024) (suicidal man with gun on table or in pocket, though still within reach); *Partidge v. City of Benton, AR*, 929 F.3d 562, 565-66 (8th Cir. 2019) (suicidal teen facing officers but who never pointed gun at them); *Turk v. Bergman*, 685 F.App'x 785, 787-88 (11th Cir. 2017) (suspect with gun on car seat); *Weinmann v. McClone*, 787 F.3d 444, 451 (7th Cir. 2015) (person threatening suicide with gun on lap); *Cooper v. Sheehan*, 735 F.3d 153, 159 (4th Cir. 2013) (man holding shotgun with muzzle pointing down on threshold of home who made no sudden moves or threats). *Bennett ex rel. Estate of Bennett v. Murphy*, 120 F.App'x 914, 917-18 (4th Cir. 2005) (man in stand-off with officers who held shotgun pointed up or down but not at officers).

authority to shoot a member of the public simply because that person is carrying a weapon. Instead, deadly force may only be used by a police officer when, based on a reasonable assessment, the officer or another person is *threatened* with the weapon." *Cooper v. Sheehan*, 735 F.3d 153, 159 (4th Cir. 2013) (emphasis in original). Or the Sixth Circuit: "an officer does not have probable cause to use deadly force against a suspect just because he is armed. Something else about the situation must have reasonably indicated to Officer Bowers not only that Mr. Heeter was armed, but that he planned to shoot the officers or otherwise posed a serious threat to their safety." *Heeter v. Bowers*, 99 F.4th 900, 913-14 (6th Cir. 2024). The Eleventh Circuit put it even more plainly:

> [T]he mere presence of a gun or other weapon is not enough to warrant the exercise of deadly force and shield an officer from suit. Where the weapon was, what type of weapon it was, and what was happening with the weapon are all inquiries crucial to the reasonableness determination.

Perez v. Suszczynski, 809 F.3d 1213, 1220 (11th Cir. 2016).

Conversely, when shootings are held reasonable, there are other portents of danger beyond simply holding something that could be a gun, let alone holding one while running away toward an abandoned lot. Such circumstances include moving

toward the officer,[2] lying in wait to ambush officers,[3] making a motion suggesting pulling a concealed gun,[4] brandishing a gun or pointing it at officers,[5] turning back seemingly to shoot,[6] being wanted for a serious crime,[7] having a known history of violence,[8] previously

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[2] *Craven v. Novelli*, __ F.App'x __, 2024 WL 1952590 at ** 7-8 (4th Cir. 2024); *Liggins v. Cohen*, 971 F.3d 798, 800-801 (8th Cir. 2020); *Thomas v. City of Columbus, OH*, 854 F.3d 361, 366 (6th Cir. 2017).

[3] *Jean-Baptiste v. Gutierrez*, 627 F.3d 816, 821 (11th Cir. 2010).

[4] *N.S. by and through Lee v. Kansas City Bd. of Police Comm.*, 35 F.4th 1111, 1113 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 2422 (2023); *Estate of Valverde by and through Padilla v. Dodge*, 967 F.3d 1049, 1062-64 (10th Cir. 2020); *Davis v. Edwards*, 779 F.App'x 691, 695-96 (6th Cir. 2019); *Escalera-Salgado v. United States*, 911 F.3d 38, 40-41 (1st Cir. 2018); *Murphy v. Demings*, 626 F.App'x 836, 840 (11th Cir. 2015); *Oakes v. Anderson*, 494 F.App'x 35, 38 (11th Cir. 2012); *Lamont v. New Jersey*, 637 F.3d 177, 183 (3d Cir. 2011).

[5] *Banuchi v. Homestead*, __ F.App'x __, 2024 WL 2014424 at ** 4-5 (11th Cir. 2024); *Arnold v. City of Olathe, KS*, 35 F.4th 778, 792 (10th Cir. 2022); *Thorkelson v. Marceno*, 849 F.App'x 879, 881 (11th Cir. 2021).

[6] *Salaam v. Wolfe*, 806 F.App'x 90, 93 (3d Cir. 2020); *Conley-Eaglebear v. Miller*, 2017 WL 7116973 at * 2 (7th Cir. 2017); *Savage v. City of Memphis*, 620 F.App'x 425, 426-28 (6th Cir. 2015).

