Excessive Force and the Fourth Amendment

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I. The Fourth Amendment.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

II. The state of constitutional litigation.

A. When is use of force a violation of the Fourth Amendment?

The Fourth Amendment prohibits "unreasonable … seizures." *Salazar v. Molina*, 37 F.4th 278, 281 (5th Cir. 2022). Under certain circumstances, a seizure can be "unreasonable," and consequently violate the Fourth Amendment, if the government official doing the "seizing" uses excessive force. *Graham v. Connor*, 490 U.S. 386 (1989).

The excessive-force inquiry is fact-intensive, requiring "careful attention to the facts and circumstances of each particular case, including 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." *Salazar*, 37 F.4th at 281 (quoting *Graham*, 490 U.S. at 396). In addition, the

> '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…. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Salazar, 37 F.4th at 281 (quoting *Graham*, 490 U.S. at 396–97).

B. When can a police officer be held liable for use of excessive force?

Lawsuits against police officers for alleged use of excessive force in violation of the Fourth Amendment are brought pursuant to 42 U.S.C. § 1983. Police officers, however, are entitled to a qualified immunity from suit and liability unless

(1) the plaintiff has alleged or shown a violation of a constitutional right (e.g., the Fourth Amendment), and
(2) the police officer's conduct was objectively unreasonable in light of clearly established law.

Villarreal v. City of Laredo, Tex., 44 F.4th 363, 369 (5th Cir. 2022).

"For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated reasonable government agent that what defendant is doing violates federal law *in the circumstances*." *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997) (original emphasis). Though "a case directly on point" is not required, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). "This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Rich v. Palko*, 920 F.3d 288, 294 (5th Cir. 2019). In sum, qualified immunity "represents the norm, and courts should deny a defendant immunity only in rare circumstances." *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018).

The Supreme Court has repeatedly told courts that they should not define clearly established law at a high level of generality. *al-Kidd*, 563 U.S. at 742. "The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *Id.* (citing *Saucier v. Katz*, 533 U.S. 194, 201–202 (2001)).

The interplay between the first and second prongs of the qualified immunity analysis can be particularly confusing in the excessive force context. Stated at a high level of generality, "use

of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Stating the issue at this high level of generality led some courts to conclude "that qualified immunity is merely duplicative in an excessive force case, eliminating the need for the second step. *Id.* at 203; *see also Anderson v. Creighton*, 483 U.S. 635, 643 (1987) (discussing the same confusion in context of the general prohibition on unreasonable searches and seizures).

While acknowledging the similarities between the first and second prongs of the qualified immunity analysis in the excessive force context, the Court insisted that they "remain distinct." *Saucier*, 533 U.S. at 204. Under *Graham*, claims of excessive force in the context of arrests or investigatory stops should be analyzed under the Fourth Amendment's "objective reasonableness standard." *Id.* at 205 (citing *Graham*, 490 U.S. at 388, 394). "The qualified immunity inquiry, on the other hand, has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Saucier*, 553 U.S. at 205.

1. Prompt resolution of qualified immunity.

Qualified immunity is an affirmative defense that the police officer has the burden of pleading. *Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009). Once qualified immunity is raised, the burden is then on the plaintiff to show that the officer is not entitled to qualified immunity. *Wyatt v. Fletcher*, 718 F.3d 496, 510 (5th Cir. 2013). In determining whether the plaintiff has met the required burden, "a court must decide whether the facts that the plaintiff has alleged (*see* Fed. Rules Civ. P. 12(b)(6), (c)) or shown (Rules 50, 56) make out a violation of a constitutional right." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). In addition, the jury may be given the issue of qualified immunity if that defense is not resolved on summary judgment. *Brown v. Sudduth*, 675 F.3d 472, 482 (5th Cir. 2012) (citing *Melear v. Spears*, 862 F.2d 1177, 1184 (5th Cir. 1989)).

2. Immunity from the burdens of litigation.

Qualified immunity is more than a mere defense to liability. *Carswell v. Camp*, 37 F.4th 1062, 1065 (5th Cir. 2022) (citing *Pearson*, 555 U.S. at 237). It is also an immunity from suit. *Id.* And one of the most important benefits of the qualified immunity defense is "protection from pretrial discovery, which is costly, time-consuming, and instrusive." *Carswell*, 37 F.4th at 1065 (quoting *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012)).

3. Interlocutory appeals under qualified immunity.

Under the collateral order doctrine, appellate courts have jurisdiction to review orders denying qualified immunity. *Carswell*, 37 F.4th at 1065. Likewise for district court orders declining or refusing to rule on a motion to dismiss based on a government officer's defense of qualified immunity. *Id.* (citing *Zapata v. Melson*, 750 F.3d 481, 484 (5th Cir. 2014)). Such orders are tantamount to orders denying the defendant's qualified immunity. *Id.* The collateral order doctrine permits immediate appeals of these orders because a defendant's entitlement to qualified immunity must be determined "at the earliest possible stage of the litigation." *Carswell*, 37 F.4th at 1065 (citing *Ramirez v. Guadarrama*, 3 F.4th 129, 133 (5th Cir. 2021) (per curiam)).

C. When can a supervisor be held liable for a subordinate's use of excessive force?

A supervisory official's entitlement to qualified immunity cannot be overcome based solely on the actions of subordinates on any theory of vicarious or *respondeat superior* liability. *Estate of Davis es rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005). Rather, a plaintiff must show that the conduct of the supervisors denied the plaintiff his constitutional rights. *Id.* When a plaintiff alleges a failure to train or supervise, "the plaintiff must show that: (1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiffs rights; and (3) the failure to train or supervise amounts to deliberate indifference." *Id.* (quoting *Smith v.*

Brenoettsy, 158 F.3d 908, 911–12 (5th Cir. 1998)).

D. When can a municipality be held liable for a police officer's use of excessive force?

A local government may *not* be sued under Section 1983 for an injury inflicted solely by its employees or agents. *Monell v. Dep't of Soc. Svcs. of City of New York*, 436 U.S. 658, 694 (1978). Municipal liability requires (1) an official policy or custom, of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy or custom. *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002). A municipality may not be subject to liability merely for employing a tortfeasor. *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 167 (5th Cir. 2010). Municipal liability requires deliberate action attributable to the municipality that is the direct cause of the alleged constitutional violation. *Id.*

1. Only an official policy or custom can create municipal liability.

"The description of a policy or custom and its relationship to the underlying constitutional violation … cannot be conclusory; it must contain specific facts." *Spiller v. City of Tex. City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997). To prove the existence of a custom, a plaintiff must allege a "persistent, widespread practice of city officials … which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992).

"Allegations of an isolated incident are not sufficient to show the existence of a custom or policy." *Fraire v. City of Arlington*, 957 F.2d 1268, 1278 (5th Cir. 1992). "Isolated violations are not the persistent, often repeated constant violations that constitute custom and policy." *Id.* To demonstrate a municipal custom or policy under Section 1983, a plaintiff must at least allege "a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent policy misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force." *Id.* (quoting *Languirand v. Hayden*, 717 F.2d 220, 227 (5th Cir. 1983)). Similarly, a city's custom or policy allegedly authorizing or encouraging police misconduct "cannot be inferred from a municipality's isolated decision not to discipline a single officer for a single incident of illegality." *Fraire*, 957 F.2d at 1278–79 (quoting *Berry v. McLemore*, 670 F.2d 30, 33 (5th Cir. 1982)).

2. Only an official policymaker may create municipal liability.

"Only those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988). The question of whether a particular official or government body has "final policymaking authority" is a question of state law and the official or government body must be policymaker for the specific area of the municipality's business that is at issue. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989); *see also Groden v. City of Dallas, Tex.*, 826 F.3d 280, 286 (5th Cir. 2016) ("In *Bolton*, we held that under Texas law, the final policymaker for the city of Dallas is the Dallas city council."); *Bolton v. City of Dallas*, 541 F.3d 545, 551 (5th Cir. 2008) ("State law instead reserves that role for the 'governing body.'). A complaint is insufficient if it "invites no more than speculation that any particular policymaker … knew about the alleged custom." *Peña v. City of Rio Grande City*, 879 F.3d 613, 623 (5th Cir. 2018); *see also Baker v. City of Arlington*, No. 4:20-CV-00385-P, 2020 WL 6063311, at *3 (N.D. Tex. Oct. 14, 2020) (conclusory allegations that fire department lieutenant's actions constituted official policy of the city were insufficient to establish lieutenant had policymaking authority).

3. The policy or custom must be the moving force of the constitutional violation.

"For a municipality to be liable on account of its policy, the plaintiff must show, among other things, either (1) that the policy *itself* violated federal law or authorized or directed the deprivation of federal rights or (2) that the policy was adopted or maintained by the municipality's policymakers "with 'deliberate indifference' as to its known or obvious consequences ... A showing of simple or even heightened negligence will not

suffice." *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 309 (5th Cir. 2004). Addressing the deliberate indifference standard in the context of failure to train allegations, the Supreme Court explained,

> In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983. A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. … [A] municipality's failure to train its employees in a relevant respect must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." Only then "can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983."
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> "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action."
>
> Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. The city's "'policy of inaction'" in light of notice that its program will cause constitutional violations "is the functional equivalent of a decision by the city itself to violate the Constitution." A less stringent standard of fault for a failure-to-train claim "would result in *de facto respondeat superior* liability on municipalities."
>
> A pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train. Policymakers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.

Connick v. Thompson, 563 U.S. 51, 61–62 (2011) (citations omitted).

