United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
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No. 20-10055

Selina Marie Ramirez, *individually and as Independent Administrator of*, *and on behalf of*, The Estate of Gabriel Eduardo Olivas *and the heirs-at-law of* Gabriel Eduardo Olivas, *and as parent*, *guardian*, *and next friend of and for female minor* SMO; Gabriel Anthony Olivas, *individually*,

Plaintiffs—Appellees,

versus

Jeremias Guadarrama; Ebony N. Jefferson,

Defendants—Appellants.

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

ON PETITION FOR REHEARING EN BANC

(Opinion: February 8, 2021, 5 Cir., 844 F. App'x 710)

Before Jolly, Stewart, and Oldham, *Circuit Judges*.

Per Curiam:

The court having been polled at the request of one of its members, and a majority of the active judges who are in regular service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), rehearing en banc is DENIED. In the en banc poll, four judges voted in favor of rehearing (Judges Smith, Graves, Higginson, and Willett) and thirteen judges voted against rehearing (Chief Judge Owen and Judges Jones, Stewart, Dennis, Elrod, Southwick, Haynes, Costa, Ho, Duncan, Engelhardt, Oldham, and Wilson).

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
E. Grady Jolly
United States Circuit Judge

E. GRADY JOLLY, *Circuit Judge*, concurring in denial of rehearing en banc:[1]

The dissent and I must have received different sets of dots and dashes from the 1844 telegraph message that it attempts, strangely, to metaphorically adapt to this appeal. *See post*, at 1–16 (Willett, J., dissenting). For this appeal is not the "particularly egregious" case the dots and dashes transmitted to it. *See id.* Instead, this appeal is a textbook case for the grant of qualified immunity, as the doctrine presently is promulgated.

A 13–4 majority of the court has voted not to rehear, en banc, this factually horrifying but—legally speaking—transparent qualified-immunity appeal. The unanimous panel opinion explains why we must grant immunity to Officer Jeremias Guadarrama and Sergeant Ebony Jefferson. *See Ramirez v. Guadarrama*, 844 F. App'x 710, 713–17 (5th Cir. 2021) (per curiam). The unanimous panel opinion also explains why we cannot quarterback from our Delphic shrines, three years later, the split-second decision-making required of these officers in response to a suicidal man (1) doused in gasoline, (2) reportedly high on methamphetamine, (3) screaming nonsense, (4) holding a lighter, and (5) threatening to set himself on fire and to burn down the home, occupied by six people, which he had earlier covered in gasoline.[2] *See id.*

With respect, the dissenting opinion emotes; it does not reason.[3] Indeed, when reading the dissent, one questions why these officers have not

[1] This response speaks only to the dissenting opinion penned by Judge Willett.

[2] The unanimous panel resolved this appeal on the constitutional-violation prong of qualified immunity, concluding that plaintiffs had not pleaded a Fourth Amendment violation. *Ramirez*, 844 F. App'x at 713–17. The unanimous panel did not reach the "clearly established law" prong. *Id.*

[3] Unable itself to say—over three years after the fact—what a reasonable officer might have done, the dissent says that "[e]xploring that vital question is precisely why discovery exists." *Post*, at 8 (Willett, J., dissenting). That is a misguided view of both pleading standards and the purposes of discovery, a practice called in the vernacular "fishing" for a cause of action. "[T]he question presented by a motion to dismiss a

been charged with first-degree murder. According to the dissent, the officers simply arrived at a suicidal man's home and burned him alive—for no reason. *See post*, at 1–16 (Willett, J., dissenting). Of course, that is not what happened and not what the complaint alleges. May I redirect the dissent from its *rhetoric* to the *factual allegations* of the complaint:

- Officers arrived at the home in response to a 911 call by a member of Olivas's family. Compl. ¶14.
- The family member had told dispatch that Olivas "was threatening to burn down the house." Compl. ¶15.
- The family member had told dispatch that Olivas "was pouring gasoline in the house." Compl. ¶15.
- Another officer was dispatched to the home based on reports of "an alleged suicidal subject." Compl. ¶19.
- This officer was told that the "alleged suicidal suspect" was "high on methamphetamines." Compl. ¶19.
- This officer was told that the "alleged suicidal suspect" who was "high on methamphetamines" was also "pouring gasoline inside the home." Compl. ¶19.
- After receiving the call from dispatch, Officer Guadarrama stated that Olivas might be "the same subject" he had encountered on a previous call, who had "want[ed] suicide by cop at the time." Compl. ¶38.
- When officers arrived at the home, they saw Olivas's wife "in the front yard waving . . . and yelling '[h]urry up.'" Compl. ¶ 17.