[7] *Estate of Valverde*, 967 F.3d at 1062-64; *Salaam*, 806 F.App'x at 93; *Escalera-Salgado*, 911 F.3d at 40-41; *Murphy*, 626 F.App'x at 840; *Jean-Baptiste*, 627 F.3d at 821; *Savage*, 620 F.App'x at 426-28.

[8] *Davis*, 779 F.App'x at 695-96.

shooting at or fighting with officers,[9] disobeying commands or not responding to officers,[10] known or obvious mental illness or erratic or intoxicated behavior,[11] verbal threats,[12] and fear for bystanders.[13]

3. Consequently, the majority's holding that police can shoot someone from behind who is simply running away and possibly holding a gun or something else in his right hand is novel and sharply at odds with the law of other circuits, which rightly require additional omens of danger. There were no such signs here. As the dissenting judges note, Argueta wasn't wanted for any offense, and dashcam video shows he obeyed traffic rules. App. 20, 24, 48-49. Construing the facts in Petitioners' favor, Jaradi did not issue a command or warning. App. 10, 35-36; *see Garner*, 471 U.S. at 11-12 (deadly force allowed "if, where feasible, some warning has been given"). Most important, jurors could find "Argueta was running *away* from the officers and towards an abandoned lot," based on the

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[9] *Salaam*, 806 F.App'x at 93; *Wilkerson v. City of Akron, OH*, 906 F.3d 477, 482-83 (6th Cir. 2018); *Estate of Turnbow v. Ogden City*, 386 F.App'x 749, 753 (10th Cir. 2010).

[10] *Craven*, 2024 WL 1952590 at ** 7-8; *Arnold*, 35 F.4th at 792; *Davis*, 779 F.App'x at 695-96; *Escalera-Salgado*, 911 F.3d at 40-41; *Oakes*, 494 F.App'x at 38; *Lamont*, 637 F.3d at 1183; *Savage*, 620 F.App'x at 426-28.

[11] *Davis*, 779 F.App'x at 695-96; *Oakes*, 494 F.App'x at 38; *Beckman v. Hamilton*, 732 F.App'x 737, 742 (11th Cir. 2018).

[12] *Arnold*, 35 F.4th at 792; *Beckman*, 732 F.App'x at 742.

[13] *Jean-Baptiste*, 627 F.3d at 821.

autopsy and video. App. 33-34 (emphasis added). The majority likewise acknowledged that no evidence suggests Argueta "made any motion in the direction of the officers." App. 9-10. The reason why is simple: Argueta was in front of them, running away, when Jaradi shot him in the back. What's more, all agree that the facts construed in Petitioners' favor show that Jaradi could not and did not see Argueta with a weapon. App. 9, 32-33.

What's left? Only redefining running as a threatening "gesture," like pulling a gun, which courts universally find to be dangerous. Thus the panel majority held that "by suspiciously concealing his right arm as he fled in a way that objectively suggested he was armed and dangerous, he engaged in a furtive gesture justifying deadly force." App. 17. But "suspiciously concealing his right arm as he fled" is another way to describe seeing someone run from the left side, when the right arm isn't fully visible. And Jaradi specifically testified that how Argueta moved his right arm as he fled could have been consistent with merely running. App. 35. He also explained that it wasn't the movement of Argueta's arm that made him fearful anyway – it was seeing a gun, and the majority agrees that whether any gun was visible is disputed. As Judge Douglas put it, any "gesture" on Argueta's part was "akin to running, as Argueta argues, Jaradi *admits*, and the district court found." App. 47 (emphasis in original). Judge Elrod wrote that "all Argueta did was 'clutch his right arm to his side as he fled'" and correctly observed that equating running in that manner with suddenly reaching for a gun vastly enlarges and distorts the furtive gesture justification. App. 42-43.

In the final analysis, then, the only material difference between this case and *Garner* is that Argueta was found with a gun *after* he was shot. The panel called him "apparently unarmed," as distinct from "visibly unarmed," adding that "no reasonable jury could conclude that Argueta was visibly unarmed – because he was armed." App. 15. Whatever the value in differentiating between being "visibly" and "apparently" unarmed – in both cases, the officer never sees a gun – finding a weapon after the fact can't justify Jaradi's earlier shooting or influence the assessment of dangerousness, as Judge Douglas observed. App. 49. "The qualified immunity analysis is limited to the facts that were knowable to the defendant officers at the time they engaged in the conduct in question. Facts an officer learns after the incident ends – whether those facts would support granting immunity or denying it – are not relevant." *Hernandez v. Mesa*, 582 U.S. 548, 554 (2017) (cleaned up).

