No. 23-1257

In the Supreme Court of the United States

SANTOS ARGUETA, ET AL., PETITIONERS,

v.

DERRICK S. JARADI

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

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE SUPPORTING PETITIONERS

JOHN W. WHITEHEAD
WILLIAM E. WINTERS
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888

ANAND AGNESHWAR
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000

PAIGE H. SHARPE
Counsel of Record
KIRBY MAYO
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
paige.sharpe@arnoldporter.com

LAUREN S. WULFE
ARNOLD & PORTER
KAYE SCHOLER LLP
777 South Figueroa St.
44th Floor
Los Angeles, CA 90017
(213) 243-4000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued Page(s)

Other Authorities

INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae is The Rutherford Institute. The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms.

As part of its mission, The Rutherford Institute resists the erosion of fundamental civil liberties that many would ignore in a desire to increase the power and authority of law enforcement. The Rutherford Institute believes that according ever-increasing power and authority to law enforcement only creates a false sense of security while allowing unconscionable intrusions upon the lives of private citizens.[2]

The Rutherford Institute is interested in this case because it is committed to ensuring the continued vitality of the Fourth Amendment. Review of the Fifth Circuit's decision is necessary to address the majority's endorsement of a principle that would erode Fourth Amendment protections substantially and treat nearly any movement of a fleeing suspect, or even non-movement of an arm or hand as in this case, as a "furtive gesture" justifying lethal force, as well as the majority's misapplication of the summary judgment standard—

---

[1] No counsel for a party authored this brief in whole or in part. No person other than *Amicus Curiae* or its counsel made a monetary contribution to its preparation or submission. The parties were given timely notice of *Amicus Curiae*'s intent to file this brief.

[2] The views in this brief are those of the *Amicius Curiae* only and not necessarily of any of the institutions with which they are or have been affiliated.

construing disputed facts in favor of the moving party officer.

INTRODUCTION AND SUMMARY OF ARGUMENT

Assume a teenager is not wanted for a crime and is stopped without reasonable suspicion for minor traffic violations at 3 a.m. in the morning. During the stop, the teen exits his car and runs away from an officer toward an empty parking lot. No weapon is visible, and he is apparently unarmed. While he runs, he does not turn toward the officer and does not make any threatening motion. While he flees, his right arm is pressed to his right side, a posture that the officer later acknowledges is possibly consistent with simply running. The officer does not warn the teen to stop or warn that he might shoot. Instead, the officer fatally shoots the teen twice in the back, just five seconds after the teen exited the car. Was deadly force objectively reasonable to protect the life of the shooting officer or others?

The trial court held that the above allegations—which are in dispute in this case and thus must be construed in Luis Argueta's favor—bear on the answer to that question and thus preclude summary judgement for Officer Derrick Jaradi.

A Fifth Circuit majority reversed, concluding that Jaradi's use of force was objectively reasonable. It did so by (1) adopting a bright-line rule that erodes the Fourth Amendment's protection against unreasonable seizure by deadly force, and (2) misapplying the summary judgment standard to support its untenable rule.

First, this Court has long provided that the objective reasonableness analysis "requires careful attention to the facts and circumstances of each particular case." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Indeed, "the test of reasonableness under the Fourth Amendment is not

capable of precise definition or mechanical application." *Id.* The Fifth Circuit disregards that directive. Apparently seeking an easy-to-apply legal test—which is not permitted in these cases, *see Scott v. Harris*, 550 U.S. 372, 383 (2007)—the Fifth Circuit held that deadly force is objectively reasonable where a suspect runs away with his right arm by his right side and out of view from the officer. According to the Fifth Circuit, the lack of visibility of a person's arm and hand is so inherently dangerous it "amounted to a furtive gesture," Pet. App. 16, and all other indicia of dangerousness (or the lack thereof) are of no moment. But, even if intentional, keeping one's arm and hand from view while running does not "objectively suggest[]" a person is "armed and dangerous." *Id.* at 17. Courts therefore have never before held that such a movement could be interpreted out of context and in isolation to justify lethal force. Yet the Fifth Circuit now stands alone, splitting from this Court and its sister circuits on a vital constitutional question. This case therefore meets the Court's conventional criteria for certiorari.