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complaint for insufficient pleadings does not turn on the controls placed upon the discovery process." *Ashcroft v. Iqbal*, 556 U.S. 662, 684–85 (2009). The dissent's "we need discovery" argument reduces to the proposition that qualified immunity cannot be resolved on a motion to dismiss.

- When officers entered the home, they smelled gasoline. Compl. ¶23.
- When officers entered the bedroom where Olivas was located, they saw Olivas pour gasoline on his head while holding a lighter. Compl. ¶23.
- There were six people in the bedroom: Olivas, Olivas's wife and son, and three officers. Compl. ¶25.
- Olivas—gasoline-soaked and armed with a lighter in a gasoline-drenched bedroom occupied by five other people—"began screaming 'non-sense' [*sic*] and yelling that he was going to burn the place to the ground." Compl. ¶49.
- Olivas stood just six feet away from the closest of the officers at the time he threatened to "burn the place to the ground." Compl. ¶50.

These factual allegations—demonstrating the intense, fast-moving, and incredibly dangerous circumstances under which the officers must make a choice when there are no good choices—make no appearance in the dissent. *See post*, at 1–16 (Willett, J., dissenting). If "facts are *all* that matter," *id.*, at 11, surely the omission must be an oversight of such facts from the dissent's "officers gone wild" narrative.[4] Perhaps the dissent would like another opportunity to look at and try to understand the record.

[4] The dissent faults the unanimous panel for "invok[ing] something resembling summary-judgment review" in its Rule 12(b)(6) analysis. *Post*, at 4 (Willett, J., dissenting). This charge ignores the kaleidoscopic character of the complaint, which spans fifty four pages (117 paragraphs) and recounts the incident from the occasionally dueling perspectives of everyone on the scene. To the extent the unanimous panel opinion speaks of "dispute[s]," *Ramirez*, 844 F. App'x at 714, such differences are alleged in the complaint.

* * *

From purple prose, to the astonishment of what God has wrought, to images of nineteenth-century Justices in green eyeshades hovering over a telegraph transmitter tapping out opinions in Morse code, to the patriotic celebration of 42 U.S.C. § 1983, and finally to the sermonette that good can come even from the tragedy of the unanimous panel opinion, much as it did to Samuel F.B. Morse in the invention of the telegraph, the dissent packs it all in—except for a fair and complete rendition of the facts and law.

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. As for the "obviousness" of the Fourth Amendment violation, if a distinguished United States Circuit Judge—after months of research, thought, and contemplation—does not now know what the Constitution then required, it seems "obvious" that "these officers had no 'fair and clear warning of what the Constitution require[d]'" in the split-second, life-or-death encounter. *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 617 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 746 (2011) (Kennedy, J., concurring)).[5]

In short, I write to say the dissent is quite unfair to the record, to the law, and to the officers.

[5] The opinions of Judge Ho and Judge Oldham, with which I fully concur, examine the dissent's "obvious case" and "need for discovery" arguments. There is no need to duplicate their critique of the dissent here.

James C. Ho, *Circuit Judge*, joined by Jolly and Jones, *Circuit Judges*, concurring in denial of rehearing en banc:

A robust majority of this court has voted to deny rehearing en banc in this matter. I concur and write separately to offer a brief response to the dissent authored by Judge Willett.

A unanimous panel of our court found that the police officers committed no constitutional violation in this admittedly tragic case. Their reason is simple—there was no reasonable alternative course of action that the officers could have taken instead to protect innocent lives:

> Although the employment of tasers led to a tragic outcome, we cannot suggest exactly what alternative course the defendant officers should have followed that would have led to an outcome free of potential tragedy. We emphasize that the reasonableness of a government official's use of force must be judged from the perspective of a reasonable official on the scene, not with the benefit of 20/20 hindsight. *See Graham* [*v. Connor*], 490 U.S. [386,] 396 [(1989)]. The fact that Olivas appeared to have the capability of setting himself on fire in an instant and, indeed, was threatening to do so, meant that the officers had no apparent options to avoid calamity. If, reviewing the facts in hindsight, it is still not apparent what might have been done differently to achieve a better outcome under these circumstances, then, certainly, we, who are separated from the moment by more than three years, cannot conclude that [officers] Guadarrama or Jefferson, in the exigencies of the moment, acted unreasonably.