The majority's decision that a suspect can be shot for simply running in a way that suggests he may be holding something that could be a gun, with no other reason why an officer might feel threatened, puts the Fifth Circuit in clear conflict with others and should be reviewed.

II. The Fifth Circuit Also Erred and Created a Circuit Split By Treating the Level and Immediacy of Any Threat Posed By Argueta's Flight as a Legal Question

The panel majority's decision hinges on treating the second genuine dispute of material fact identified

by the district court – "whether Argueta's flight posed any risk to the officers or the public" – as a legal conclusion rather than a genuinely disputed question of material fact. App. 10, 15. This error led the court to exceed its jurisdiction and creates a second circuit split.

1. In determining that "it is not clear whether Argueta's flight posed any risk to the officers or the public," the district court cited the video showing Argueta "running away from the officers and towards an abandoned lot" as well as the autopsy establishing that he was shot in the back. App. 33-34. This question – where was Argueta headed, and would his flight bring him into dangerous proximity with officers or bystanders? – is plainly factual and within the ken of lay jurors. Yet the panel majority classified it as legal, calling it "a question of law left to the court." App. 15.

This was an error that determined the outcome of the appeal and clashes with law from other circuits. It is true that whether conduct violates the Fourth Amendment is a legal question. *Scott*, 550 U.S. at 381 n. 8. A violation, in turn, depends on the "objective *legal* reasonableness" of the officer's conduct, *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (quotation omitted, emphasis added), which is also necessarily a judgment for the court. *Scott*, 550 U.S. at 381 n. 8. But objective reasonableness "turns on the 'facts and circumstances of each particular case.'" *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021) (*quoting Graham v. Connor*, 490 U.S. 386, 396 (1989)). More specifically, *Graham* gives a nonexclusive list of these "facts and circumstances" that includes "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." 490 U.S. at 396 (emphasis added). That is, this Court in *Graham* defined the level and immediacy of the threat posed by the suspect as factual – one of several circumstantial components that go into the objective reasonableness mix – not the ultimate legal question itself.

Far from being academic, this distinction between fact and law determined the outcome below. The district court's decision as to "the existence or nonexistence of a triable issue of fact" is not reviewable on interlocutory appeal. *See Johnson v. Jones*, 515 U.S. 304, 316 (1995). As a result, when district courts have identified the suspect's level of dangerousness to be a disputed fact question, other circuits have deemed the ruling to be unreviewable.

In *Rush v. City of Philadelphia*, for instance, the Third Circuit declined to entertain the appellant-officer's contentions because it held its jurisdiction over his "interlocutory appeal [to be] limited to resolving legal questions, not factual questions… Yet, the bulk of Officer Nicoletti's arguments relate to a factual question: whether the District Court correctly concluded that a reasonable jury could find that Mr. Dennis posed no threat to surrounding officers or public safety." 78 F.4th 610, 615 (3d Cir. 2023). The First Circuit put it similarly: "the district court determined that the evidence could support a jury finding 'that Plaintiff did not pose an immediate threat to Defendant Drouin and the others who were present.' That determination… is not a ruling that we

can review on this interlocutory appeal." *Begin v. Drouin*, 908 F.3d 829, 834 (1st Cir. 2018) (citation omitted). Or consider the Eleventh Circuit's recent explanation for affirming a denial of summary judgment: "The dispute is whether English – in fact – posed a danger when the shooting occurred. In other words, the only issues in this appeal concern what happened at the scene. Those are questions of fact, not law." *English v. City of Gainesville*, 75 F.4th 1151, 1156 (11th Cir. 2023). *See also*, *e.g., Smith v. Finkley*, 10 F.4th 725, 740 (7th Cir. 2021) ("a factual dispute exists as to whether, from the perspective of a reasonable officer on the scene, Smith appeared to pose an immediate threat to their safety or the safety of others"); *Estate of Aguirre v. Cty. of Riverside*, 29 F.4th 624, 626 (9th Cir.) ("level of threat [suspect] posed immediately before he died" is "quintessential question of fact"), *cert. denied*, 143 S. Ct. 426 (2022).