III. The context of the common law.

The common law can be reasonably described as providing a presumption in favor of what William Blackstone called "the natural liberty of mankind." 1 Blackstone 121. This natural liberty is "a power of acting as one thinks fit, without any restraint or control, unless by the law of nature." *Id.* Political or civil liberty, in turn, is the remaining portion of natural liberty after it is subject to the restraints of human laws that are "necessary and expedient for the general advantage of the publick." *Id.* at 121–22. Human laws are intended to facilitate the exercise of natural liberty, and so should leave a person "entire master of his conduct, except in those points wherein the public good requires some direction or restraint." *Id.* at 122.

The liberty (or liberties) that are protected fall into three general categories: (1) the right of personal security; (2) the right of personal liberty; and (3) the right of private property. *Id.* at 125.

The right of personal security consists in a person's "legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and– his reputation." *Id.* "Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo* [in self-defense], or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion." *Id.* at 126.

The right of personal liberty consists in the power of locomotion, "of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." *Id.* at 130.

A. The who and when of seizure.

According to its language, the Fourth Amendment does not create any rights. Rather, it states that the "right of the people to be secure… shall not be violated." That is to say, the right already exists, and the Fourth Amendment prohibits the government from violating that right. Historically, this right was primarily vindicated through a cause of action for false imprisonment.[1] As to instances of unlawful (or excessive) force, the right to bodily integrity was primarily vindicated through assault and battery claims.

Fourth Amendment case law tends to blur three distinct types of claims: (1) claims of false imprisonment; (2) claims of assault or battery (excessive force) in furtherance of lawful imprisonment; and (3) claims of assault or battery (or excessive force) that are essentially unrelated to an attempt to lawfully imprison. This paper focuses on the second and third of these types of claims that are regularly made under the Fourth Amendment.

1. False imprisonment and lawful arrest.

The tort of false imprisonment has three elements: (1) the defendant willfully detained the plaintiff; (2) the detention was without the plaintiff's consent; and (3) the detention was without legal authority or justification. *Wal-Mart Stores v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002).

The most obvious form of legal authority for non-consensual detention is pursuant to a subpoena or warrant. *Plummer v. Harrison*, 540 S.W.2d 835 (Tex. App.—Texarkana 1976, writ ref'd n.r.e.); *Tandy Corp. v. McGregor*, 527 S.W.2d 246 (Tex. App.—Texarkana 1975, writ ref'd n.r.e.).

However, there are circumstances under which a person can arrest or detain another person, absent a subpoena or warrant. For example, a police officer can make a warrantless arrest if

- an offense was committed in the presence or view of the officer, TEX. CODE CRIM. P. art. 14.01(b);[2]
- a felony or breach of the peace is committed in the presence or view of a magistrate who verbally orders the officer to make the arrest, *id.* at art. 14.02;
- a person is found in a suspicious place that suggests the person either (1) has committed a felony, an offense against public order and decency, a breach of the peace, or a public-intoxication offense, or (2) threatens to or is about to commit such an offense, *id.* at art. 14.03(a)(1); and
- an officer has probable cause to believe both that a person has committed an assault resulting in bodily injury and that there is danger of further bodily injury, *id.* at art. 14.03(a)(2).

This list of situations in which a police officer can make a warrantless arrest is illustrative, not exhaustive. For citizens, however, the circumstances in which a citizen can make an arrest (i.e., without a warrant) are limited to:

- when a felony or misdemeanor against the public peace is committed in the citizen's presence or view, TEX. CODE CRIM. P. art. 14.01(a);[3] and

[1] See Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stanford L.R. 1337, 1372 n. 211 (June 2021) (discussing the varying elements for false imprisonment claims against peace officers and private citizens).

[2] Historically, it appears that even a peace officer could not arrest a person simply because the person committed an offense in the officer's presence. Rather, like with citizen's arrests, it required that the offense be a felony or a more serious misdemeanor, such as a breach of the peace. *See McKinney v. State*, 22 S.W. 146 (Tex. Crim. App. 1893).

[3] "A private person may make an arrest only at the time he sees the actual offense being committed. A private citizen may not see an offense and then later pursue the guilt party in order to apprehend him for the police." *Young v. State*, 957 S.W.2d 923, 926 (Tex.

- when the citizen has reasonable grounds to believe that property has been stolen, *id.* at art. 18.16.

In making a legal arrest, whether pursuant to a warrant or without a warrant, "all reasonable means are permitted to be used to effect it. No greater force, however, shall be resorted to than is necessary to secure the arrest and detention of the accused." TEX. CODE CRIM. P. art. 15.24; *id.* at art. 14.05.[4] The extent of force that is permitted, then, is considered in light of the goal: arrest and detention. Consequently, while "[a]n officer is required to use such force as may be necessary to prevent an escape when it is attempted, … he must not in any case kill one who attempts to escape, unless in making or attempting such escape the life of the officer is in danger or he is threatened with great bodily injury." *Fagan v. State*, 14 S.W.2d 838, 841 (Tex. Crim. App. 1929).

2. Temporary detention for limited purposes.

In addition, there are specific circumstances in which a person can detain someone for investigative purposes, without that detention constituting false imprisonment.

- A person who reasonably believes another person has stolen or is attempting to steal property has a privilege to detain that person in a reasonable manner[5] and for a reasonable time to investigate the ownership of the property. TEX. CIV. PRAC. & REM. CODE § 124.001.
- An employer has a common-law privilege to investigate reasonably credible allegations of employee dishonesty. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995).
- An officer is justified in briefly detaining an individual on less than probable cause to investigate possible criminal behavior when the officer can point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Carmouche v. State*, 10 S.W.3d 323, 328 (Tex. Crim. App. 2000); *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

B. Force and excessive force.

In Texas, the civil and criminal elements of assault and battery claims mirror each other. *Umana v. Kroger Texas, L.P.*, 239 S.W.3d 434, 436 (Tex. App.—Dallas 2007, no pet.). A person commits an assault under Texas law if the person (1) intentionally, knowingly, or recklessly causes bodily injury to another; (2) intentionally or knowingly threatens another with imminent bodily injury; or (3) intentionally or knowingly causes physical contact with another the person knows or should reasonably believe that the other will regard as offensive or provocative. TEX. PENAL CODE § 22.01(a). The assault is an aggravated assault if the person (1) causes serious

App.—Texarkana 1997), *rev'd on other grounds*, 991 S.W.2d 835 (Tex. Crim. App.) (en banc).

[4] Article 14.05 provides that, "In each case enumerated where arrests many be lawfully made without a warrant, the officer or person making the arrest is justified in adopting all the measures which he might adopt in cases of arrest under warrant," except there are additional limitations if the arrest would require entering a residence.

[5] In *Dillard Dep't Stores, Inc. v. Silva*, 148 S.W.3d 370, 372 (Tex. 2004), the Court upheld a jury verdict of false imprisonment based on detention of a suspect in an unreasonable manner. The Court explained that the plaintiff/suspect, Silva, "testified that after he made his purchases, the Dillard security guard, Rivera, stopped him, accused him of theft, placed him on the floor, handcuffed him, emptied the contents of his bag on the floor, and questioned him while he lay handcuffed on the floor. Although Silva told Rivera that he had receipts for three of the shirts in his vehicle, Rivera declined to go look for them. Instead, Rivera escorted Silva in handcuffs up the escalator to an empty office. Silva testified to his embarrassment and humiliation at being led through the store in handcuffs. Once in the office, he testified that Rivera and another Dillard employee verbally taunted him and refused him a glass of water he needed to take medication for a migraine headache. Silva also testified that when the police arrived, Rivera placed him on the floor again with his knee on Silva's back to exchange handcuffs with the police."

bodily injury to another; or (2) uses or exhibits a deadly weapon during the commission of the assault. TEX. PENAL CODE § 22.02(a).

However, a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force. TEX. PENAL CODE § 9.31(a).

Texas law creates a presumption that the actor's belief that the force was immediately necessary is reasonable in specified situations, including when the actor knows or has reason to believe that the person against whom the force is used was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery. TEX. PENAL CODE § 9.31(a)(1)(C).

Deadly force, however, is not justified in defense of person except when and to the degree the actor reasonably believes the deadly force is immediately necessary: (A) to protect the actor against the other's use or attempted use of unlawful deadly force; or (B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery. TEX. PENAL CODE § 9.32(a)(2).[6]

As with the use of force generally, Texas law creates a presumption that the actor's belief that deadly force was immediately necessary is reasonable in specified situations, including when the actor knew or had reason to believe that the person against whom the deadly force was used was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery. TEX. PENAL CODE § 9.32(b)(1)(C).

Defense of a third person by the use of force generally, or by the use of deadly force, is justified analogously to use of force or deadly force in self-defense; when the the actor reasonably believes that his intervention is immediately necessary to protect the third person. TEX. PENAL CODE § 9.33.

'Deadly force' means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing death or serious bodily injury. TEX. PENAL CODE § 9.01(3).

'Immediately necessary' means conduct may be justified if the actor reasonably believes the conduct is immediately necessary to avoid imminent harm. *Henley v. State*, 493 S.W.3d 77, 89–90 (Tex. Crim. App. 2016); TEX. PENAL CODE § 9.22. 'Imminent,' in turn, means "ready to take place, near at hand, impending, hanging threateningly over one's head, menacingly near." *Henley*, 493 S.W.3d at 89. Consequently, imminent harm is harm that is ready to take place—harm that is coming in the very near future. *Id.* In the context of self-defense and defense of a third person, force that is 'immediately necessary' to protect oneself or another from a person's use of unlawful force is force that is needed at that moment—"when a split second decision is required." *Id.* at 90 (citing *Smith v. State,* 874 S.W.2d 269, 273 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd), *abrogated on other grounds by Clewis v. State,* 922 S.W.2d 126 (Tex. Crim. App. 1996)).

IV. Recent excessive force decisions from the Fifth Circuit.

What is the purpose of the force? Is the force justified as part of a lawful seizure? Is the force justified for the protection of the officers or others?