Second, and just as troubling, the Fifth Circuit undergirds its erroneous rule with a clear misapprehension of the summary judgment standard, resolving disputed facts in Jaradi's favor. For instance, the majority articulated its own view that Argueta's right arm was "unnatural[ ]," "purposeful[ ]," and "suspicious [ ]," "suggest[ing] he was armed and dangerous." *Id.* at 14, 17. The majority reached this conclusion despite Jaradi's testimony that Argueta's movement might have been simply consistent with how Argueta ran. *Id.* at 35. The majority also interpreted Argueta's gesture as inherently dangerous because Argueta was "armed with a high-capacity semiautomatic weapon," even though evidence indicated that at the time of the shooting, Jaradi did not know Argueta was armed. *Id.* at 14. And for all

other factual disputes that would otherwise indicate Argueta posed no immediate threat, the majority resolved or "set aside" those facts in Jaradi's favor. *Id.* at 8. By construing these facts in favor of the party moving for summary judgment, the majority opinion squarely contravenes *Tolan v. Cotton*, 572 U.S. 650 (2014). This Court should grant the petition for a writ of certiorari to correct the Fifth Circuit's clear misapprehension of the summary judgment standard.

ARGUMENT

I. THE FIFTH CIRCUIT MAJORITY ERODES CRITICAL FOURTH AMENDMENT PROTECTIONS

Deciding whether an officer's use of deadly force was objectively reasonable "requires careful attention to the facts and circumstances of each particular case," *Graham*, 490 U.S. at 396, and does not lend itself to "easy-to-apply legal test[s]." *Scott*, 550 U.S. at 383. But here, the majority expands its "furtive gesture" doctrine to apply—and thus justify deadly force—whenever a person "conceal[s] his right arm as he fle[es] the police," Pet. App. 16, despite no other indicia of dangerousness.

There are, of course, many non-dangerous reasons a person may run with his arm by his side out of view from the officer that have nothing to do with a weapon. The person may have an injured arm. The person may have no arm so the sleeve of his shirt is hanging. The person may be holding onto other items that are not a weapon. *See* Merrick J. Bobb & Police Assessment Resource Center, The Los Angeles County Sheriff's Department 30th Semiannual Report 63 (2011) (listing alternative reasons provided by suspects for hand movements including pulling up pants and keeping identifying objects like cell phones and wallets from falling). Or as Judge Douglas noted in dissenting from denial of rehearing en banc, an arm to one's side may simply be "akin to

running." Pet. App. 47. That ambiguity is precisely why a gesture that arguably suggests a suspect is concealing something, standing alone, often does not provide officers with probable cause to conduct a search or seizure, let alone probable cause to shoot and kill. *See, e.g.*, *Palma v. Johns*, 27 F.4th 419, 434 (6th Cir. 2022) ("The fact that [the officer] could not see [the suspect's] hands would not lead a reasonable officer to believe he was in imminent danger."); *A. K. H by & through Landeros v. City of Tustin*, 837 F.3d 1005, 1009, 1013 (9th Cir. 2016) (suspect concealing his right hand in his pocket, along with "something in there that appeared to be heavy," did not justify officer's use of deadly force); *Withers v. City of Cleveland*, 640 Fed. App'x 416, 420–22 (6th Cir. 2016) (material dispute of fact as to whether suspect's "sudden" hand movement was threatening or consistent with commands); *see also* Pet. App. 18–19 (Haynes, J., dissenting) (analysis should consider whether other factors led the officer to suspect that the victim would resort to violence). Other indicia of dangerousness must be present.

The same is true even when an officer reasonably believes that a suspect possesses or has access to a weapon (which is disputed here). *See Tennessee v. Garner*, 471 U.S. 1, 9 (1985) (even where "probable cause [exists] to seize a suspect, an officer may not always do so by killing him"). The critical question in deadly force cases is *not* whether someone might *access* a weapon; rather, the question is whether the facts and circumstances indicate the suspect might *use* that weapon, *i.e.*, whether the suspect "poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 3. Accordingly, other courts of appeals commonly hold that a suspect's mere possession or access to a gun is not alone sufficient justification for deadly force. *See, e.g.,* Pet. 16–19 (collecting cases); *Knibbs v.*

Momphard, 30 F.4th 200, 219 (4th Cir. 2022) (explaining that the focus must be on movements that "objectively indicate that [the suspect] plans to *use* [the firearm] to harm the officers or a third party") (emphasis added); *Campbell v. Cheatham Cnty. Sheriff's Dep't*, 47 F.4th 468, 480 (6th Cir. 2022) ("[M]ere possession of a weapon is not sufficient to justify the use of deadly force. . . . Rather, there must be additional indicia that the safety of the officer or others is at risk.") (citations omitted); *Estate of Biegert by Biegert v. Molitor*, 968 F.3d 693, 700 (7th Cir. 2020) ("Having a weapon is not the same thing as threatening to use a weapon."); *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013) ("If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat *might* create an immediate threat.") (emphasis added). Only through careful examination of the totality of circumstances can a court determine whether a suspect's access to a weapon indeed poses an immediate threat to an officer.

