No. 22-933

# In The Supreme Court of the United States

JEAN HENDERSON, as next friend and guardian of CHRISTOPHER HENDERSON,

*Petitioner,*

v.

HARRIS COUNTY, TEXAS and ARTHUR SIMON GARDUNO,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENT ARTHUR SIMON GARDUNO'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

A man suspected of either selling or using marijuana in a playground full of children led police on a quarter mile chase into an apartment complex. Without warning or explanation, he stopped running and turned toward the officer in a manner that led the officer (who was 15 feet away) to fear he was reaching for a weapon. With only a split-second to make a decision, the officer tased the man. When the man continued to resist while on the ground, the officer tased him a second time, restrained him, and stopped using force. The officer asserted qualified immunity, and Petitioner cannot identify any clearly established law at the time of the incident that applies to the facts of this case. The question presented is:

Does qualified immunity apply when an officer tases a fleeing suspect who suddenly stops and turns toward him in a manner that leads the officer to believe he is reaching for a weapon, continues to resist while on the ground, and when there is no binding caselaw placing the officer on notice that this would violate any clearly established law?

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## STATEMENT OF THE CASE

In April 2018, the Harris County, Texas Precinct 6 Constable's Office received "many reports from citizens" about "drug activity, drug sales," "high gang activity," and stolen vehicles in Ingrando Park. R.944, 3704-14. A local civic club identified a specific picnic table near a popular playground where open-air drug use and sales occurred near children, and Deputy Arthur Garduno had previously found men smoking narcotics and possibly selling drugs at that table. R.944-45, 979. The park was a designated drug free zone, and there are enhanced penalties for possessing marijuana in that location. R.959.

On April 26, 2018, Garduno and two other deputy constables were ordered to investigate and conduct a "park check." R.944, 3704-14. The deputies arrived in the early evening and found the park "packed with families." R.944-45. The picnic table was 10 feet from a double-slide, swing set, and climber filled with playing children, 50 feet from a children's baseball game, and 40 feet from basketball courts. R.945, 1011.

Garduno approached the table and watched three men "breaking up marijuana" (pulling the marijuana off the leaf and disposing of the stems) in a dark blue shoebox. R.945. Garduno and Deputy Michael Holbert smelled marijuana, and Holbert's drug dog alerted and "started going crazy" as he saw Henderson smoking with two other men. R.602, 945, 964-65. When the three men saw the officers, they abandoned the shoebox and marijuana on the table. Two of the men walked

away, but Henderson took off running through the park. R.645, 945.

As Henderson began to run, Deputy Garduno noticed he had what appeared to be a hand-rolled marijuana cigar behind his ear, and he threw a clear plastic bag with a green leafy substance on the ground. R.645-46, 946.

Deputies Garduno and Macias followed Henderson through the park, across a street, and to an apartment complex known for violent crime. R.945-46, 948-49, 959. Both ordered Henderson to stop and surrender multiple times, but Henderson continued running with his hands and arms pumping "at a runner's pace" through the apartment grounds and toward the parking lot. R.945-46, 949-50. Garduno pursued Henderson on foot for 1,400 feet and was mindful that nearby children could be hit in the chase or shot if Henderson fired a weapon. R.949-50, 955-56.

Henderson abruptly stopped in a horseshoe-shaped parking lot in the middle of the complex and started turning toward Garduno and moving his hands. R.609-10, 946, 949, 951. From 15 feet away, Garduno believed Henderson was reaching for the waist band of his pants. R.952, 1172. In that split second, he feared Henderson could have a concealed weapon or "was trying to scare me into retreating or stop pursuing him by reaching into his waistband." R.952.

In response to this threat, Garduno fired his taser. R.949, 952-53, 959. One of the prongs missed, so the

taser did not work. One second later, Garduno tried his second cartridge and both prongs connected to Henderson's back. Henderson fell backwards and hit his head on the pavement. R.607, 953-54.

Deputies Soto, Holbert, and Macias arrived and attempted to detain Henderson, but he kicked his legs and pulled his arms toward his chest to avoid being handcuffed. R.602, 604-05, 957, 967, 998-1000. Garduno tased Henderson a final time, and he surrendered and placed his hands behind his back. He was moved to the back of a police vehicle and deputies contacted emergency medical services to remove the taser prongs. R.958, 968.

Officers recovered 5.6 grams of marijuana from Henderson. R.970, 1012, 1039, 1050-52. When officers returned to the picnic table, park patrons advised them that while they were gone, somebody came back and took the stash of drugs. R.969. Henderson was charged, but the charges were later dismissed.

