IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 20-10055

SELINA MARIE RAMIREZ, individually and as Independent Administrator of, and on behalf of, the Estate of Gabriel Eduardo Olivas and the heirs-at-law of Gabriel Eduardo Olivas, and as parent, guardian, and next friend of and for female minor SMO; GABRIEL ANTHONY OLIVAS, individually,

Plaintiffs-Appellees,

v.

JEREMIAS GUADARRAMA; EBONY N. JEFFERSON,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Texas, No. 4:20-CV-7

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF TEXAS, AMERICANS FOR PROSPERITY FOUNDATION, CATO INSTITUTE, AND DISABILITY RIGHTS TEXAS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES' PETITION FOR *EN BANC* REVIEW

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CERTIFICATE OF INTERESTED PERSONS

In addition to the persons and entities previously identified by the parties, undersigned counsel certifies that the following persons and entities have an interest in the outcome of this case:

A. American Civil Liberties Union Foundation;

B. Somil Trivedi, Carl Takei, Susan Mizner, and West Resendes, counsel for the American Civil Liberties Union Foundation;

C. American Civil Liberties Union Foundation of Texas;

D. Adriana Piñon, Brian Klosterboer, and Savannah Kumar, counsel for the American Civil Liberties Union Foundation of Texas;

E. Americans for Prosperity Foundation;

F. Cynthia Fleming Crawford, counsel for Americans for Prosperity Foundation;

G. Cato Institute;

H. Clark M. Neily III and Jay R. Schweikert, counsel for the Cato Institute;

I. Disability Rights Texas;

J. Beth L. Mitchell, counsel for Disability Rights Texas.

SO CERTIFIED, this 15th day of March, 2021.

/s/ Jay R. Schweikert

Counsel for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union Foundation is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil-rights laws. The ACLU of Texas is one of its statewide affiliates and ensures these principles extend to all Texans.

The Americans for Prosperity Foundation is a nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government.

Disability Rights Texas is an agency authorized to provide legal representation and related advocacy services and to investigate abuse and neglect of individuals with disabilities in a variety of settings to ensure such persons' constitutional rights to liberty and equality are upheld.

Amici's interest arises from qualified immunity's deleterious effect on people's ability to vindicate their constitutional rights and the subsequent erosion of accountability for public officials that the doctrine encourages.

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No one other than *amici* and their members made monetary contributions to its preparation or submission.

SUMMARY OF THE ARGUMENT

In July 2017, Defendant Arlington police officers Ebony Jefferson and Jeremias Guadarrama responded to a 911 call placed by a son worried about his father, Gabriel Eduardo Olivas, who was threatening to commit suicide by lighting himself on fire. When Jefferson and Guadarrama found Olivas in a bedroom, they smelled gasoline and could see Olivas holding a gas can. Jefferson and Guadarrama knew from their training that tasers could ignite gasoline, but they drew and aimed their tasers anyway. Another officer on the scene, Caleb Elliott, warned them "[i]f we Tase him, he is going to light on fire." Despite this explicit warning, Jefferson and Guadarrama tased Olivas, setting him on fire and killing him, thereby causing the very injury they had been called to prevent.

Viewing the facts in the light most favorable to the Plaintiffs, the Defendants' decision to use deadly force in this scenario was an obvious violation of Olivas's Fourth Amendment rights. Even when physical force is justified, police "must also select the appropriate '*degree* of force,'" and must take "measured and ascending action" in response to the threat posed by a suspect. *Joseph v. Bartlett*, 981 F.3d 319, 332-33 (5th Cir. 2020) (quoting *Deville v. Marcantel*, 567 F.3d 156, 167-68 (5th Cir. 2009)). No reasonable officer in the Defendants' position could have thought that setting Olivas on fire was an appropriate, measured response to the possibility that Olivas *might* set himself on fire.

Despite this obvious violation of Olivas's constitutional rights, the panel found that Defendants were entitled to qualified immunity. That decision was not simply an egregious misapplication of Supreme Court and Fifth Circuit precedent on excessive

force—it is also reinforces a dangerous but widespread misunderstanding of how the doctrine of qualified immunity should apply in cases of obvious constitutional violations.

In its recent decision in *Taylor v. Riojas*, 141 S. Ct. 52 (2020), the Supreme Court reaffirmed the basic principle that qualified immunity turns on whether a defendant had "fair warning" that their conduct was unlawful, and that in cases with "particularly egregious facts," it is unnecessary for plaintiffs to identify a prior case involving the same factual scenario. *Id.* at 54. While *Taylor* did not formally revise black-letter law, the decision was a much-needed corrective to the increasingly common practice of lower courts requiring a prior case exactly on point before denying immunity. The Court should grant the petition for *en banc* review to ensure that lower courts properly account for the Supreme Court's recent clarification on how to apply qualified immunity.