The Fifth Circuit's rule end-runs this required analysis and Fourth Amendment protections. As Judge Elrod cautioned in her dissent from denial of rehearing en banc, the majority's rule amounts to a "sweeping expansion of [the] furtive-gesture caselaw." Pet. App. 43. No longer does the reasonableness of an officer's force turn on the totality of circumstances. Now, according to the Fifth Circuit, the analysis may rise and fall entirely on whether a suspect conceals his arm while he flees because that action alone suggests the person is "armed and dangerous." *Id.* at 17. That bright-line rule is untenable and promises unjust results.

And if left unchecked, the Fifth Circuit's decision opens the door for other courts of appeals to adopt "easy-to-apply" tests that erode the totality of circumstances analysis. Despite the often-times appealing nature of

"easy-to-apply" legal tests, "in the end we must still slosh our way through the factbound morass of 'reasonableness.'" *Scott*, 550 U.S. at 383. The Fourth Amendment's protection against unreasonable seizures requires as much.

II. THE FIFTH CIRCUIT MAJORITY ERRONEOUSLY RESOLVED FACTUAL DISPUTES IN FAVOR OF THE MOVANT

The trial court identified four material disputed questions of fact, each bearing on the reasonableness of Jaradi's use of force: (1) whether Jaradi could see that Argueta was armed; (2) whether Argueta's flight posed any risk to the officers or the public; (3) whether Argueta raised a gun or otherwise made a threatening motion towards the officers; and (4) whether either officer warned Argueta before firing. Pet. App. 32.

Each of these disputed questions is fundamental to the objective reasonableness analysis. *See Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021) (quoting *Graham*, 490 U.S. at 396) (objective reasonableness "depends on 'the facts and circumstances of each particular case'"). Specifically, each bears on the fact-based inquiry of "whether the suspect poses an immediate threat to the safety of the officers or others." *See Graham*, 490 U.S. at 396; Pet. 25–26 (collecting cases holding degree of threat posed is a factual issue); *Reavis, Estate of Coale v. Frost*, 967 F.3d 978, 994 (10th Cir. 2020) ("[T]he immediacy of the threat to the officer is a disputed fact that a reasonable jury could resolve against the officer."); *S.R. Nehad v. Browder*, 929 F.3d 1125, 1142–43 (9th Cir. 2019) (holding genuine dispute as to "whether [the suspect] posed a significant, if any, danger to anyone" precluded summary judgment in officer's favor).

The Fifth Circuit acknowledged that each of the above facts is disputed. Pet. App. 8–10. But rather than allow the fact-finder to resolve those disputes by weighing

the contradictory testimony and evidence, the majority did so itself. Critically, the majority resolved and "set aside" genuine issues of disputed fact in favor of Jaradi, violating the axiom that in deciding a motion for summary judgment, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan*, 572 U.S. at 651 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). The majority violated this axiom in three ways.

First, regarding Argueta's gesture—running with his right arm by his right side—the majority relied on its own view that Argueta did so "purposefully," "unnaturally," and "suspiciously." Pet. App. 14, 17. The majority concedes that "Argueta's right arm and hand were not visible in the dashcam footage," *id.* at 3, but it appears to have drawn its conclusion from Jaradi's testimony that Argueta was "trying to conceal his right arm and hand from the officers," *id.* at 9. In his deposition, however, Jaradi also testified that Argueta's movement was not consistent with how he would raise his arm to shoot a gun, and that Argueta's "gesture" "could have been" consistent with simply running. *See id.* at 35; *see also* Transcript of the Testimony of Officer Derrick S. Jaradi at 53:11–24, *Argueta v. Galveston*, No. 3:20-cv-00367 (S.D. Tex. Feb. 23, 2022), ECF No. 59-1. Moreover, Jaradi's own partner, Officer Matthew Larson, who also observed Argueta running away, testified that he did not know why Jaradi opened fire. Pet. App. 46; *see also* Transcript of the Testimony of Matthew Larson at 39:7–20, *Argueta v. Galveston*, No. 3:20-cv-00367 (S.D. Tex. Feb. 23, 2022), ECF No. 59-3 (answering that he "really do[esn't] specifically know" why Jaradi shot Argueta). Thus, in concluding Argueta's gesture was "unnatural[ ]," "purposeful[ ]," and "suspicious[ ]," Pet. App. 14, 17, the majority improperly credited one person's version of the

events (the movant on summary judgment) over another's (the non-movant).