Henderson sued Deputy Garduno and Harris County[1] on June 20, 2018. After extensive discovery, Garduno moved for summary judgment based on qualified immunity. R.916-3721. The district court granted the motion and found Henderson alleged disputed facts sufficient to establish a Fourth Amendment violation but failed to show Garduno's conduct was

[1] In footnote 2 of his Petition, Henderson acknowledges he does not seek certiorari on his dismissed claims against Harris County.

objectively unreasonable in light of clearly established law at the time the violation occurred.

On appeal, the Fifth Circuit affirmed summary judgment because Henderson could not identify any precedent specific to the facts at issue that would have put Garduno on notice at the time of the incident that he was violating Henderson's constitutional rights. Pet. App. 9a-15a. The Fifth Circuit also held Henderson failed to identify any obvious-case exception to this requirement. Pet. App. 15a-16a.

## REASONS FOR DENYING THE PETITION

The Court should not grant certiorari to address Petitioner's writ because none of the Rule 10 factors are present and there is no compelling reason to grant certiorari. Henderson alleges there are three reasons to grant review, and in response, Garduno will show: (1) the court of appeals decision is correct; (2) federal courts of appeals are not divided on the question presented; and (3) this is not a compelling case.

### I. THE COURT OF APPEALS' DECISION IS CORRECT

#### A. The Fifth Circuit applied the correct standard and properly granted qualified immunity.

Qualified immunity shields public officials from "undue interference with their duties and from

potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). When a defendant asserts qualified immunity, plaintiff bears the burden of satisfying a strict two-part test by pleading (1) the defendant violated a constitutional or statutory right and (2) this right was clearly established at the time of defendant's conduct. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

For a right to be clearly established, plaintiff must show that existing precedent "squarely governs" the specific facts at issue. *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (cleaned up). The caselaw is not required to be directly on point, but "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.*, quoting *White v. Pauly*, 580 U.S. 73, 79 (2017) (internal question marks omitted). "In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." *Id.*

The Court recently emphasized that this precedent must be specific to the facts at issue and reminded lower courts "not to define clearly established law at a high level of generality." *Kisela*, 138 S. Ct. at 1152, quoting *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015). *See also City of Tahlequah, Oklahoma v. Bond*, 142 S. Ct. 9 (2021).

A plaintiff has a particularly high burden to overcome qualified immunity in cases involving claims of excessive force. These cases require split-second judgments and it "is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive

force, will apply to the factual situation the officer confronts." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015), quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Henderson must demonstrate the law is "*so* clearly established that in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know it immediately." *Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019) (emphasis in original), citing *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 582 (5th Cir. 2009).

In the court below, Henderson attempted to meet this burden by pointing to "a slew of cases" that were not relevant or helpful. Pet. App. 11a. The first group of six cases was published after Henderson was tased, which was too late to supply Garduno with notice of "clearly established law at the time of the violation." *Salazar v. Molina*, 37 F.4th 278, 286 (5th Cir. 2022); *Kisela*, 138 S. Ct. at 1154. Only three of these six cases even relate to tasers, and those three were the first to clearly establish the rights at issue. See case list at Pet. App. 12a.

The second group contained three cases related to tasers but were unpublished opinions that did not establish binding law for the circuit and could not be the source of clearly established law for qualified immunity. *Marks v. Hudson*, 933 F.3d 481, 486 (5th Cir. 2019). See case list at Pet. App. 13a.

The third group contained six cases involving body slams, a dog attack, and a shooting—but not tasing or fleeing. See case list at Pet. App. 13a-14a. Henderson's only two published Fifth Circuit cases involving tasing

are *Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012) and *Darden v. City of Fort Worth*, 880 F.3d 722 (5th Cir. 2018), which are easily distinguished.

In *Newman*, an officer stopped a vehicle for a traffic offense and discovered a passenger had an outstanding warrant. The passenger, Newman, got out of the car and followed all instructions. *Newman*, 703 F.3d at 759. When the officer touched Newman's crotch "for an uncomfortable length of time" during a pat-down, Newman made a joke, which prompted officers to beat him at least 10 times with a baton and tase him three times. *Id.* at 759-61. It was undisputed that Newman never tried to flee, never disobeyed any commands, and was dragged by the arm to the sidewalk and left with his shorts around his ankles. *Id.* at 762-63.