ARGUMENT

I. RECENT SUPREME COURT DECISIONS HAVE REAFFIRMED AND CLARIFIED THAT COURTS SHOULD NOT GRANT QUALIFIED IMMUNITY SIMPLY BECAUSE THERE IS NO PRIOR CASE INVOLVING THE SAME FACTS.

Under the doctrine of qualified immunity, public officials can only be held liable under 42 U.S.C. § 1983 if they "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). However, the Supreme Court has not always spoken with clarity on how lower courts should decide whether a right was "clearly established." It has instructed lower courts "not to define clearly established law at a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), and stated that "clearly established law must be

'particularized' to the facts of the case," *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). But the Court has also emphasized that its case law "does not require a case directly on point for a right to be clearly established," *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *White*, 137 S. Ct. at 551), and that "'general statements of the law are not inherently incapable of giving fair and clear warning.'" *White*, 137 S. Ct. at 552 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)). While "earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

Despite these conflicting statements of principle, for decades the Court *did* send a clear message to lower courts through the outcomes in actual qualified immunity cases. From 1982 through the 2018-2019 term, the Court issued 32 substantive qualified immunity decisions,[2] and only twice did it find that defendants' conduct violated clearly established law.[3] Moreover, in all but two of the 27 cases explicitly granting immunity, the Supreme Court *reversed* the lower court's denial of immunity below.[4] The takeaway was clear: lower courts should ratchet up the difficulty of demonstrating "clearly established law."

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[2] *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82, 88-90 (2018) (identifying all qualified immunity decisions between 1982 and the end of 2017); *see also Sause v. Bauer*, 138 S. Ct. 2561 (2018); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018).

[3] *See Groh v. Ramirez*, 540 U.S. 551 (2004); *Hope v. Pelzer*, 536 U.S. 730 (2002).

[4] *Lane v. Franks*, 134 S. Ct. 2369 (2014), and *Wilson v. Layne*, 526 U.S. 603 (1999), were the two cases affirming grants of immunity.

Lower courts received this message. A recent Reuters investigation examined hundreds of circuit court opinions from 2005 to 2019 on appeals of cases in which police officers accused of excessive force raised a qualified immunity defense. The report revealed that the rate of qualified immunity grants has been steadily rising over time—in the 2005-2007 period, courts granted immunity in only 44% of cases, but in the 2017-2019 period, courts granted immunity in 57% of cases.[5]

But in 2020, the Supreme Court began to change course. In light of recent scholarship undermining the purported legal rationales for qualified immunity[6] and explicit calls to re-evaluate the doctrine from both Justices[7] and lower-courts judges,[8] the Court has faced the question of whether the doctrine of qualified immunity should be reconsidered.[9] And while the Justices have yet to grant a petition on this fundamental, underlying issue, the Supreme Court did recently issue an opinion in *Taylor v. Riojas*, 141 S. Ct. 52 (2020), which provides crucial clarity on how lower courts should apply the doctrine.

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[5] Andrew Chung, et al., *Shielded*, REUTERS (May 8, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/.

[6] *See* Baude, *supra*; Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).

[7] *Kisela*, 138 S. Ct. at 1162 (2018) (Sotomayor, J., dissenting) (qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence.").

[8] *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring) ("I add my voice to a growing, cross-ideological chorus of jurists urging recalibration of contemporary immunity jurisprudence . . . .").

[9] *See, e.g.*, *Baxter v. Bracey*, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from the denial of certiorari) ("I continue to have strong doubts about our §1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition.")

In *Taylor*, a panel of this Court granted qualified immunity to corrections officers who held an inmate in inhumane conditions—one cell that was covered floor-to-ceiling in human feces, and another kept at freezing temperatures with sewage coming out of a drain in the floor—for six days. *Taylor v. Stevens*, 946 F.3d 211, 222 (5th Cir. 2019). The panel reasoned that, "[t]hough the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end," the law in this case "wasn't clearly established" because "Taylor stayed in his extremely dirty cell for only six days." *Id.*

But the Supreme Court summarily reversed. In its per curiam opinion, the Court explained that even though no prior case had addressed these exact circumstances, "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." *Taylor*, 141 S. Ct. at 53. The Court also reaffirmed the basic principle that "'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.'" *Id.* at 53-54 (quoting *Lanier*, 520 U.S. at 271).

Despite its brevity, and notwithstanding that the opinion did not formally alter black-letter law, the *Taylor* decision marks a clear change in the trajectory of qualified immunity jurisprudence. Indeed, the Supreme Court has already vacated and remanded *another* decision of this Court granting qualified immunity "for reconsideration in light of *Taylor v. Riojas*." *McCoy v. Alamu*, No. 20-31, 2021 U.S. Lexis 768 (Feb. 22, 2021). In *McCoy*, a prison guard had allegedly assaulted an inmate with pepper spray because he had "grown frustrated" with *another* inmate and "arbitrarily took out his anger on McCoy by

spraying him 'for no reason at all.'" *McCoy v. Alamu*, 950 F.3d 226, 231 (5th Cir. 2020). But the Fifth Circuit affirmed immunity because no prior case had specifically held that "an isolated, single use of pepper spray" was more than a *de minimis* use of force. *Id.* at 233.