Ramirez v. Guadarrama, 844 F. App'x 710, 716 (5th Cir. 2021).

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. *Post*, at 6–7 (Willett, J., dissenting). So the

officers' actions "turned risk into reality"—but only for the one person who actively sought to bring about his own death. *Id.* No one else was harmed, notwithstanding the "risk of death or serious bodily injury to . . . everyone in the house." *Id.*

I.

According to the dissent, however, the officers committed an "obvious," "egregious," and "conscience-shocking" "constitutional violation." *Id.* at 1, 6, 7, 15, 16. This despite the dissent's admission that the panel may well be right that "the officers had no apparent options." *Id.* at 7.

But how can a constitutional violation be "obvious," "egregious," and "conscience-shocking," when the dissent can't tell the officers what they should have done differently to keep people safe?

The dissent responds that, if we allowed discovery, we might uncover some reasonable alternative action that the officers could have taken.

Two responses. First, the dissent does not explain how discovery would impact the analysis. To the contrary, the dissent has already decided that the officers here engaged in an "obvious," "egregious," and "conscience-shocking" constitutional violation. So the defendants should be held liable, regardless of what discovery might uncover.

Second, let's assume the premise that discovery is necessary to prove the existence or absence of reasonable alternatives. If the only way to know what the Constitution requires is to consult lawyers and conduct discovery, what message does that send to police officers? What are they supposed to do in extremely dangerous situations such as this? What are the rules of engagement they can follow, so they know how to protect innocent people from violent criminals, while avoiding a career-ending lawsuit?

The dissent has no answer.

II.

Another problem: The dissent says the constitutional violation here was "obvious." But apparently not so in *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc). There our court subjected officers to trial for shooting and killing a potential school shooter. But it did so over a number of dissenting opinions. *See*, *e.g.*, *id.* at 470 (Willett, J., dissenting).[1]

So let's take the dissent at its word: Our en banc court got it wrong in *Cole*—and got it wrong here as well. What, then, is the law?

No one would deny that the threat of lethal violence in *Cole* was *less* imminent than the danger presented here. In *Cole*, the potential school shooter was merely on the way to the school when officers shot and killed him. *See id.* at 448. Here, by contrast, the suspect was at home, in the very same room as—and in dangerously close proximity to—the officers and citizens he was endangering.

So what is the dissent telling police officers in our circuit—that they can use lethal force, but only when the lethal threat is *less* imminent than the one presented here? What kind of rule is that?[2]

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[1] *See also id.* at 457 (Jones, J., dissenting); *id.* at 469 (Smith, J., dissenting); *id.* at 473 (Ho & Oldham, JJ., dissenting); *id.* at 479 (Duncan, J., dissenting).

[2] Tellingly, the dissent does not even attempt to reconcile its position here with its position in *Cole*. Instead, it changes the subject, claiming that "my colleagues risk" making "qualified immunity an impenetrable shield against every manner of wrongdoing, however ghastly." *Post*, at 11 (Willett, J., dissenting). Of course, the dissent offers zero evidence that our circuit is at any risk of heading toward this dystopian future. *Cf.*, *e.g.*, *Horvath v. City of Leander*, 946 F.3d 787, 800–03 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) (arguing that qualified immunity is incorrect as a textualist and originalist matter); *Cole*, 935 F.3d at 477–79 (Ho & Oldham, JJ., dissenting) (same); *Delaughter v. Woodall*, 909 F.3d 130, 141 (5th Cir. 2018) (Ho, J., concurring in the judgment) (agreeing with denial of qualified immunity); *Webb v. Stone*, 821 F. App'x 369, 371 (5th Cir. 2020) (same).

* * *

Reasonable people can disagree with the doctrine of qualified immunity. *See*, *e.g.*, *Horvath v. City of Leander*, 946 F.3d 787, 800–03 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part). But that debate has nothing to do with this appeal. As the dissent acknowledges, the panel decided this case based on the absence of a constitutional violation, not on whether any such violation was "clearly established" for purposes of qualified immunity.

Reasonable people can disagree with what the police officers did here. But assuming that the police had the duty to do *something* here to protect innocent lives, no one has explained: What should the officers have done instead? The dissent acknowledges that that is a "perfectly sensible question." *Post*, at 7 (Willett, J., dissenting). But it offers no answer.

Reasonable people can advocate in favor of greater restrictions on the police than what the Fourth Amendment requires. Our Nation is currently engaged in a rigorous debate over the need for police reform. Some argue the police should not use force, even in cases involving deadly threats—or that we should defund the police altogether. But that is a policy debate for the political branches, not the judiciary. As judges, we apply our written Constitution, not a woke Constitution.