*Darden* was published only two and a half months before the incident in this case. A team of heavily armed police used a battering ram to execute a no-knock search warrant at a private home. *Darden*, 880 F.3d at 725. Once they breached the house, they found an obese man and threw him to the ground, tased him twice, choked him, punched and kicked him in the face, pushed him into a face-down position, pressed his face into the ground, and pulled his hands behind his back to handcuff him. *Id.* at 725-26. Occupants warned police that Darden had asthma and stopped breathing, but police continued their assault until he died of a heart attack. *Id.* at 726. There was no evidence he resisted, attempted to flee, or made threatening gestures. *Id*.

The court below recognized these two cases to be "extreme examples that do nothing to clearly establish the law for less-extreme tasings like Henderson's." Pet. App. 14a. Even now, Henderson cites no binding, timely, and on-point precedent to show that Garduno violated clearly established law.

In lieu of identifying on-point cases, a plaintiff can show that the challenged conduct is so obviously unconstitutional that any reasonable officer should have realized qualified immunity does not apply. Pet. at 11-12. "Obvious" cases such as these are exceedingly "rare." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018); *see Joseph, on Behalf of the Estate of Joseph v. Bartlett*, 981 F.3d 319, 337 (5th Cir. 2020) ("The standard for obviousness is sky high."). The court below recognized the existence of this "obvious-case exception" and carefully considered Henderson's arguments.

In both the court below and here, Henderson relies on *Hope v. Pelzer*, 536 U.S. 730 (2002) and *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam). Both cases involve the Eighth Amendment—rather than the Fourth Amendment—and both cases involve correctional officers' treatment of prisoners. *Taylor* postdates the incident, and both cases predate *Tahlequah*, in which the Court re-emphasized the importance of using granularity when defining Fourth Amendment protections for purposes of qualified immunity. *City of Tahlequah, Oklahoma*, 142 S. Ct. at 11.

Neither of Henderson's two "obvious" cases come close to placing Garduno on notice that his actions were unconstitutional. In *Hope*, an Alabama prison forced an inmate to take off his shirt and expose himself to the sun before handcuffing him to a hitching post above shoulder height that caused pain and cut off circulation. *Hope*, 536 U.S. at 733-36. He stayed there seven hours with only one or two water breaks, no bathroom breaks, and a guard taunting him about his thirst. *Id.* at 735.

The Court held this was excessive force because there was no clear emergency and guards knew they were gratuitously subjecting Hope to prolonged pain and a substantial risk of physical harm without reason. *Id.* at 738. It also found binding circuit cases and relevant Alabama Department of Corrections regulations prohibiting inmates from being handcuffed to fences or cells for long periods—all of which provided notice of unconstitutional conduct. *Id.* at 741-43. *See Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) and *Ort v. White*, 813 F.2d 318 (11th Cir. 1987).

*Hope* is significantly different from this case. Henderson was a suspect who had just tried to flee police, had not unequivocally surrendered, and was not yet restrained, while Hope was institutionalized and always under police control. Henderson received two five-second jolts that stopped once he was restrained, while Hope was always restrained and endured a seven-hour gratuitous punishment.

In *Taylor*, an inmate was confined to two unsanitary cells. The first was covered in "massive amounts of feces" on the floor, ceiling, window, walls, and even "packed inside the water faucet." *Taylor*, 141 S. Ct. at 53. The second was "frigidly cold" and had only a clogged drain to dispose of body wastes. *Id.* Because Taylor had no bed or clothes, he was forced to sleep naked in sewage. *Id.* While there was no case law directly on point, the Court held that "any reasonable officer should have realized" these conditions violated the Eighth Amendment. *Id.* at 54.

In contrast, it cannot be said that no reasonable officer in Garduno's position would have known he could not deploy his department-issued taser in the heat of a foot chase when a suspect who has ignored all previous orders unexpectedly turns toward him while moving his hands. Accordingly, the Fifth Circuit correctly found that Henderson failed to meet the second prong of qualified immunity.

### B. The Fifth Circuit applied the correct facts.

Henderson claims the Fifth Circuit gave "lip service" to his facts and "wholeheartedly embraced Garduno's account—and then some." Pet. at 15. Fed. R. Civ. P. 56(a) requires a court to grant summary judgment if "there is no genuine dispute as to any material fact." A court "must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *Newman*, 703 F.3d at 761.

However, facts must be supported by the record and not merely be opinions or speculation. *See Nat'l Coal. on Black Civic Participation v. Wohl*, No. 20 CIV. 8668 (VM), 2023 WL 2403012, at *15 (S.D.N.Y. Mar. 8, 2023).