The panel majority's decision stands in opposition to this precedent from other courts. The district court's determination that the parties genuinely dispute "whether Argueta's flight posed any risk to the officers or the public" was not properly reviewable on appeal. And it is undeniably material to objective reasonableness; *Graham* specifically lists it as a relevant factual circumstance. *See* 490 U.S. at 396. In fact, whether Argueta was running away from and ahead of the officers when Jaradi shot him is critical to the outcome of this case. The panel majority's decision depends on its own factual finding that Argueta "needed only a slight turn to begin firing on the officers at close range," App. 14, but that supposition is belied by the evidence scrutinized by the district court: video footage, which the panel

acknowledges doesn't contradict Petitioners' proof, and the autopsy report. The autopsy report, in particular, refutes the majority's factual conclusion; how could Argueta have been shot in the back if he was positioned to the officers' side and therefore needed only a "slight turn" to his left to fire on them? Regardless, close questions of fact like this are beyond the court of appeals' jurisdiction on an appeal from denial of qualified immunity – they should rest with jurors. *See Johnson*, *supra*.

Because the Fifth Circuit breaks new ground in holding otherwise, setting the court apart from its sister circuits, this Court should review the case.

III. The Fifth Circuit's Decision Merits Review Because it Will Confuse Qualified Immunity Law Nationally and Jeopardize Those Who Choose to Carry Firearms Openly

The circuit splits created by the panel majority's decision are significant and merit this Court's consideration.

In qualified immunity cases, what happens in New Orleans doesn't stay in New Orleans (or Boston, Atlanta or Denver). All courts of appeals look to a "robust consensus" of other authority to clearly establish the law when there is no binding precedent. *See District of Columbia v. Wesby,* 583 U.S. 48, 63 (2018); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011). And all circuits routinely deal with "furtive gesture" cases; indeed, it is "[o]ne of the most commonly heard justifications for suspicion" voiced by officers. Seth Stoughton, Kyle McLean, Justin Nix,

Geoffrey Alpert, *Policing Suspicion: Qualified Immunity and "Clearly Established" Standards of Proof*, 112 J. CRIM. L. AND CRIMINOLOGY 37, 63 (Winter 2022). Defining dangerousness down, then, as the Fifth Circuit has here, will affect Fourth Amendment jurisprudence throughout the system. What Judge Douglas said of the decision's impact within the Fifth Circuit – that it "foments inconsistency in the caselaw," App. 52-53 – is no less true nationwide.

The circuit split created by the majority's decision to treat the level and immediacy of the danger posed by the suspect as legal rather than factual is also worth addressing. As Judge Douglas correctly recognized, this holding "drastically changes the law with respect to excessive force claims." App. 50. It reflects the confusion inherent in distinguishing between the subsidiary factual question of how threatening circumstances on the scene actually were, and the larger but analytically distinct question whether officers' actions were legally justified. The legal question is highly fact-bound, *Rivas-Villegas*, *Graham*, *supra*, and the panel majority's error illustrates the difficulty of separating the two, though doing so is outcome-determinative. The Fifth Circuit's approach will inevitably be mimicked by other courts and threatens to upset the balance between trial and appellate courts when officers appeal denials of qualified immunity, as they typically do. There should be no uncertainty about the contours of appellate jurisdiction in this all-too-common class of cases. The Court should therefore clarify this important and recurring feature of qualified immunity litigation and

resolve the split between lower courts engendered by the majority's approach.

Perhaps most important, the majority's decision is out of step with changing legal and social treatment of firearms in a way that deserves this Court's attention. More than half of Americans now live in households with guns, and the figure has rapidly grown – rising ten percent in ten years.[14] Guns are ubiquitous; there are nearly 400 million of them in the United States, "or enough for every man, woman and child to own one and still have 67 million guns left over."[15] Two terms ago, this Court eliminated any doubt about a citizen's constitutional "right to 'bear' arms *in public* for self-defense." *Bruen*, 597 U.S. at 32 (emphasis added). As Justice Alito recognized, many people "reasonably believe that unless they can brandish or, if necessary, use a handgun in the case of attack, they may be murdered, raped, or suffer some other serious injury." *Id.* at 74 (Alito, J., concurring). All but four states and the District of Columbia therefore allow open carry of firearms, with half the states allowing open carry

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[14] Alexandra Marquez, *Poll: Gun Ownership Reaches Record High With American Electorate*, NBC NEWS MEET THE PRESS BLOG (Nov. 21, 2023), https://www.nbcnews.com/meet-the-press/meetthepressblog/poll-gun-ownership-reaches-record-high-american-electorate-rcna126037.

