Somil Trivedi

Clark M. Neily III
Jay R. Schweikert

MERICAN CIVIL LIBERTIES UNION
FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0769

Counsel for the American Civil Liberties Union Foundation

Adriana Piñon
Brian Klosterboer
Savannah Kumar
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF TEXAS
5225 Katy Fwy., Ste. 350
Houston, TX 77007
(713) 942-8146

Counsel for the American Civil Liberties Union Foundation of Texas

Beth L. Mitchell
Texas Bar No. 00784613
DISABILITY RIGHTS TEXAS
2222 W. Braker Lane
Austin, TX 78758
(512) 454-4816

Counsel for Disability Rights Texas

Cynthia Fleming Crawford
AMERICANS FOR PROSPERITY
FOUNDATION
1310 N. Courthouse Road, Suite 700
Arlington, VA 22201
(703) 224-3200

Counsel for Americans for Prosperity Foundation

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*

INTEREST OF [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

'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.

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

spraying him 'for no reason at all.'" *McCoy v. Alamu*, 950 F.3d 226, 231 (5th Cir. 2020). But the

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.*

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established law. *See Cole v. Carson*, 935 F.3d 444, 453-55 (5th Cir. 2019) (en banc) (

Respectfully submitted,

DATED: March 15, 2021.

/s/ Jay R. Schweikert

Somil Trivedi
Carl Takei
AMERICAN

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 foregoin with the Clerk of Court, who will enter it into the CM/ECF system, which will sen notification of such filing to the appropriate counsel.

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