I am grateful for the overwhelming vote to leave the panel ruling intact. That includes Judge Smith, whose dissent notes that the panel "got it exactly right." *Post*, at 1 (Smith, J., dissenting).

But the fact remains that we are sending some awfully confusing and discomfiting signals to police officers. I fear that officers in our circuit will stop taking on these difficult and dangerous duties, if they have to worry about which panel of our court they will draw in the event tragedy strikes. I fear that officers will decline to put their careers and families on the line

because they're unable to predict the outcome of our en banc votes. I fear that officers will choose to stand by and watch, rather than to protect and to serve, if the rules of engagement are unclear and unknowable at the time of the incident—determinable only after discovery is completed.

I concur in the denial of rehearing en banc.

ANDREW S. OLDHAM, *Circuit Judge*, joined by JOLLY, JONES, HO, and ENGELHARDT, *Circuit Judges*, concurring in the denial of rehearing en banc:

This case is tragic, as so many of our cases are. But the question is not whether it's tragic. The question is whether the plaintiffs pleaded a violation of the Fourth Amendment. Judge Willett says the answer is obviously yes. I respectfully disagree for three reasons.[1]

I.

First, I do not understand how the dissent can say the officers' split-second decision was "unreasonable"—much less plainly unreasonable—when no one can specify what reasonable alternative the officers had.

Many understand the Fourth Amendment's use of the word "unreasonable" to create a font of excessive-force tort law. *E.g.*, *Roque v. Harvel*, 993 F.3d 325, 333 (5th Cir. 2021). I have elsewhere expressed my skepticism of that view. *See* Andrew S. Oldham, *Official Immunity at the Founding*, https://ssrn.com/abstract=3824983 (questioning whether originalists' qualified-immunity debate is framed in the correct terms or the correct time period); *cf.* *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998) (noting the Constitution "is not a font of tort law to be superimposed upon whatever systems may already be administered by the States" (quotation omitted)). But for those who think the Fourth Amendment gives us a roving commission to decide when officers commit torts, we can do it *only* by comparing the officers' conduct to a hypothetical reasonable response under the circumstances.

[1] I respectfully disagree with Judge Smith that this case is a suitable vehicle for revisiting *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc). The balance of this opinion addresses the arguments raised by Judge Willett.

Take negligence. The common law "theory of negligence presupposes some uniform standard of behavior." W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 32, at 173 (5th ed. 1984). Common law courts fabricated a "man of ordinary prudence" to set the standard. *See id.* at 174 (stating that "[t]he 'man of ordinary prudence' was perhaps first set forth in ordinary negligence cases in *Vaughan v. Menlove*, 1837, 3 Bing.N.C. 468, 132 Eng. Rep. 490"). This imaginary "reasonable person" is no "ordinary individual, who might occasionally do unreasonable things," but "rather a personification of reasonable behavior." *Id.* at 174–75. The reasonable person is never negligent. So to show that a tort defendant acted negligently, the tort plaintiff must explain what course the reasonable person would have taken instead of the defendant's. *See id.* at 175 ("[N]egligence is a failure to do what the reasonable person would do under the same or similar circumstances." (quotation omitted)); *id.* at 239 ("The burden of proof of the defendant's negligence is quite uniformly on the plaintiff, since he is asking the court for relief, and must lose if his case does not outweigh that of the defendant's.").

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. This is functionally identical to the reasonable-alternative requirement that the Supreme Court imposes upon method-of-execution plaintiffs under *Baze v. Rees*, 553 U.S. 35, 47–52 (2008). Only if the State "refuses to adopt such an alternative" could its "refusal to change its method . . . be viewed as 'cruel and unusual' under the Eighth Amendment." *Id.* at 52. In my view, so too with the Fourth.

Here, at the moment the officers acted, they were confronting a suicidal man (Gabriel Olivas) who was dousing himself in gasoline, holding a lighter, and threatening to burn his house down. The officers, Olivas, and

members of his family were all in one room—and Olivas was only six feet away from the closest officer. The officers were forced to make a "split-second judgment[]" regarding how to subdue Olivas. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)). And in that split second, the officers decided to tase him.