Henderson faults the Fifth Circuit for not going outside the facts to reach subjective opinions in his favor about intent and motive. For instance, he claims the Fifth Circuit wrongly found that he turned toward Garduno. Pet. at 15. He believes it should have found that he turned his "*head* slightly toward the officer . . . as anyone would in response to an officer's order." Pet. at 15.

There is no evidence about what "anyone" else would do under the circumstances. The record establishes that the first time Garduno deployed the taser, one of the prongs lodged next to Henderson's nostril. Pet. App. 3a, 19a; R.925, 1010, 1045. This confirms both parties' accounts that Henderson at least partially turned toward Garduno. Garduno ordered Henderson to stop, but he did not order Henderson to turn and had no way of knowing why Henderson suddenly turned toward him or moved his hands without provocation. R.955. He certainly had no idea what Henderson's next move would be.

Henderson takes umbrage with the Fifth Circuit's characterization that he "suddenly stopped running" without mentioning that he stopped running because he was ordered to do so. Pet. at 15. However, the Fifth Circuit is factually correct, and the threatening act was not that Henderson stopped running, but that he

turned and moved his hands without communicating his intentions.

Henderson faults the Fifth Circuit for finding that he moved "his arms in a manner that suggested to Garduno that Henderson was reaching for a weapon." Pet. at 16. The Fifth Circuit was clear that this was Garduno's perception from 15 feet away[2]—not an undisputed fact. However, it is undisputed that Henderson never told anyone he was surrendering or explained his actions, and his own witness, Daniel Pinon, Jr., admitted Henderson did not "fully extend" his arms (R.1235) and his "hands were not completely up" (R.1236) in a way that would indicate surrender.

Henderson effectively argues the Fifth Circuit was obligated to accept his subjective thoughts and motives as fact and retroactively impute that knowledge to Garduno. Pet. at 16. No law requires that.

It is also important to clarify that no one inflicted "gratuitous" force on Henderson. When Garduno's first taser cartridge missed its mark, he tried again "*one second later*."[3] The second attempt was an immediate follow-up to subdue an unpredictable suspect who had just led police on a quarter mile chase after either using or selling drugs on a playground, and who now

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[2] R.1172 ("I believe it was approximately 15 feet.").

[3] Pet. at 7 (emphasis added). This is supported by the taser logs, which show one cartridge deployed on April 26 at 18:42:20 and a second deployed at 18:42:21. R.644.

unexpectedly turned toward an officer in a way that exacerbated a tense situation.

Henderson then claims he "lay on the ground, bleeding from his ears, nose, and mouth" while being tased again.[4] Henderson resisted being handcuffed while on the ground, which prompted Garduno to provide warnings before discharging his taser a third time. R.1122, 1187, 2426 (video). While the parties dispute the degree of resistance Henderson showed on the ground and whether that resistance resulted from a desire not to be handcuffed or a response to pain, the parties agree he was calling out, moaning, and moving at least part of his body while officers tried to handcuff him. R.602, 604-05, 957, 967, 998-1000, 1036, 1237, 1267.

The taser log shows a full one minute and 17 seconds passed between the second and third deployments as three officers struggled to handcuff Henderson. R.644. As soon as Garduno deployed the taser the last time, Henderson stopped resisting and allowed officers to handcuff him and place him in the car. Officers used no further force.

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[4] Pet. at 3. This description of Henderson's physical condition is not supported by the medical evidence. Officers summoned emergency medical services because policy requires a medical professional to remove taser prongs. The medical professionals who examined Henderson at the scene noted two prongs were still attached and there was a hematoma on the back of Henderson's head. The only blood they reported was from his right ear. R.739. Witness Henry Garcia thought he saw blood coming out of both ears. R.749. Witness Troy Carlton could not remember if Henderson's nose or head was bleeding. R.1232. There is no evidence that officers understood the extent of Henderson's injuries at the time.

In criticizing the Fifth Circuit's assessment of the facts, Henderson claims "[t]his is *Tolan* all over again." Pet. at 17. In *Tolan*, police showed up at a person's home with guns drawn at 2 a.m. and falsely accused him of stealing a car. His parents came outside in their pajamas and tried to explain the mistake, but an officer slammed the mother against the garage door and shot the son three times while he was on his knees 15 or 20 feet away. *Tolan v. Cotton*, 572 U.S. 650, 653, 657-59 (2014).