A. *Craig v. Martin*, --- F.4th ----, 2022 WL 4103353 (September 8, 2022)

Officer Martin was called out to a disturbance in a residential neighborhood. He responded to the call alone. A male complainant told Martin that A.C. had thrown trash in his yard. Officer Martin then spoke with Jacqueline Craig, a neighbor and A.C.'s mother. Craig alleged that

[6] Texas law also permits use of deadly force to protect property, including when and to the degree the actor reasonably believes the deadly force is immediately necessary to (A) to prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime; or (B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property. TEX. PENAL CODE § 9.42(2).

the male complainant grabbed her son A.C. after A.C. allegedly littered. Martin asked Craig why she did not teach A.C. not to litter and, after Craig said it did not matter since the man had grabbed her son, Officer Martin asked, "Why not?"

Craig began yelling at Martin. Martin told her that if she continued to yell at him, he would take her to jail. J.H., Craig's fifteen-year-old daughter, stepped between Craig and Martin and put her hands on Craig's forearms. Martin grabbed J.D. and pulled her away from her mother. K.H., Craig's fourteen-year-old daughter, then pushed Martin from the left side with most, if not all, of her body weight. Martin pulled his taser and yelled, "Get to the ground!" Martin tased Craig in the back and she slowly descended to the ground. Martin handcuffed Craig. He then walked over to J.H., ordered her to get on the ground. J.H. squatted, so Martin placed her on the ground before handcuffing her. As Martin walked Craig and J.H. to the police vehicle, K.H. attempted to stop him. When he warned K.H. that if she did not get back she would go to jail too, she said, "I don't care." Martin pushed K.H. out of the way, and attempted to get J.H. in the back seat of the vehicle. J.H. resisted, leaving her leg hanging out. After repeated warnings, and refusals, Martin "kicked" J.H.'s leg into the vehicle. Martin returned to arrest Hymond, who had been harassing him throughout the arrests. When she would not tell him her name, he raised her handcuffed arms, but despite her later claims that it caused excruciating pain, there was no noticeable difference in the video regarding the nature of her yelling at Martin before and after he raised her arms.

Craig, individually and on behalf of J.H. and K.H., and Hymond sued Martin for unlawful arrest and excessive use of force, in violation of the Fourth Amendment. The district court dismissed the unlawful arrest claims, holding that Martin was entitled to qualified immunity as to those claims. However, the district court concluded that the video evidence was too uncertain to determine whether Martin should receive qualified immunity as to the excessive force claims. On appeal, the Fifth Circuit held that Martin did not use excessive force, and also was entitled to qualified immunity.

> Under the circumstances, it was not objectively unreasonable for Martin to grab Craig and force her to the ground to effectuate her arrest. Martin was the only police officer at the scene, he had just been pushed from behind, and he was facing numerous people who were shouting and jostling as he attempted to separate Craig from the crowd and arrest her.
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> [T]he plaintiffs in this case—except for Craig—were still resisting when the [other] alleged unlawful conduct occurred.

The Fifth Circuit panel consisted of Judges Richman, Barksdale, and Duncan. The original opinion was written by Chief Judge Owen, 26 F.4th 699 (February 15, 2022), as was the substituted opinion, though, since the substituted opinion was issued after April 14, 2022, it identifies the authoring judge as Chief Judge Richman.[7]

B. *Greene v. DeMoss*, No. 21-30044, 2022 WL 3716201 (August 29, 2022)

Ronald Greene was driving on U.S. Highway 80 in Monroe, Louisiana around 12 a.m. on May 10, 2019. As alleged in the First Amended Complaint, Trooper Dakota DeMoss attempted to stop Greene for an unspecified violation, but Greene sped away, and a pursuit ensued. He eventually crashed into a wooded area. Greene's vehicle was only moderately damaged, and he was uninjured.

DeMoss and Master Trooper Chris Hollingsworth immediately arrived at the scene. Shortly after, five additional officers joined as well. Greene exited his vehicle without assistance and began to apologize to the officers, but they pinned him to the ground. Greene begged the officers to stop, continuing to apologize repeatedly. Although Greene had surrendered, showed no resistance, and posed no threat, each of the seven officers then "beat, smothered, and choked" Greene. The officers also tased him at

[7] https://www.fjc.gov/history/judges/richman-priscilla

least three times, although it is unclear who used the weapon because the Louisiana State Police had not produced the body–camera or dashboard–camera footage or other relevant records.

The alleged attack left Greene "beaten, bloodied, and in cardiac arrest." At 12:29 a.m., an officer called for an ambulance. When it arrived at 12:51 a.m., Greene was covered in blood with multiple taser barbs attached to his body. The paramedics transported Greene to the hospital, where he was pronounced dead.

Greene's family brought suit against the officers, alleging various claims, including excessive force in violation of the Fourth Amendment. Five officers, including DeMoss, moved for dismissal based on qualified immunity. The district court denied their request. The court concluded that qualified immunity is inappropriate because every reasonable officer would have known that he could not beat, smother, and choke an unresisting suspect who was subdued and posing no threat. On appeal, the Fifth Circuit affirmed the decision of the district court.

> The Amended Complaint alleges that each officer "beat, smothered, and choked" Mr. Greene after he was "pinned ... down on the ground ... begging the officers to stop, and repeatedly saying 'I'm sorry.'" The beating left Mr. Greene "unresponsive," "covered in blood," and "in cardiac and respiratory arrest." An autopsy also "found multiple signs of recent trauma, blunt force injuries to the head and face, facial lacerations, facial abrasions, facial contusions, scalp lacerations, blunt force injuries to the extremities, and abrasions and contusions over the left and right knees."

The Fifth Circuit panel consisted of Judges Richman, Clement, and Duncan. The opinion was issued per curiam.

C. *Ramirez v. Escajeda*, 44 F.4th 287 (August 10, 2022)

Rushing to the scene of an ongoing suicide, El Paso Police Officer Ruben Escajeda, Jr., found Daniel Ramirez in the process of hanging himself from a basketball hoop. But it was dark, Escajeda was afraid Daniel might have a weapon, and Daniel did not respond to Escajeda's orders to show his hands. So Escajeda tased Daniel once, took down his body, and performed CPR. To no avail. Daniel died later, in the emergency room.

Daniel's parents sued Escajeda for excessive force in violation of Daniel's Fourth Amendment rights. The district court denied qualified immunity and Escajeda appealed. On appeal, the Fifth Circuit explained that it lacked jurisdiction to resolve the dispute as to whether the tasing contributed to Daniel's death. However, it could evaluate whether Escajeda's conduct violated clearly established law. The court concluded that it did not.

> Escajeda used the taser precisely because Daniel was *not* in custody and Escajeda was unsure whether the strange scenario he faced posed a threat to his safety. Perhaps his fear that he might be walking into an "ambush" was unfounded; in that event, the tasing could be excessive under prong one of the analysis. But even so, no authority cited by the plaintiffs remotely addresses the situation Escajeda faced. It follows, then, that Escajeda could not have been on notice that his single use of the taser was clearly unlawful.

The Fifth Circuit panel consisted of Judges Jones, Stewart, and Duncan. The opinion was written by Judge Duncan.

D. *Tyson v. Sabine County*, 42 F.4th 508 (July 28, 2022)

Wade Tyson called the Sheriff's Department to request a welfare check on his wife, Melissa Tyson. Deputy Sheriff David Boyd contacted Melissa and told her that he would visit her to conduct a welfare check the following morning. During the welfare check, Boyd allegedly coerced Melissa into engaging in various sexual acts, based on his authority as law enforcement, the isolated location of her home, and what she took to be an implicit threat to arrest her for possession of marijuana paraphernalia. Deputy Boyd has since been indicted and charged with sexual assault, indecent exposure, and official oppression.

Melissa sued Deputy Boyd, the County Sheriff, and the County, alleging violations of her rights under the Fourth, Eighth, and Fourteenth Amendments. The defendants moved for summary judgement, arguing there were no underlying constitutional violations. The district court agreed. On appeal, the Fifth Circuit affirmed that there were no Fourth or Eighth Amendment violations, but held that there was a Fourteenth Amendment violation under the "shocks the conscience" standard.

> Tyson's assumption that Deputy Boyd suspected her of marijuana possession based on a story about other people caught possessing marijuana is insufficient to effect a seizure. Deputy Boyd did not accuse Tyson of drug possession nor explicitly indicate awareness of her drug paraphernalia. And although he described a duty to ticket for possession, he also said he would sometimes just confiscate the drugs and let the owner keep going. Deputy Boyd's story about ticketing attendees of a swinger party for possession of marijuana would not have indicated to an objectively reasonable, innocent person that they were suspected of wrongdoing.
>
> Tyson also argues that she was seized because Deputy Boyd made intimidating sexual advances while she was home alone. But she does not argue that he ever told her she could not leave or otherwise attempted to physically prevent her from terminating the encounter. An intimidating police presence does not, standing alone, constitute a seizure.

The Fifth Circuit panel consisted of Judges Clement, Graves, and Costa. The opinion was written by Judge Clement.

E. *Salazar v. Molina*, 37 F.4th 278 (June 16, 2022)

Around 2am, a deputy sheriff attempted to pull over Salazar for speeding. Instead of stopping, Salazar accelerated and led police on a high-speed chase for approximately five minutes. At one point, Salazar traveled in excess of 70mph on a narrow residential street. When two vehicles pulled in front of Salazar, blocking his way, he abruptly stopped. He got out of his vehicle, laid down on the ground with his arms above his head and his legs crossed. The deputy sheriff arrived as Salazar was laying down, got out of his vehicle and ran toward Salazar. Two seconds before the deputy got to Salazar, Salazar uncrossed his legs. The deputy then fired his taser at Salazar's back. A total of eight seconds went by between Salazar abruptly stopping his vehicle, and the deputy firing the taser.