If the officers couldn't try to incapacitate Olivas with a taser, what *could* they reasonably have done? The dissent speculates that perhaps the officers had "options galore"—but the dissent is unable to identify a single one. *Post*, at 7 (Willett, J., dissenting). For their part, the plaintiffs alleged the officers could have tackled Olivas—and presumably prayed to survive. Compl. ¶ 51 ("Mr. Olivas being only 6 feet away from Officer Elliott, and only a bit more than that away from other officers in the room, such officers could have closed the distance between themselves and Mr. Olivas in much less than a second and physically restrained him from doing anything to himself."). And at argument, the plaintiffs instead suggested the officers could "wait for the crisis intervention team" while "engag[ing] in negotiations." Both options are absurd—so absurd in fact that today's dissent cannot even bear to mention them, let alone embrace them. And that's for good reason because each of the officers' "options galore" would put the lie to Justice Jackson's admonition that the Constitution is not "a suicide pact." *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

The dissent's only response is a fallacious invocation of *Illinois v. Lafayette*, 462 U.S. 640 (1983). *See post*, at 9 & n.24 (Willett, J., dissenting). In *Lafayette*, the Supreme Court held that a *reasonable* search does not become *unreasonable* simply because the officer might've had other reasonable alternatives. *See* 462 U.S. at 647. That's obviously true: If an officer has two reasonable alternatives (X and Y), she can choose either of them and behave reasonably. But it should be equally obvious that a Fourth

Amendment plaintiff cannot show that a third alternative (Z) is *unreasonable* without any reference to X or Y. In fact, *Lafayette* expressly states that the "real [Fourth Amendment] question" is "whether the . . . Amendment require[d]" officers to do something other than what they did. *Ibid.* (emphasis omitted). That comparison is impossible when a plaintiff cannot specify the "range of conduct which is objectively 'reasonable' under" the circumstances. *Post*, at 9 n.24 (Willett, J., dissenting) (quoting *Shulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995)). The dissent's contrary assertion is illogical and unsupported by any precedent from any court.

II.

Second, the dissent says that none of this matters because the plaintiffs should be allowed to take discovery and only then (maybe) tell us what a reasonable officer would've done in a split-second confrontation with a suicidal man doused in gasoline and holding a lighter in a room with innocent family members. *But see Pearson v. Callahan*, 555 U.S. 223, 232 (2009) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." (quotation omitted)).

I doubt that ever has been the Rule 12(b)(6) standard, *cf. Conley v. Gibson*, 355 U.S. 41 (1957), but it's certainly not the standard today. In *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99 (2d Cir. 2005), the court of appeals (like the dissent today) said it would be unfair to require plaintiffs to plead an actual legal violation where so much of the information necessary to so plead is unknown to the plaintiffs before discovery. *Id.* at 110–11, 114. In the Second Circuit's view, *Conley v. Gibson* required plaintiffs to plead only enough to put the defendants on notice of the claim; after that, the plaintiffs were entitled "to potentially limitless fishing expeditions—discovery pursued just in case anything turns up—in hopes, perhaps, of a favorable

settlement in any event." *Id.* at 115 (quotation marks, alterations, and footnotes omitted). The Supreme Court reversed in a landmark decision, abrogated *Conley*, and held that all plaintiffs—even those who want to go fishing in discovery—must plausibly plead every element of their claim to withstand Rule 12(b)(6). *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

By all accounts, the plaintiffs in our case are missing an element of their claim. Alleging the officers behaved unreasonably without any facts to support a superior alternative[2] is materially identical to alleging an antitrust conspiracy without any facts to support a conspiracy. Both fail Rule 12(b)(6). In fact, this case is far easier than *Twombly* because our plaintiffs have alleged nary one fact they hope to uncover in discovery if given the chance to go fishing. (At least in *Twombly*, the plaintiffs hoped to uncover some smoking-gun conspiracy that they did not have a basis to allege.) Supreme Court precedent squarely forecloses the dissent's assertion that plaintiffs can fail to allege an element of their claim and then use discovery to find it.