Second, the majority concluded that Argueta's "furtive gesture" justified deadly force because "Argueta was armed with a high-capacity semiautomatic weapon, which he kept out of view as he fled, and needed only a slight turn to begin firing on the officers from close range." *Id.* at 14. But here, too, the court did not credit directly contradictory evidence. On the officers' dashboard and body cameras, Argueta's right arm and right hand are not visible, nor can a gun be seen. *See id.* at 24. Moreover, the street was "very dark" and the entire encounter lasted just five seconds. *Id.* at 32. Though Argueta was later found to be in possession of a gun, only the facts known to Jaradi at the time of the shooting—not facts he learned after the incident ended—are relevant. *Graham*, 490 U.S. at 396 (explaining "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"). Here, too, the majority disregarded contradictory evidence and credited only one version of the facts—that of the movant on summary judgment.

Third, the majority "set aside" key factual evidence that weighs against the immediacy of threat. For example, common sense, as well as the law, tells us that a suspect is less of a threat when he is turning or moving away from the officer. *See Garner*, 471 U.S. at 4, 21 (holding it was unreasonable to kill a burglary suspect by shooting him in the back of the head while he ran away on foot); *see also id.* at 11 ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."); *Clawson v. Rigney*, 777 F. App'x 381, 385 (11th Cir. 2019) (affirming denial of summary judgment in part because of factual

dispute about the direction of suspect's flight); Pet. App. 20 (Haynes, J., dissenting) ("whether Argueta fled away from officers towards an empty lot" undermined the objective reasonableness of Jaradi's force). Yet the majority "set aside" the relevance of the direction Argueta was running, Pet. App. 8, choosing instead to emphasize that Argueta "needed only a slight turn to begin firing on the officers from close range," *id.* at 14.

The majority also rejected the import of the disputed fact of whether Jaradi warned Argueta that he might shoot. *See id.* at 17–18; *id.* at 20 (Haynes, J., dissenting) ("The warning, or lack thereof, is also equally material to the objective reasonableness calculus."). This Court has counseled that "where feasible," an officer's warning, or failure to do so, factors into the objective reasonableness of the officer's use of force. *See Garner*, 471 U.S. at 11–12; *see also Cole Estate of Richards v. Hutchins*, 959 F.3d 1127, 1133 (8th Cir. 2020) (explaining that while failure to warn does not "automatically" render use of deadly force unreasonable, "it does 'exacerbate the circumstances' and militates against finding use of deadly force objectively reasonable") (quoting *Ludwig v. Anderson*, 54 F.3d 465, 474 (8th Cir. 1995)). By outright ignoring the relevance that an officer's failure to warn may have on the objective reasonableness of force, the majority engaged in a form of "weighing the evidence" that this Court has rejected at the summary judgment stage. *Tolan*, 572 U.S. at 659–60.

Considered together, the Fifth Circuit's articulation of the "facts" of this case lead to the inescapable conclusion that the majority credited the evidence of the movant, Jaradi, and failed to acknowledge pertinent evidence offered by Argueta. While "this Court is not equipped to correct every perceived error coming from the lower federal courts," *Boag v. MacDougall*, 454 U.S. 364, 366 (1982) (O'Connor, J., concurring), the Court should do so here "because the opinion below reflects a

clear misapprehension of summary judgment standards in light of [this Court's] precedents." *Tolan*, 572 U.S. at 659. *Cf. Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (summarily reversing decision in a Fourth Amendment excessive force case "to correct a clear misapprehension of the qualified immunity standard"); *see also Fla. Dep't of Health and Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam) (summarily reversing an opinion that could not "be reconciled with the principles set out" in this Court's sovereign immunity jurisprudence).

CONCLUSION

The petition for a writ of certiorari should be granted to review the Fifth Circuit's significant erosion of the Fourth Amendment's protection against excessive force and its fundamental misapplication of the summary judgment standard.

Respectfully submitted.

JOHN W. WHITEHEAD
WILLIAM E. WINTERS
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888

ANAND AGNESHWAR
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000

PAIGE H. SHARPE
Counsel of Record
KIRBY MAYO
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
paige.sharpe@arnoldporter.com

LAUREN S. WULFE
ARNOLD & PORTER
KAYE SCHOLER LLP
777 South Figueroa St.
44th Floor
Los Angeles, CA 90017
(213) 243-4000

JULY 2024