[15] Christopher Ingraham, *There are More Guns than People in the United States, According to a New Study of Global Firearm Ownership*, WASH. POST, June 19, 2018, https://www.washingtonpost.com/news/wonk/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership/.

without a permit.[16] Texas has allowed permitless open carry since 2021; at the time of Argueta's shooting, Texas allowed open carry with a permit.[17]

Treating running with a gun as dangerous to the point of justifying immediate deadly force hardly jibes with the widespread, legal practice of open carry. Gun possession was once more heavily regulated, so "[l]awful carry, concealed or open, was exceedingly rare. To see a gun was to see danger." Brandon Del Pozo, Barry Friedman, *Policing in the Age of the Gun*, 98 N.Y.U. L. REV. 1831, 1833 (Dec. 2023). But widespread gun ownership today means that "the law of guns is on a collision course with the law of policing, the growing ripples of which are being felt all over the country." *Id*. at 1835-36.

Courts are beginning to recognize this. Only weeks ago, a district court refused to immunize officers who defended a shooting on the ground that the suspect carried a gun in his back waistband and refused to surrender it, though he never reached for it.

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[16] Katharina Buchholz, *Which States Allow The Permitless Carry Of Guns?*, FORBES, April 6, 2023, Forbes.com/sites/katharinabuchholz/2023/04/06/which-states-allow-the-permitless-carry-of-guns-infographic/?sh=501b548a4e85.

[17] *See Open Carry*, OFFICIAL WEBSITE OF THE CITY OF AUSTIN, https://www.austintexas.gov/department/opencarry#:~:text=Beginning%20September%201%2C%202021%2C%20HB1927,have%20a%20license%20to%20carry (last visited May 21, 2024).

Torgerson v. Starr, __ F. Supp. 3d __, 2024 WL 1340389 at * 14 (D.N.M. Mar. 29, 2024). To say officers could shoot the plaintiff, "who was not suspected of having committed a crime and did not pose an immediate threat to officers, because he possessed a non-concealed firearm on his person, would run afoul of the principles set forth in the Supreme Court's second amendment jurisprudence," the court recognized, citing *Bruen*. *Id*. at n. 11. Other courts note that openly carrying guns can no longer be viewed as inherently suspicious under the Fourth Amendment, justifying detention or arrest. *See, e.g., Northrup v. City of Toledo Police Dept*., 785 F.3d 1128, 1131-32 (6th Cir. 2015); *United States v. Homer*, __ F. Supp. 3d __, 2024 WL 417103 (E.D.N.Y. Feb. 5, 2024); Karen Zraick, *Does Having a Gun Make a Person Suspicious? Courts Aren't Sure Now*, N.Y. TIMES, March 16, 2024, https://www.nytimes.com/2024/03/16/nyregion/bruen-guns-robert-homer.html.

Of course, citizens have no right to threaten *use* of a gun unless in lawful self-defense, or to disobey police commands regarding their guns. But the facts here, when construed in Petitioners' favor, don't involve either circumstance. Underlying the panel majority's error is its automatic equation of "armed" with "armed and dangerous." Argueta supposedly held his arm "in a way that objectively suggested he was armed *and dangerous*," not just armed, the panel held. App. 17 (emphasis added) But even if Argueta's gait or arm position fairly signified running with a gun – a dubious proposition Jaradi's own testimony contradicts – running with a gun is just that: running with a gun. Guns are legal objects millions of

Americans carry for protection, sometimes in high crime areas and sometimes openly. Absent something else – the kinds of circumstances forecasting violence towards officers or others evident in the caselaw described above – it isn't inherently or necessarily threatening. *See, e.g.*, *United States v. Robinson*, 846 F.3d 694, 707-14 (4th Cir.) (en banc) (Harris, J., dissenting) (being armed not equivalent to "armed and dangerous" under current firearms law), *cert. denied*, 583 U.S. 943 (2017); *Northrup*, 785 F.3d at 1131-32 (Sutton, J.) (officer needed proof suspect "may have been 'armed *and dangerous*.' Yet all he ever saw was that [suspect] was armed – and legally so. To allow stops in this setting would effectively eliminate Fourth Amendment protections for lawfully armed persons" (cleaned up, emphasis in original)).