Salazar brought suit against the deputy sheriff, arguing that the use of the taser constituted excessive force in violation of the Fourth Amendment. The district court denied summary judgment to the deputy sheriff, holding, in part, that there was a factual dispute as to whether a reasonable officer would have continued to view Salazar as an immediate threat. On appeal, however, the Fifth Circuit reversed and remanded, holding that the deputy had not used excessive force in violation of the Fourth Amendment and that, in addition, the law was not clearly established.

> [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.

The Fifth Circuit panel consisted of Judges Smith, Elrod, and Oldham. The opinion was written by Judge Oldham.

F. *Solis v. Serrett*, 31 F.4th 975 (April 21, 2022)

Officer Serrett pulled over Timothy Robinson and his girlfriend, Jessica Solis. Serrett told Robinson, the driver, that he was pulled over for failing to properly signal and driving outside of his lane. Serrett began to ask Robinson various questions, but Solis would answer, even after Serrett told Solis that Robinson needed to answer questions that were directed to him. Because Serrett believed that Robinson or Solis (or both) may be intoxicated, he requested backup.

Robinson was subsequently arrested after he apparently refused a field sobriety test.

Meanwhile, Solis began recording the encounter on her phone and accusing Serrett of pulling over the couple because Robinson is black. When Robinson was arrested, Solis objected and stepped closer to Serrett and Robinson. Officer Sims, the backup officer, told Solis to move back or he would put handcuffs on her for interference.

Serrett and Sims next proceeded to arrest Solis. Serrett reached out for Solis, informing her that she was being arrested, but she pulled back. Sims came up behind her, and quickly pulled her left arm behind her back. Serrett reached for Solis' other arm. Solis fell to the ground. Sims then held his knee on her back as Serrett handcuffed her. Solis was promptly picked back up after being handcuffed, and she was informed that she was being arrested for public intoxication.

Solis brought suit against Serrett and Sims, asserting various claims, including that they had used excessive force in violation of the Fourth Amendment. Serrett and Sims filed a motion for summary judgment, seeking dismissal of all claims. The district court granted dismissal, except as to the excessive force claim. The district court held that disputed issues of material fact barred summary judgment as to whether the officers had violated her clearly established rights. On appeal, however, the Fifth Circuit reversed and remanded, holding that the officers had not used excessive force in violation of the Fourth Amendment and that, in addition, the law was not clearly established.

> Solis's adverse course of conduct leading up to the arrest—including indignant remarks, asking for Serrett's badge number, refusing to provide him her phone, and stepping back—may have indicated to the officers that she would not submit to arrest. Indeed, such a belief would be well-founded. Solis confirmed in her deposition that she would not have submitted to arrest unless the officers explained to her why [she] was being arrested.

The Fifth Circuit panel consisted of Judges Davis, Smith, and Engelhardt. The opinion was written by Judge Engelhardt.

G. *Smith v. Heap*, 31 F.4th 905 (April 14, 2022)

Herschel Smith is an elected constable in Waller County. He was driving through adjoining Harris County when he saw a car speeding on the tollway. Smith flashed his police lights to tell the driver to slow down. The driver, however, called 911 and reported that Smith had flashed police lights at him, and that after the caller slowed down, Smith pulled up next to him and pointed a gun at him, yelling, and then drove off. Harris County deputy constables subsequently located Smith's vehicle, and directed Smith to stop. The deputies approached Smith's vehicle with guns drawn and asked Smith to show his hands. Smith complied, and exited the vehicle with his hands up, out, and empty. A deputy led Smith behind a police car and cuffed him. The deputies asked Smith to sit in the back of their police car, but he refused. When the deputies told him about the 911 call, Smith admitted to flashing his lights, but denied pointing his gun. After one minute forty-seven seconds, the deputies removed the handcuffs. Smith left a few minutes later.

Smith brought suit against, as relevant here, Constable Heap, the constable with supervisory authority over the deputy constables, alleging that the deputy constables used excessive force in violation of his Fourth Amendment rights. Constable Heap filed a motion to dismiss, asserting qualified immunity, which was denied by the district court. On appeal, however, the Fifth Circuit reversed and rendered judgment for Constable Heap, holding that the deputy constables had not used excessive force in violation of the Fourth Amendment.

> Objectively reasonable force will result in *de minimis* injuries only, and *de minimis* injuries cannot sustain an excessive-force claim. … Such is the case here. Informed that Smith had pointed his gun at another driver, the officers approached the car with weapons drawn, directed Smith to exit the vehicle, and then handcuffed him for under two minutes (causing no

> physical injury) while they secured the scene. That use of force was reasonable; it's a "routine police procedure" for safely confronting armed suspects like Smith.

The Fifth Circuit panel consisted of Judges Smith, Costa, and Wilson. The opinion was written by Judge Smith.

H. *Buehler v. Dear*, 27 F.4th 969 (March 3, 2022)

In the middle of the night, Antonio Buehler was arrested on crowded Sixth Street in downtown Austin while video-recording police activity. Buehler's arrest occurred after repeated verbal confrontations between him and the officers regarding how close to them he was permitted to stand while recording. The video footage appears to indicate that Buehler was regularly standing within one to two feet of the officers and filming, while they were responding to a disturbance. When Officer Dear finally tells Buehler to turn around and that he is under arrest, Buehler starts walking away. Four Austin police officers took Buehler to the ground and handcuffed him, with Buehler suffering minor bruises and lesions as a result. He was on the ground for between 40 and 45 seconds. Buehler was arrested for misdemeanor interference with performance of official duties.

Buehler brought suit against the police officers, alleging various constitutional claims, including use of excessive force in violation of his Fourth Amendment rights. The police officers filed motions for summary judgment, seeking dismissal of all claims. The district court granted dismissal on all claims, except the excessive force claim against the police officers. On appeal, however, the Fifth Circuit reversed and rendered judgment for the police officers on the excessive force claim.

> In case after case, courts upheld officers' use of takedowns to gain control of suspects who had disregarded lawful police orders or mildly resisted arrest, even when arrestees were suspected of minor offenses and the force employed appeared greater than necessary in retrospect—at least when officers' tactics caused arrestees only minimal injuries.

The Fifth Circuit panel consisted of Judges Clement, Southwick, and Willett. The opinion was written by Judge Willett.

I. *Wilson v. City of Bastrop*, 26 F.4th 709 (February 21, 2022)

The Bastrop Police Department received reports of an armed confrontation, one report mentioning that the individuals "are drawing guns" and another that "Thomas Johnson" was a perpetrator and described his truck. The police responded and located a stationary truck matching the reported description. Officer Green instructed the driver to turn off the engine, which he did. When Officer Green exited his police vehicle, the passenger, Thomas Johnson III, stepped out of the truck holding a semiautomatic pistol with an extended magazine. Officer Green ordered Johnson to close the door, but Johnson ignored him and ran toward a nearby abandoned school.

As vehicles passed nearby, Officer Green drew his weapon and yelled, "Drop the gun!" When Johnson failed to comply and continued to run, Green fired at him. Green stated that, as Johnson ran, Johnson looked over his shoulder at him and had the barrel of the gun pointing back in Green's direction. Officer McKinney arrived shortly thereafter, to see Johnson running back toward Green's vehicle, outrunning Green. McKinney ordered Johnson to stop and drop the gun. When Johnson did not, McKinney shot. Johnson stumbled, dropping the gun, but then picked it up and continued to flee. Both officers gave chase, repeatedly ordering Johnson to stop and drop the gun. When in range, both officers shot, and Johnson fell and dropped his gun, dying on the scene from the gunshot wounds. The chase lasted approximately two minutes.

The suspect's family brought suit against the officers and the city, alleging that the shooting constituted excessive force in violation of the Fourth Amendment. The district court granted summary judgment to the officers based on qualified immunity and separately dismissed the claims against the city. On appeal, the Fifth Circuit affirmed.

> In sum, both Green and McKinney reasonably believed that Johnson—(1) suspected of an armed confrontation, (2) fleeing as police attempted to detain him, (3) running towards one of the officers in the presence of bystanders, (4) armed with a semiautomatic pistol, and (5) refusing to obey audible police commands to drop his weapon—posed a threat of serious physical harm to themselves and bystanders.

The Fifth Circuit panel consisted of Judges Jones, Higginson, and Duncan. The opinion was written by Judge Duncan.

J. *Timpa v. Dillard*, 20 F.4th 1020 (December 15, 2021), *petition for writ of certiorari denied at* 142 S. Ct. 2755 (2022)

Timpa called 911 and asked to be picked up. He stated that he had a history of mental illness, had not taken his medications, was having a lot of anxiety, and he was afraid of a man that was with him. The call ended abruptly. The dispatcher called back, and he provided his location as on Mockingbird Lane. Meanwhile, a motorist called to report a man running up and down the highway on Mockingbird Lane stopping traffic and attempting to climb a public bus. Also, a private security guard called and reported similar behavior by a man, mentioning that he thought the man was "on something."

By the time the police arrived, security guards had handcuffed Timpa and he was rolling around on the ground and occasionally thrashing. After he rolled towards the street, the officers rolled him on his belly and two officers placed a knee on his back. They asked him what he had taken, and he responded, "Coke." Officer Dillard's left knee remained pressed into Timpa's back, putting much of his 190 pound weight on Timpa. Dillard remained in this position for fourteen minutes. The officers added ankle cuffs, and Timpa stopped thrashing his legs. There were five police officers, two paramedics, and two private security guards present.