The Court's error in *McCoy* was the same sort of error as in *Taylor*: requiring a prior case with nearly identical facts before denying immunity, even though application of clearly established law to the particular conduct at issue would have been obvious to any reasonable person in the defendant's position. As the dissent in *McCoy* explained, prior judicial decisions had already held that gratuitously punching, tasing, or beating an inmate with a baton would violate clearly established law. *Id.* at 235 (Costa, J., dissenting). Why should the gratuitous use of pepper spray be any different? By vacating the *McCoy* order and remanding for reconsideration in light of *Taylor*, the Supreme Court has signaled that lower courts should cease the practice of granting immunity simply because there is no prior case with identical facts.

II. THIS COURT SHOULD GRANT THE PETITION TO CORRECT THE PERSISTENT PATTERN OF GRANTING IMMUNITY EVEN IN THE FACE OF OBVIOUS CONSTITUTIONAL VIOLATIONS.

The petition explains in detail how the Defendants' conduct in this case amounted to a constitutional violation, and an obvious one at that. Construing the facts in the light most favorable to the Plaintiffs, the Defendants (1) received training just four months before Olivas's death explicitly warning them that tasers could ignite gasoline, Pet. at 10-11; (2) found Olivas in his bedroom a "safe distance away from his family," *id.* at 10; (3) could smell gasoline and see Olivas holding a gas can, *id.* at 9; (4) heard Officer Elliot's

explicit warning that "[i]f we Tase him, he is going to light on fire," *id.* at 10; and (5) both chose to discharge their tasers anyway, *id.* at 11-12.

The Defendants' actions were plainly at odds with clearly established Fifth Circuit precedent on excessive force. As the petition explains in more detail, *see id.* at 14-22, even when the use of physical force is justified, police "must also select the appropriate '*degree* of force,'" and must take "measured and ascending action" in response to a suspect's level of resistance. *Joseph v. Bartlett*, 981 F.3d 319, 332-33 (5th Cir. 2020) (quoting *Deville v. Marcantel*, 567 F.3d 156, 167-68 (5th Cir. 2009)). These limitations are especially important in the context of individuals experiencing mental distress and suicidal ideation, like Olivas, because such individuals are 16 times more likely than the general public to be killed during a police encounter.[10]

Application of these Fourth Amendment principles to specific circumstances may sometimes raise difficult questions. But it is inconceivable that a reasonable officer in the Defendants' position could have thought that *knowingly setting Olivas on fire* was a measured, appropriate response to the mere possibility—contested in the record—that Olivas *might* light himself on fire. One could as well argue that, if Olivas had been threatening to hurt himself with a gun, a reasonable response would have been to shoot him before he could shoot himself. And indeed, this Court recently held that similar alleged conduct was not only a Fourth Amendment violation, but a violation of clearly

[10] Doris A. Fuller et al., *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters* (Arlington, VA: Treatment Advocacy Center, 2015), *available at* https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf.

established law. *See Cole v. Carson*, 935 F.3d 444, 453-55 (5th Cir. 2019) (en banc) (denying immunity to officers alleged to have shot and killed a suicidal teen who was pointing a gun at his own head).

Although the panel in this case rested its decision on a flawed understanding of the Fourth Amendment itself, it did so in the context of qualified immunity and employed the same sort of overly granular application of the "clearly established law" standard that the Supreme Court vacated in both *Taylor* and *McCoy*. Specifically, the panel disclaimed reliance on several Fifth Circuit cases involving excessive force against non-resisting suspects, simply because those cases did not involve "a suicidal individual, flammable material, a credible threat of arson, or the potential immolation of others." *Ramirez v. Guadarrama*, No. 20-10055, 2021 U.S. App. LEXIS 3382, *9-10 (5th Cir. Feb. 8, 2021).

But to the extent this case involves distinct facts, those distinctions only underscore how plainly *unreasonable* the use of force here actually was. It is precisely *because* this case involved "flammable material" and the "potential immolation of others" that the use of force was excessive—the Defendants knowingly created the very danger they were called to prevent. This case therefore involves a continuation of the same flawed mode of qualified immunity analysis that the Supreme Court has begun to curb. The Court should grant the petition to elaborate in detail on how lower courts should understand and apply *Taylor v. Riojas* to ensure that judges do not keep making the same mistakes.

CONCLUSION

For the foregoing reasons, as well as those presented by Plaintiffs-Appellees, the Court should grant the petition.

Respectfully submitted,

DATED: March 15, 2021.

/s/ Jay R. Schweikert

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,582 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 12-point Book Antiqua typeface.

/s/ Jay R. Schweikert
March 15, 2021

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Jay R. Schweikert*
March 15, 2021