Police have always had to deal with people who behave in ways that are unpredictable or noncompliant, but many more are now openly armed. Likewise, some people have always run from police when they shouldn't – but their fear of being detained or their spur of the moment impulse to bolt, even if wrong, shouldn't trigger deadly force just for running. "[A]s public possession and display of firearms become lawful under more circumstances, Fourth Amendment jurisprudence and police practices must adapt." *United States v. Williams*, 731 F.3d 678, 691 (7th Cir. 2013) (Hamilton, J., concurring). This is a rapidly evolving area of law. *See* Del Pozo and Friedman, *Policing*, *supra*. The Court should grant the petition to consider the increasingly uncertain interplay between the Fourth and Second Amendments raised by the majority's opinion.

IV. Alternatively, the Court Should Summarily Reverse the Decision Below as Directly Contrary to this Court's Precedent

This Court has consistently overseen the operation of qualified immunity through summary reversal of erroneous lower court decisions. *See White v. Pauly*, 580 U.S. 73, 79 (2017) ("In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases;" collecting cases) *see also Rivas-Villegas, supra*; *City of Tahlequah, OK v. Bond*, 595 U.S. 9 (2021). Not surprisingly, these decisions go both ways, since the doctrine carefully balances the "need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231; *compare, e.g.*, *White and cases cited therein* (reversing denials of qualified immunity) *with Tolan* (reversing grant of qualified immunity).

Summary reversal is appropriate in this case for the same reason: because the panel majority's decision unambiguously flouts this Court's precedents, especially *Tolan* and *Johnson*. In *Tolan*, the Court reversed the Fifth Circuit because it failed to construe the facts of the encounter in Tolan's (the non-movant's) favor but instead engaged in "weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence." 572 U.S. at 660. Just as here, the key factual disputes concerned the surrounding circumstances dictating whether officers would reasonably feel imperiled, such as what they

could see at the scene, whether Tolan's mother acted to heighten tensions, and whether Tolan verbally threatened the officer. *Id.* at 657-59. Above all, and exactly like this case, the parties disputed Tolan's physical positioning – where he was and how he was moving during the brief encounter, particularly right before he was shot – and whether those movements would reasonably have led the officer to conclude an attack was imminent. *Id.* at 659.

The same kinds of factual disputes exist here, all bearing on Argueta's supposed dangerousness. They include whether the minor (in fact, nonexistent) traffic offense for which Argueta was ostensibly stopped should have led officers to regard him as nondangerous; whether Jaradi warned Argueta and the feasibility of giving a warning; and whether a gun was visible. Most critically, the case turns on factual disputes about Argueta's and Jaradi's positioning in the moments before and when Jaradi fired, and what Jaradi would or could have seen in those moments. The panel majority cut to the chase and made two factual findings on that issue: (i) that Argueta was running in such a way as to "suspiciously conceal[] his right arm as he fled in a way that objectively suggested he was armed and dangerous;" and (ii) that his positioning was such that he "need[ed] only a slight turn to begin firing on the officers at close range." App. 17, 14. But the district court found that both of these factual points were disputed. A reasonable jury could find that the way Argueta's arm was moving was simply produced by normal running, as even Jaradi conceded. App. 35. And Argueta was running away from Jaradi when Jaradi fired, causing him to be shot in the back because he was well ahead, disproving the

notion that he needed only a slight leftward turn to shoot at the officers. App. 33. Far from "blatantly contradicting" Petitioners' evidence, *Scott*, 550 U.S. at 380, the video and other record evidence confirms the existence of a genuine factual dispute, as the panel itself noted. App. 8 n. 3. The six judges of the Fifth Circuit who dissented from denial of rehearing en banc are therefore correct that, to quote Judge Elrod, "the panel majority contravenes… [precedent] of the Supreme Court by failing to draw all inferences in favor of Argueta, the non-moving party." App. 42 (citing *Tolan*); *accord* App. 45 (Douglas, J.) ("the opinion contravenes *Tolan*").

The majority's decision also conflicts with *Johnson*. As discussed in Point II, appellate review in qualified immunity cases is limited to confirming that the district court identified genuine issues of material fact. There can be no doubt here that it did. Rather than stop there, the panel majority plunged ahead and found its own facts about Argueta's dangerousness though nothing in the record indisputably controverted the district court's findings. This further warrants summary reversal.

The Court should summarily reverse the decision below, as it has in other qualified immunity cases, and return this case to its proper arbiters: jurors in Galveston, Texas.

CONCLUSION

The petition for a writ of certiorari should be granted.

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