After about ten minutes with Dillard's knee on his back, Timpa's voice became weak, he fell limp, and ultimately nonresponsive, as he remained for the remainder of the final three-and-a-half minutes of the restraint. Shortly after Dillard removed his knee, the paramedics determined that Timpa was dead. The medical examiner determined that the cocaine had caused him to suffer from "excited delirium syndrome," and that he had died as a result of the physiological stress associated with the physical restraint, which could have resulted in asphyxia.

Timpa's family brought suit against, as relevant to this appeal, Officer Dillard for excessive force in violation of the Fourth Amendment, as well as bystander liability against various other officers. On summary judgment, the district court granted qualified immunity to all of the officers, holding that there was no clearly established law that their conduct violated the Fourth Amendment. On appeal, the Fifth Circuit reversed, holding that there was a fact question as to whether the officers had used excessive force in violation of the Fourth Amendment and also that the law was clearly established.

> As to any threat of harm to the Officers, it is obvious that Timpa could no longer kick when he was lying face down and handcuffed with his ankles restrained and confined under the bus bench. As to any threat to himself, Timpa had already calmed down sufficiently for the paramedics to take his vitals. As to any threat to passing motorists, Plaintiffs' expert opined that "it was unlikely, if not completely impossible, for [Timpa] to roll into the street considering he was literally flanked on all sides by police officers." And when the paramedic asked if Timpa could walk to the ambulance in ankle cuffs, Dillard said: "I highly doubt it." A jury could find that no objectively reasonable officer would believe that Timpa—restrained, surrounded, and subdued—continued to pose an immediate threat of harm justifying the prolonged use of force.

The Fifth Circuit panel consisted of Judges Clement, Southwick, and Willett. The opinion was written by Judge Clement.

K. *Harmon v. City of Arlington*, 16 F.4th 1159 (October 26, 2021)

An Arlington police officer pulled over O'Shae Terry and his passenger, Terrence Harmon, for driving a large SUV with an expired registration tag. After taking their identification, the officer advised them that he smelled marijuana coming from the car and, as a result, had to search it. In the meantime, Officer Bau Tran had arrived at the scene and approached the car from the passenger's side. Tran asked them to lower the windows and shut off the vehicle's engine. Terry initially complied, but after some small talk, he started raising the windows and reaching for the ignition. Tran clambered onto the running board, and grabbed the passenger window. As Terry started the ignition and shifted into drive, Tran drew his weapon, stuck it through the window past Harmon's face, and shot five rounds, hitting Terry four times. Terry lost control and crashed, and did not survive. Meanwhile, Tran was knocked from the vehicle and almost hit by the car's rear tires.

Terry's estate and Harmon brought suit against Officer Tran for excessive force in violation of the Fourth Amendment, and also against the City of Arlington on a failure to discipline Tran for past actions and alleged custom of using excessive force with racial bias. Tran filed a motion to dismiss, asserting qualified immunity, and the City also filed a motion to dismiss. The district court granted both motions, and the plaintiffs appealed. On appeal, the Fifth Circuit affirmed, holding that the allegations did not establish excessive force in violation of the Fourth Amendment, much less a clearly established violation, and that the claims against the City should likewise be dismissed.

> That brief interval—when Tran is clinging to the accelerating SUV and draws his pistol on the driver—is what the court must consider to determine whether Tran reasonably believed he was at risk of serious physical harm. That belief was reasonable.

The Fifth Circuit panel consisted of Judges Jones, Southwick, and Engelhardt. The opinion was written by Judge Jones.

L. *Jackson v. Gautreaux*, 3 F.4th 182 (June 30, 2021)

Travis Stevenson repeatedly slammed his vehicle into a police cruiser and a concrete pillar in front of an apartment building while yelling "Kill me!" to officers who were trying to control the scene. After making repeated but unsuccessful efforts to deescalate the situation and to disable Stevenson's vehicle, officers shot and killed him.

Stevenson's family brought suit against the officers, alleging that they used excessive force in violation of the Fourth Amendment. At summary judgment, the district court held that the plaintiffs had failed to overcome the officers' qualified immunity. On appeal, the Fifth Circuit affirmed, holding that the plaintiffs could not show that the officers used excessive force in violation of the Fourth Amendment.

> First, like in *Fraire* and *Hathaway*, Stevenson was using his car as a weapon. … Second, Stevenson and the drivers in our precedents exhibit volatile behaviors that contributed to the officers' justification in firing to prevent death or great bodily harm. … Third, Plaintiffs have not produced any evidence that suggests the officers might've had a reasonable alternative course of action.
>
> Plaintiffs' counsel said the officers should've stepped back and allowed Mr. Stevenson to finish the episode, and then they could have acted. That's absurd. Lieutenant Birdwell was inches from the front left bumper of Stevenson's car while he was repeatedly driving it backwards and forwards and violently crashing into things.

The Fifth Circuit panel consisted of Judges Davis, Duncan, and Oldham. The opinion was written by Judge Oldham.

M. *J.W. v. Paley*, 860 Fed. App'x 926 (June 23, 2021)

J.W. was a 17-year-old special education student at Mayde Creek High. After he got into a fight with another student in the classroom, he

stormed out and ultimately proceeded to head towards the doors leading out of the school, yelling that he hated the school. Two school resource officers, including Officer Paley, a security guard, a coach, and an assistant principal intercepted J.W. at the exit door. While some of them held the door shut from the outside (while J.W. tried to push it open), Officer Paley and others tried to prevent J.W. from opening the door. Someone threatened J.W. with use of a taser, but J.W. continued to struggle and began screaming. Officer Paley told the other individuals to let J.W. go, and then Paley tased J.W. He used the taser on J.W. for approximately 15 seconds, including after J.W. was on the ground and had stopped struggling. School officials called emergency medical services and J.W. was taken to the hospital.

J.W. and his mother brought various claims against Officer Paley and the school district. The defendants moved for summary judgment, which the district court granted, except as to the Fourth Amendment excessive force claim against Officer Paley. On appeal, the Fifth Circuit reversed, holding that the law is not clearly established as to whether the Fourth Amendment applies to school official's use of force against students.

> Although some of our cases have applied the Fourth Amendment to school official's use of force, other cases have held that such claims cannot be brought. That divide in our authority is the antithesis of clearly established law supporting the existence of Fourth Amendment claims in this context.

The Fifth Circuit panel consisted of Judges King, Jones, and Costa. The opinion was issued per curiam.

N. *Tucker v. City of Shreveport*, 998 F.3d 165 (May 18, 2021), *petition for writ of certiorari denied at* 142 S. Ct. 419

Officer Cisco attempted to pull over a vehicle driven by Tucker, for misdemeanor traffic violations. Tucker did not immediately pull over, but drove into a neighborhood and into the driveway of a residence. Officer Cisco had Tucker get out of the vehicle and began to pat him down. Tucker was visibly angry, including flailing his arms and banging his fist on the vehicle. Officer Cisco ordered Tucker to place his arms behind his back, which he did. Then Officer Cisco, and newly arrived Officer McIntire, took Tucker to the ground in order to arrest and cuff him. From the video, it appears that when the officers grabbed Tucker's arms, he appeared to tense up and, in light of Tucker's greater height and agitated demeanor, they were concerned that they would lose control of him if they did not take him down before cuffing him.

Once on the ground, Tucker was kicking his legs and would not lay still in order to allow himself to be handcuffed. At the same time, the officers each punched Tucker at least once, and McIntire kicked him at least three times, but without using all their strength.

Tucker brought suit against Officers Cisco and McIntire, alleging use of excessive force in violation of the Fourth Amendment when they (1) executed a takedown of him; and (2) hit and kicked him after he was on the ground. The district court denied summary judgment, holding that there were fact questions that prevented resolving whether the officers had used excessive force or, even if they did, whether the use of force violated clearly established law. The Fifth Circuit reversed, and rendered judgment for the officers, holding that they were entitled to qualified immunity. As to the takedown, prior caselaw was materially distinguishable such that, at a minimum, reasonable officers would debate whether Cisco's and McIntire's takedown of Tucker was excessive.

As to the force used while Tucker was on the ground, there was a fact question as to whether the blows and kicks were excessive, as it is disputed whether Tucker continued to resist arrest. But the officers were nevertheless entitled to qualified immunity because the law was not clearly established. Prior case law did not clearly establish that the officers should have known that they could not strike Tucker in order to gain his compliance

> Faced with this scenario, viewed in its entirety, an officer in McIntire's position, having just arrived on the scene, could reasonably question whether Tucker might attempt to break away, fight being handcuffed, or even

> attempt to grab one of the officer's weapons. At a minimum, he could reasonably question whether Cisco had sufficient control over the scene or instead required immediate officer assistance.
>
> On these facts, given Tucker's refusal to comply with their verbal directives to put his hands behind his back and quite moving, it would not have been evident to Defendant Officers, based on clearly established law, that they were not entitled to use heightened force in order to gain control of Tucker's hands and place him in handcuffs.

The Fifth Circuit panel consisted of Judges Clement, Higginson, and Engelhardt. The opinion was written by Judge Engelhardt.

Judge Higginson issued a dissenting opinion.

> [C]areful resolution properly comes, and constitutionally must come, from citizen peer jurors. Their fair assessment is vital as much for fellow citizens like Tucker and public trust, as it is for the police who respond to situational threats with professional restraint and seek to be distinguished from the few who do not, whose misconduct is maliciously unrestrained. One acting under color of law who throws a fellow citizen to the ground and then, when the other is prone, surrounded, and unarmed, repeatedly strikes and kicks him, surely gives rise to a material question of fact as to whether the government force is excessive.

Justice Sotomayor issued a statement regarding denial of certiorari:

> While this case does not meet our traditional criteria for certiorari, I write to note that the Fifth Circuit's reversal of the District Court's detailed order denying qualified immunity appears highly questionable for the reasons set forth by Judge Higginson's thorough dissenting opinion.