The Court reversed qualified immunity because the lower court improperly resolved "central facts" in favor of defendants. *Id.* at 657. For instance, the Fifth Circuit concluded the area was "dimly lit" despite there being a gas lamp, two floodlights, and two motion lights illuminating the scene. *Id.* at 655. The court similarly resolved fact issues about whether someone threatened the officer with physical harm, shouted at him, or advanced toward him "in a charging position" as opposed to being shot while on his knees. *Id.* at 657-59. That is nothing like this case, and the court below appropriately viewed the largely undisputed facts and reached the correct legal decision.

### C. The Fifth Circuit did not apply a "*per se* obviousness test."

Finally, Henderson claims the Fifth Circuit improperly applied a "*per se* obviousness test." Pet. at 18. Henderson is referring to the last paragraph of the opinion where the Fifth Circuit noted that Henderson

not only failed to show Garduno's conduct was "obviously" unconstitutional, but suggested the opposite:

> If anything, the obviousness of this case points in the other direction: As illustrated in *Escobar v. Montee*, 895 F.3d 387 (5th Cir. 2018), and as we explained in *Salazar*, "a suspect cannot refuse to surrender and instead lead police on a dangerous hot pursuit—and then turn around, appear to surrender, and receive the same Fourth Amendment protection from intermediate force he would have received had he promptly surrendered in the first place." *Salazar*, 37 F.4th at 282-83.

Pet. App. 16a.

Henderson argues this creates a "new test" that is "irreconcilable" with the Fourth Amendment's "context-dependent standard." Pet. at 19. The Fifth Circuit never created a new test. In *Salazar*, it held that when a court is trying to determine whether an officer used reasonable force, the fact that a person commits the crime of felony evading arrest by leading police on a dangerous car chase through a heavily populated area weights in favor of the first two *Graham* factors.[5] *Salazar v. Molina*, 37 F.4th 278, 281 (5th Cir. 2022),

[5] In *Graham v. Connor*, 490 U.S. 386 (1989), the Court provided three factors to consider when determining whether force is excessive: (1) severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight.

cert. denied, No. 22-564, 2023 WL 3046124 (U.S. Apr. 24, 2023).

The Fifth Circuit never reached the question of whether Garduno used excessive force because it did not need to do so. Garduno is entitled to qualified immunity under the second prong of the test because Henderson cannot show that Garduno violated law that was clearly established at the time of the incident. Thus, the paragraph Henderson complains about is only *dicta* and was not a basis for the lower court's decision.

## II. THERE IS NO CIRCUIT SPLIT

Henderson contends the courts of appeals are divided on the question of whether officers can use "gratuitous force against suspects who initially fled from the police but who had surrendered at the time force was used." Pet. at 21. This premise is incorrect, and no circuit allows the use of gratuitous force in the way he describes. Henderson provides cases from the New Jersey Supreme Court and every circuit except the Third and Fifth where officers used excessive force to punish people who initially resisted arrest, but then surrendered. In each case, qualified immunity was denied—just as it would likely be under similar facts in the Fifth Circuit.

Henderson misses the most important point. In the cases he cites, the suspects had fully and unquestionably surrendered, but officers still used force. It was not clear that Henderson had surrendered until

the taser was deployed a third time. Henderson may have stopped running, but his decision to turn and move his hands and continue to resist while on the ground distinguishes his case from the others. And even if Garduno used excessive force, there was no clearly established law that applied to these facts at the time of the incident.

## III. THIS IS NOT A COMPELLING CASE

Finally, Henderson contends this is a compelling case because it is recurring and important. Pet. at 29. Once again, he incorrectly asserts the Fifth Circuit created a new rule that police can use excessive force on anyone who runs from them but then surrenders. Pet. at 30. That is not what the case below holds.

Of the many qualified immunity cases that pass through the Court each year, this is one of the least compelling to be selected for review. The Court recently denied certiorari in taser cases where officers had less justification, greater knowledge of the risk, and more severe consequences than this one, including a case where officers tased a person doused in gasoline knowing he would likely burst into flames and die. *See Ramirez v. Guadarrama*, 3 F.4th 129 (5th Cir. 2021), cert. denied, 213 L. Ed. 2d 1121, 142 S. Ct. 2571 (2022).

While Henderson suffered a serious and unfortunate injury, it occurred under circumstances squarely within the protections of qualified immunity. This was not a close case, there was no attempt to use gratuitous

force, and the ruling would likely have been the same anywhere in the nation.

## CONCLUSION

The petition for writ of certiorari should be denied.

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