O. *Hinson v. Martin*, 853 Fed. App'x 926 (April 29, 2021)

In February 2016, DeSoto Parish Sheriff's Deputies, including Martin, were informed that Hinson was wanted on a felony arrest warrant for armed robbery involving a firearm. He was presumed armed and dangerous, according to the warrant; a Crime Stoppers tip also indicated that he was likely armed. Martin spotted his vehicle, identified the driver as Hinson, and pursued. Hinson initially accelerated his vehicle to flee, but then pulled over and fled on foot into a wooded area. Martin deployed Rex, his police K9, and both pursued Hinson into the woods. After approximately 200 yards, Rex caught Hinson by the arm and took him to the ground.

According to Hinson, Rex initially bit him on the wrist, at which point he voluntary went to the ground with the canine. Hinson alleges he ceased any attempts to escape or resist and submitted to commands from that point on. Nonetheless, Martin cursed at him, hit Rex, and gave Rex a command that caused Rex to bite Hinson several more times on the upper arm. Both while Hinson was being handcuffed and after, deputies, including Martin, kicked him in the ribs. While Hinson lay handcuffed on the ground, subdued and compliant, Martin yanked on Rex's choke chain, causing Rex to once again bite down on Hinson's forearm and not let go. The biting stopped only when another deputy said, "he's had enough," causing Martin to remove Rex from Hinson's arm. There was no video evidence of the encounter.

Jason Hinson, proceeding pro se, sued the dog's handler, DeSoto Parish Sherriff's Deputy Kyle Martin, alleging that he had used excessive force during the arrest, in violation of the Fourth and Eighth Amendments. Martin's motion for summary judgment on the basis of qualified immunity was denied. On appeal, the Fifth Circuit affirmed in part and reversed in part. The Fifth Circuit held that the Eighth Amendment did not apply, and that the claims should be evaluated only under the Fourth Amendment. In addition, the Fifth Circuit held that the initial decision to use Rex did not violate the Fourth Amendment. The panel affirmed, however, as to the allegations of continued bites and related mistreatment.

> The law was also clearly established before February 2016 that, generally speaking, "once a suspect has been handcuffed and subdued, and is no longer resisting, an officer's subsequent use of force is excessive." ... This well established general principle—that harsh force should not be applied to a handcuffed, compliant suspect—is enough to give an officer "fair warning" that ordering a dog to inflict a severe bite wound or kicking a handcuffed and compliant suspect without cause violates the suspect's Fourth Amendment rights.

The Fifth Circuit panel consisted of Judges Owen, Clement, and Higginson. The opinion was issued per curiam.

P. *Aguirre v. City of San Antonio*, 995 F.3d 395 (April 22, 2021)

The family of Jesse Aguirre (the Plaintiffs) filed a 42 U.S.C. § 1983 lawsuit alleging that officers of the San Antonio Police Department violated Aguirre's constitutional rights by causing his death through the use of excessive force—specifically, by contorting and holding his body in a prone, hog-tie-like, "maximal-restraint position" during his arrest, leading to his dying from asphyxiation. Aguirre's family claimed that five of the officers killed Aguirre by holding him face down on pavement with his hands cuffed behind his back and his legs restrained, bent at the knees, and crossed against his buttocks, for approximately five-and-a half minutes, during which time Aguirre stopped breathing. They further asserted claims of deliberate indifference against the individual officers, as well as claims that the City of San Antonio was liable for failing to train its officers not to hold or bind arrestees in hog-tie-like positions conducive to asphyxiation. The district court granted summary judgment to the individual police officers, concluding that they were entitled to qualified immunity, and to the City of San Antonio on the ground that the Plaintiffs had not established a city policy or custom that was the moving force behind the Officers' actions. On appeal, the Fifth Circuit reversed summary judgment for the officers as to the excessive force claims, affirmed as to the district court's other rulings, and remanded the case for further proceedings. The video evidence of the encounter generally appeared to support Aguirre's version of the facts.

> In sum, facts material to whether the Officers violated Aguirre's Fourth Amendment rights are genuinely disputed. The lack of visible resistance by Aguirre, the presence of numerous Officers surrounding him, and the fact that the Officers had already blocked off several lanes and caused traffic to slow significantly all weigh against the inference of any immediate safety threat or other need that would justify placing Aguirre in the prone maximal-restraint position. "[A] jury could conclude that no reasonable officer would have perceived [Aguirre] as posing an immediate threat to the officers' [or his own or the public's] safety," meaning that the Officers' use of what may have amounted to deadly force was necessarily excessive of any need to mitigate a public safety threat. Likewise, "a jury could conclude that no reasonable officer on the scene would have thought that [Aguirre] was resisting arrest," meaning that the use of force far exceeded the amount necessary to effect Aguirre's arrest or ensure his safety.

The Fifth Circuit panel consisted of Judges Jolly, Dennis, and Higginson. Separate opinions were written by each judge. In Judge Jolly's and Judge Higginson's opinions, concurring in the judgment, they both indicate that the use of force may have been initially been justified, but that, depending on the resolution of certain factual disputes, the continued use of maximal restraint would have violated clearly established law.

Q. *Batyukova v. Doege*, 994 F.3d 717 (April 21, 2021)

Deputy Doege was returning home from work and observed a vehicle with hazard lights on in one lane of the highway. Doege pulled over and turned on his police lights, and called dispatch to request assistance. Batyukova got out of her vehicle and began verbally berating Doege

(the exact content of the comments is disputed). Doege ordered Batyukova to put her hands on the car. Instead, she began walking towards him. Doege pulled out his firearm and again ordered her to stop, and ordered her to hold up her hands. Instead, she reached one of her hands round her back at her waist line. Believing that she was reaching for a weapon, Doege shot five times, injuring but not killing her. Batyukova subsequently told investigators that she had not been reaching for a firearm, but that she was planning on "mooning" Deputy Doege.

Batyukova brought suit against Deputy Doege alleging that he used excessive force in violation of the Fourth Amendment. Doege filed for summary judgment, which the district court granted, holding that Batyukova had not shown a violation of the Fourth Amendment. On appeal, the Fifth Circuit affirmed, but on the grounds that Batyukova had not shown the violation of a clearly established right.

> To overcome qualified immunity in this case, Batyukova must show that clearly established law prohibited using deadly force against a person who (1) repeatedly ignored commands, such as to show her hands, to place her hands on the hood of her vehicle, or to get down; and then (2) reached her hand behind her back towards her waistband, which the officer perceived to be a reach for a weapon to use against him.

The Fifth Circuit panel consisted of Judges Davis, Southwick, and Costa. The opinion was written by Judge Southwick.

R. *Hutcheson v. Dallas County*, 994 F.3d 477 (April 12, 2021), *petition for writ of certiorari denied at* 142 S. Ct. 564

Hutcheson walked into the lobby of the jail under the influence of cocaine and methamphetamine. He staggered through the lobby, approached a group of people sitting on a bench, conversed with them briefly, and took a seat on the bench. When he sat down, the others scattered. Hutcheson rose and spoke with Officer Elvin Hayes. Hayes placed a hand on Hutcheson's arm as if to restrain him, but Hutcheson brushed him away, sat back down, and conversed with Hayes and Deputy Fernando Reyes, who had walked over. Hutcheson stood up again and staggered around the lobby. After he had roamed the lobby for about a minute, Reyes approached Hutcheson, grabbed him, and placed him on the floor. Other officers joined Reyes in restraining Hutcheson on the floor. They placed him facedown, and Reyes tried to handcuff him while Officers Betty Stevens and Trenton Smith helped restrain him, including by putting their knees on Hutcheson's upper back. Hutcheson resisted, moving his arms to avoid the handcuffs and attempting to roll onto his back several times. He also continued to move his legs, prompting Hayes to step on his ankle. Hayes then grabbed both of Hutcheson's legs and pushed them upward toward Hutcheson's buttocks. Once his legs were released, he stopped moving. The officers placed him in a seated position, and a few minutes later a nurse came to the scene. Minutes after that, paramedics arrived and performed CPR. Hutcheson did not survive.

Hutcheson's family brought suit against the officers, alleging that they used excessive force in violation of the Fourth Amendment, and against the County, alleging a failure to train the officers. The district court granted summary judgment on all claims. On appeal, the Fifth Circuit affirmed.

> First, the video evidence shows Hutcheson resisting arrest, both while he moved around the lobby and while officers tried to restrain him on the floor. Indeed, he moved to escape when Hayes tried to grab his arm, and he resisted handcuffing while on the floor. Resisting while being handcuffed constitutes active resistance and justifies the use of at least some force. Second, the officers used much less force to restrain Hutcheson than the officers used in *Darden* [*v. City of Fort Worth*, 880 F.3d 722 (5th Cir. 2018)], where the officers "threw [the plaintiff] to the ground and tased him." The officers did not strike or tase Hutcheson, nor did they throw him to the ground. Thus, the plaintiffs cannot rely on *Darden* to demonstrate that the officers used excessive force, much less that they violated clearly established law.

The Fifth Circuit panel consisted of Judges Higginbotham, Smith, and Dennis. The opinion was written by Judge Smith.

S. *Cloud v. Stone*, 993 F.3d 379 (April 6, 2021)

Lincoln Parish Deputy Sheriff Kyle Luker tased and then shot and killed Joshua Cloud while trying to arrest him during a traffic stop. Cloud argued with Luker as to whether Luker could have seen him speeding, and refused to sign the ticket. The refusal to sign is an arrestable offense. Luker began to initiate an arrest. He ordered Cloud out of the vehicle and to turn around. Luker had gotten a handcuff on one of Cloud's wrists, when Cloud turned around to face Luker. Luker backed up and tased Cloud. A tased him a second time, and they grappled. During the fight, Cloud managed to get a firearm from his vehicle and shoot it twice, once hitting Luker in the chest. The firearm was ultimately knocked to the ground. Cloud attempted to run past Luker, in the direction of the firearm. Luker shot Cloud twice, and Cloud died of his injuries.

Cloud's parents sued Luker for excessive force, but the district court granted Luker summary judgment after finding no constitutional violation. On appeal, the Fifth Circuit affirmed, holding that Luker reasonably deployed his taser when Cloud continued to resist arrest and justifiably used deadly force when Cloud lunged for a revolver that had already discharged and struck Luker in the chest.

> The record in this case shows that Cloud actively resisted arrest, which gave Luker reasonable grounds to tase him. While Cloud's left hand was being handcuffed, he turned partially around. Luker responded by commanding Cloud to turn back around. But when Luker reached for Cloud's right hand, Cloud turned to face him, with the handcuffs dangling from his left wrist. In other words, Cloud took a confrontational stance, deprived Luker of the use of his handcuffs, and thwarted efforts to complete the arrest. Up to then, Luker had addressed Cloud's general uncooperativeness and modest resistance with verbal commands and milder force. But at this juncture things took a more serious turn, making Luker's resort to his taser reasonable. …
>
> It is evident from the record that Luker could have reasonably believed that Cloud threatened him with serious physical harm. At a minimum, Luker knew that a loaded revolver lay on the ground behind and to his left. More than that, though, he knew that the gun had just discharged twice—once into his chest—and that he had had to wrest it from Cloud's hands and toss it away. Finally, he saw Cloud make a sudden move in the gun's direction. Even drawing all inferences in Plaintiffs' favor, the record shows that Cloud was shot while moving toward the revolver and potentially seconds from reclaiming it. Plaintiffs contend Cloud was likely trying to flee, not to regain the revolver, but even if true, that would be irrelevant. Whatever Cloud's intentions, the circumstances warranted a reasonable belief that Cloud threatened serious physical harm. The lethal force was therefore not constitutionally excessive.

The Fifth Circuit panel consisted of Judges Smith, Willett, and Duncan. The opinion was written by Judge Duncan.

T. *Roque v. Harvel*, 993 F.3d 325 (April 1, 2021)

Multiple officers, including Harvel, responded to a 911 call about Jason Roque, who was reported to be in possession of a firearm and a suicide danger. Jason was pacing the sidewalk in front of his home with a black gun in his waistband. He was repeatedly saying, "Shoot me!" Albina, his mother, was standing on the porch imploring Jason not to kill himself. The officers could hear—but not see—Albina from where they were standing. One officer yelled, "Put your hands up!" Jason put his arms out to the side and continued walking on the sidewalk. He yelled at the officers to shoot and kill him. Jason then pulled out the gun, which was later determined to be a BB gun. Jason pointed the gun

at his head then turned away from the officers and said, "I'll f---ing kill myself!" An officer then yelled (for the first time): "Put the gun down!" The parties dispute what happened next. Video evidence (taken from two different home-surveillance systems) shows that, after the officer's order to put his gun down, Jason turned around to face the officers with the gun pointed in the air. All of the officers claim, however, that they didn't know where the gun was and didn't see Jason point it in their general direction. Nonetheless, in the split second between the officer's command to put the gun down and Jason's turning his body toward the officers with his arm and the gun in the air, Harvel shot Jason with a semi-automatic rifle. The video shows Jason immediately double over, drop the gun, and stumble from the sidewalk toward the street (away from his mother and the officers). The video also shows the black gun hitting the white sidewalk in broad daylight. Harvel claims that he didn't see the gun fall and considered Jason to be a continuing threat to his mother. About two seconds after the first shot, while Jason was stumbling into the street, Harvel fired another shot that missed Jason. Jason continued floundering into the street, and two seconds later, Harvel took a final and fatal shot. The police officers then approached Jason's body and unsuccessfully attempted CPR. Paramedics took Jason to the emergency room; he died soon after. Harvel maintains that he took each shot because he thought Jason was a threat to his mother's life and safety.

Jason's parents, Albina and Vincente Roque, sued Officer Harvel as well as the City of Austin under for violations of Jason's Fourth Amendment rights. Both Harvel and the City moved for summary judgment. The City argued that it could not be liable because the Roques failed to show any official policy or custom that caused the alleged constitutional violation. The district court agreed with the City and granted its motion. Harvel raised the defense of qualified immunity. The district court granted Harvel's motion as to the first shot but denied the motion as to the second and third shots. On appeal, the Fifth Circuit affirmed the district court's decision.

> At issue, then, is whether Officer Harvel's second and third shots were excessive (element two) and objectively unreasonable (element three). These questions are "often intertwined." Because Officer Harvel used deadly force, the answer to these intertwined questions depends on whether Jason posed a threat of serious physical harm after the first shot struck him. Two factual disputes concerning the placement of the gun and Jason's movements prevent us from answering these questions.
>
> First, the gun. Harvel asserts that, after the first shot, he perceived Jason to be a continuing threat to his mother because he didn't see Jason drop his gun. Plaintiffs argue, with video and expert evidence, that a reasonable officer should have seen Jason drop his black gun on the white sidewalk in broad daylight.
>
> Second, Jason's movements. Harvel claims that Jason was "still moving and ambulatory" after the first shot. Plaintiffs counter that the video shows Jason double over and stumble into the street. Even though Jason was still moving, Plaintiffs assert that these movements show a wounded man moving away from everyone at the scene.
>
> Both fact disputes go to whether a reasonable officer would have known that Jason was incapacitated after the first shot. If Jason was incapacitated, he no longer posed a threat. And if he no longer posed a threat, Harvel's second and third shots were excessive and unreasonable. Whether Jason was incapacitated is therefore not only disputed but material to Plaintiffs' Fourth Amendment claim.

The Fifth Circuit panel consisted of Judges King, Elrod, and Willett. The opinion was written by Judge Willett.

U. *Pearce v. FBI Agent Doe*, 849 Fed. App'x 472 (March 9, 2021)

Ulises Valladares and his twelve-year-old son U.V. were at home when two men entered and demanded information about Ulises's brother. The assailants bound and gagged Ulises and U.V. with duct tape. Then they kidnapped Ulises and left U.V. behind. U.V. managed to escape to a neighbor's house and reported the situation to local law enforcement. The FBI assisted the kidnapping investigation. One day into the FBI's investigation, Ulises's brother received a ransom call from the kidnappers. Law enforcement traced the call and used it to predict Ulises's location. A team of FBI agents including Agent Doe approached a home with their guns drawn and confirmed Ulises was bound inside. Agent Doe broke a window during the approach and pointed his gun through the opening. The gun discharged, and a bullet struck and killed Ulises.

Ulises's family brought suit against Agent Doe, alleging that he had violated Ulises's Fourth Amendment rights by using excessive force. Doe filed a motion to dismiss, asserting qualified immunity, which the district court denied. On appeal, however, the Fifth Circuit reversed and rendered judgment for Agent Doe, explaining that the negligent firing of a weapon does not constitute a Fourth Amendment violation. A Fourth Amendment violation requires an *intentional* seizure, but Doe was not attempting to seize Ulises at all.

> Here, the only plausible reading of the allegations is that Doe accidentally shot Ulises while trying to help him by ending the hostage situation. Such accidental conduct does not result in a Fourth Amendment seizure.

The Fifth Circuit panel consisted of Judges Higginbotham, Costa, and Oldham. The opinion was issued per curiam.

V. *Ramirez v. Guadarrama*, 844 Fed. App'x 710 (February 8, 2021), reissued as 3 F.4th 129, *petition for rehearing en banc denied at* 2 F.4th 506, *petition for writ of certiorari denied at* 142 S. Ct. 2571 (2022)

While responding to a 911 call reporting that Olivas was threatening to kill himself and burn down his family's house (his family was also in the house), Officers Guadarrama and Jefferson discharged their tasers at Olivas, striking him in the chest. Olivas had doused himself in gasoline, which ignited when the prongs of Guadarrama's taser came into contact with it. Olivas was engulfed in flames. The house burned down. Olivas died of his injuries several days later.

Olivas's family brought suit, alleging that the officers had violated Olivas's Fourth Amendment rights by tasing him. The officers filed a motion to dismiss, asserting qualified immunity, which was denied by the district court. On appeal, the Fifth Circuit reversed and remanded with instructions to dismiss the claims against the officers.

> Olivas posed a substantial and immediate risk of death or serious bodily injury to himself and everyone in the house. He was covered in gasoline. He had been threatening to kill himself and burn down the house. He appeared to be holding a lighter. At that point, there were at least six other people in the house, all of whom were in danger.

The Fifth Circuit panel consisted of Judges Jolly, Stewart, and Oldham. The opinion was issued per curiam.

On the petition for rehearing en banc, there were three opinions concurring in the denial of rehearing en banc and two opinions dissenting for the denial of rehearing. Judge Jolly issued a concurring opinion, as did Judge Ho, joined by Judges Jolly and Jones, and Judge Oldham, joined by Judges Jolly, Jones, Ho, and Engelhardt. Judge Smith issued a dissenting opinion, as did Judge Willett, joined by Judges Graves and Higginson.

Judge Jolly:

> Three years after the fact, the dissent is unable to articulate what the Fourth Amendment required Officer Guadarrama and Sergeant Jefferson to do in the circumstances they confronted.

Judge Ho:

> Olivas didn't just threaten to light himself on fire. He also "posed a substantial and immediate risk of death or serious bodily injury to ... everyone in the house"—including members of Olivas's own family, as well as the officers themselves. So the officers' actions "turned risk into reality"—but only for the one person who actively sought to bring about his own death. No one else was harmed, notwithstanding the "risk of death or serious bodily injury to ... everyone in the house."
>
> *Judge Oldham:*
>
> If we take seriously the dissent's view that the Constitution is a font of tort law, then the excessive-force plaintiff (like the tort one) must establish as part of his prima facie case what the reasonable officer would've done.
>
> *Judge Smith:*
>
> In reversing the denial of qualified immunity, the unanimous panel got it exactly right: … So why should this matter be reviewed en banc? It is because it bears an uncanny resemblance to a recent case, *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc), *cert. denied*, —— U.S. ——, 141 S. Ct. 111, 207 L. Ed. 2d 1051 (2020), also involving a deranged person, in which the court reached a result that is not only grave error but is legally and factually irreconcilable with the commendable panel decision here.
>
> *Judge Willett:*
>
> How is it reasonable—more accurately, not plausibly unreasonable—to set someone on fire to prevent him from setting himself on fire? To my mind, it is unfathomable to conclude with zero discovery, yet 100% finality, that no facially plausible argument exists that these officers acted unreasonably.

On the petition for writ of certiorari, Justice Sotomayor, joined by Justices Breyer and Kagan, issued an opinion dissenting from the denial of certiorari.

> According to those allegations, the officers elected to use force knowing that it would directly cause the very outcome they claim to have sought to avoid. That is, to prevent Olivas from lighting himself on fire and burning down the house, the officers tased Olivas just after they were warned that it would light him on fire.

W. *Valencia v. Davis*, 836 Fed. App'x 292 (December 4, 2020)

Abilene Police Department offices were dispatched to a bar fight at the Longbranch Saloon, and were advised that one of the individuals in the fight had a gun. As they arrived, Alfredo Valencia fled the scene in a tan Tahoe. Officers Davis, Scott, and Broyles, were a short distance away, and were able to intercept and pull over Valencia's vehicle. The officers conducted a high risk felony stop, which means they had their firearms drawn. Valencia was ordered out of the car and to face the car. He failed to promptly respond to various commands, and claims he did not hear other commands. While he was standing at the car, he dropped one hand to his waist, before putting it back on the car. Seeing the movement, Officer Davis holstered his firearm, ran towards Valencia and pinned him to the car, before taking him to the ground and handcuffing him. Valencia alleges that the impact caused him to suffer injuries to his should requiring surgery.

Valencia brought suit against Officer Davis, alleging that Davis used excessive force in violation of Valencia's Fourth Amendment rights. Davis filed a motion for summary judgment, asserting qualified immunity, which was granted by the district court. On appeal, the Fifth Circuit affirmed, holding that the law was not clearly established.

> In this case, Valencia claims that the law is "clearly established that an officer who immediately resorts to physical force rather than continuing negotiations with a person who is not fleeing, poses no danger, and who is not engaged in active resistance violates an arrestee's constitutional rights."

> However, the trio of cases that he cites in support of this proposition are easily distinguishable and do not clearly establish a Fourth Amendment violation in this case.

The Fifth Circuit panel consisted of Judges Owen, King, and Engelhardt. The opinion was issued per curiam.

X. *Joseph v. Bartlett*, 981 F.3d 319 (November 20, 2020)

A middle-school official saw Kendole Joseph near the school acting "strange" and asked school resource officers to check him out. When the school resource officers approached, Joseph ran into a nearby convenience store and jumped behind the checkout counter. The school resource officers followed and made radio calls, stating they were pursuing a "suspicious person." Twelve other officers joined them. About eight minutes after Joseph entered the store, the officers apprehended him and carried him to a police car, after which he became unresponsive and was taken to the hospital, where he died two days later.

Joseph had paranoid schizophrenia and had not taken his medication. When Joseph entered the convenience store, he was scared, yelling that someone was trying to kill him, and ultimately jumped over the counter and curled up on the floor in the fetal position. When the officers arrived, they held him down, tased him twice, kicked him twelve or thirteen times, and punched him in the head and face approximately twelve times. The officers stuffed Joseph in a police vehicle, at which point he became unresponsive and medical personnel examined him. They performed CPR and transported him to the hospital, where he died two days later from his injuries.

Joseph's family brought suit against Officers Martin and Costa for excessive force in violation of Joseph's Fourth Amendment rights, and against other officers for failing to intervene. The officers moved for summary judgment, asserting qualified immunity. The district court denied their motions. On appeal, the Fifth Circuit affirmed denial as to Officers Martin and Costa, but reversed as to the "bystander" officers. The panel majority held that the allegations against Officers Martin and Costa showed a violation of the Fourth Amendment, and that the law was clearly established. In contrast, the panel majority held that while the allegations against the other officers show a violation of the Fourth Amendment, the law was not clearly established.

> In total, Joseph endured twenty-six blunt-force injuries to his face, chest, back, extremities, scrotum, and testes. Throughout the eight-minute encounter, Joseph was on the ground, experiencing acute psychosis, and continuously yelling. Officer Bartlett recalled Joseph "yelling random things" and pleading for someone to "call the police." Officer Faison and the store manager recalled him pleading for someone to "call the real police." Officer Leduff recalled Joseph calling for his mother and "saying all types of things," including that he was "about to be killed." The store manager recalled Joseph calling out for his mother and repeatedly yelling, "My name is Kendole Joseph," and "I do not have a weapon."

The Fifth Circuit panel consisted of Judges Elrod, Willett, and Oldham. The opinion was written by Judge Willett. Judge Oldham issued a separate opinion, concurring in the judgment. He would not have reached the question of whether the allegations against the bystanders showed a constitutional violation, as the issue as poorly briefed by the plaintiffs.

Y. *Angulo v. Brown*, 978 F.3d 942 (October 23, 2020)

Emmanuel Angulo was returning to the United States from Matamoros, Mexico. He was stopped at one of the marked lanes for the port of entry, and questioned by Customs and Border Protection Officer Brown. Officer Brown directed Angulo to a secondary inspection site for further examination. Meanwhile, Angulo was accusing Officer Brown of racism and requested to speak to his supervisor. Official McCrystal overhead yelling in Officer Brown's lane, so came to assist. McCrystal spoke with Angulo, and asked him to exit the vehicle, When Angulo refused to comply, Officer McCrystal grabbed

Angulo around the arms ("shoulder-pin restraint technique"), and removed him from the car to the ground, where the officers placed handcuffs on Angulo. He was then taken to a room for questioning, and the handcuffs were removed.

Angulo brought suit on various legal theories, including alleging that the officers used excessive force in removing him from the vehicle, putting him on the ground, and handcuffing him. The district court granted summary judgment to Brown and McCrystal based on qualified immunity. On appeal, the Fifth Circuit affirmed.

> Angulo alleges that he was peacefully conversing with Brown (albeit tensely, given that he was accusing Brown of racism and demanding to speak with Brown's supervisor) and complying with all requests when he was violently accosted by McCrystal, who allegedly grabbed him by the neck and forcibly threw him to the ground. This is "blatantly contradicted" by the video evidence. … The video shows McCrystal and Guerra arriving to help Brown, after several minutes of Brown's interacting calmly with a wildly gesticulating and uncooperative Angulo. McCrystal speaks with Angulo briefly, then attempts to open the door. It is clearly locked, so he speaks with Angulo again. He tries the door again, and again is unable to open it. He says something further to Angulo, while pointing inside the window, and then successfully opens the door. He then speaks with Angulo for several seconds, apparently asking him to exit the vehicle; Angulo does not exit the vehicle. McCrystal briefly holds a hand out to Angulo (explained by McCrystal as an effort to help Angulo from the vehicle); Angulo neither accepts the proffered assistance nor exits on his own. McCrystal reaches into the vehicle with one arm; Angulo resists this effort to extract him from the vehicle with such force that the vehicle rocks to one side and the headlights flicker. Finally, McCrystal reaches in with both arms, wraps them around Angulo's midsection, and extracts Angulo. McCrystal and Brown both testified that this was a standard "shoulder-pin restraint technique" that the officers had been trained to use under such circumstances; McCrystal visibly did not grab Angulo by the neck or throw him to the ground. In short, the video shows the officers using reasonable force to compel Angulo's compliance with a command that they were legally entitled to give him.

The Fifth Circuit panel consisted of Judges Smith, Clement, and Oldham. The opinion was written by Judge Clement.

Z. *Durant v. Brooks*, 826 Fed. App'x 331 (September 1, 2020)

Officer Brooks noticed Durant engaging in what appeared to Brooks to be suspicious behavior. Officer Brooks followed Durant's vehicle, and caught up with him when he returned home. Officer Brooks then searched Durant and his girlfriend Fairley, handcuffed them, and placed them in the back of the patrol car. Durant alleges that, while in the back seat of the police vehicle, Officer Brooks (and Officer Kraly) punched him in the ribs and kicked him, all while Durant was handcuffed in the back seat of the police vehicle.

Durant brought suit against Officer Brooks and others, alleging, as relevant here, that Officer Brooks used excessive force in violation of Durant's Fourth Amendment rights. Officer Brooks filed a motion for summary judgment, which was denied by the district court. On appeal, the Fifth Circuit affirmed.

> Officer Brooks does not claim that Durant was resisting arrest while handcuffed in the back seat of the police cruiser. Instead, he testified that no scuffle happened at all. Meanwhile, Durant and Fairley testified that Officer Brooks used force on Durant while he was handcuffed and subdued in the police car. Such conduct amounts to unreasonably excessive force under our caselaw. Accordingly, any injury suffered by Durant—even sore ribs—is

> sufficient to establish the injury element of his excessive force claim.

The Fifth Circuit panel consisted of Judges Stewart, Higginson, and Costa. The opinion was issued per curiam.