The dissent's only response is to dismiss *Twombly* as just "an antitrust rule." *Post*, at 10 (Willett, J., dissenting). Again, we've been down that road before. In the years following *Twombly*, the Second Circuit attempted to read it as largely "limited to the antitrust context." *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir. 2007). After the Supreme Court granted cert in *Iqbal*, the respondent defended the Second Circuit by arguing "*Twombly* should be

[2] As noted in Part I, plaintiffs pleaded that officers could've tackled Olivas and risked immolation. I am not ignoring that allegation because it's "sufficiently fantastic to defy reality as we know it"—on par with "claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel." *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009) (Souter, J., dissenting). To the contrary, I accept it as true. Even accepting plaintiffs' tackle-and-pray hypothetical, however, the complaint fails to state a claim because it alleges nothing to show their hypothetical is superior to the officers' chosen alternative. (In fact, as plaintiffs alleged it, their hypothetical is patently *inferior*.) And without a superior alternative, the plaintiffs are without a Fourth Amendment claim.

limited to pleadings made in the context of an antitrust dispute." *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (reversing *Iqbal v. Hasty*). The Supreme Court emphatically disagreed, reversed, and emphasized that its holding—in both *Iqbal* and *Twombly*—governs *all* complaints and *all* motion-to-dismiss proceedings. *Ibid.* Today's dissent cannot both wrap itself in the Rule 12 standard, *see post*, at 5 (Willett, J., dissenting) ("This is 12(b)(6)."), and ignore the Supreme Court's canonical Rule 12 precedents.

III.

Third and finally, the dissent is quite right to focus on the Supreme Court's recent qualified-immunity orders. This Term, the Court summarily reversed one of our grants of qualified immunity and vacated another. *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam), *summarily reversing* 946 F.3d 211 (5th Cir. 2019); *McCoy v. Alamu*, 141 S. Ct. 1364 (2021), *granting, vacating, and remanding* 950 F.3d 226 (5th Cir. 2020). It's true that summary reversals can constitute sharp rebukes. *See Cole v. Carson*, 935 F.3d 444, 473 (5th Cir. 2019) (en banc) (Ho & Oldham, JJ., dissenting) (noting that "[t]he Supreme Court has not hesitated to redress . . . intransigence from our sister circuits—often through the 'extraordinary remedy of a summary reversal'" (quoting *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting))). And these summary orders are particularly remarkable because they are the Court's first- and second-ever invocations of the obvious-case exception to the clearly established law requirement.

But *Taylor* and *McCoy* both tell us to look for "particularly egregious facts" where there is "no evidence" of "necessity or exigency." *Taylor*, 141 S. Ct. at 54 (applying *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). It's unclear how we should apply these orders where there *is* overwhelming evidence of dire, life-threatening exigencies. It's one thing to say, "it should've been obvious that you cannot house prisoners in feces-covered cells for days"

(*Taylor*), or "it should've been obvious that you cannot gratuitously pepper-spray people who are no threat to anybody" (*McCoy*). But it's altogether different—and much harder—to figure out the "obvious" answer in a split-second confrontation with a suicidal man doused in gasoline and holding a lighter in a room with innocent family members. *Cf. Kisela*, 138 S. Ct. at 1152 ("'[T]he 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.'" (quoting *Graham*, 490 U.S. at 396–97)); *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 612 (2015) ("The Constitution is not blind to 'the fact that police officers are often forced to make split-second judgments.'" (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014))); *Ryburn v. Huff*, 565 U.S. 469, 477 (2012) (per curiam) (reversing the circuit court's denial of qualified immunity because, *inter alia*, "the majority did not heed the District Court's wise admonition that judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation").

* * *

This is a tragic case. But the Fourth Amendment is not an antidote to tragedy. It's a cornerstone of our Bill of Rights, with an august history and profound original meaning. We cheapen it when we treat it like a chapter from Prosser & Keeton. And we transmogrify it beyond recognition when we say officers act "unreasonably" without any effort to say what a reasonable officer would've done.

Jerry E. Smith, *Circuit Judge*, dissenting from the denial of rehearing en banc:

In reversing the denial of qualified immunity, the unanimous panel got it exactly right:

> . . . "The use of deadly force in constitutional when the suspect poses a threat of serious physical harm to the officer or others." *Elizondo* [*v. Green*, 671 F.3d 506, 510 (5th Cir. 2012)]. . . . Olivas may only have been threatening to harm himself, but he was threatening to do so in a way that put everyone in the house (and possibly others) in danger.
>
> . . . The fact that Olivas appeared to have the capability of setting himself on fire in an instant and, indeed, was threatening to do so, meant that the officers had no apparent options to avoid calamity. If, reviewing the facts in hindsight, it is still not apparent what might have been done differently to achieve a better outcome under these circumstances, then, certainly we, who are separated from the moment by more that three years, cannot conclude that Guadarrama or Jefferson, in the exigencies of the moment, acted unreasonably.

Ramirez v. Guadarrama, 844 F. App'x 710, 716 (5th Cir. 2021) (per curiam).

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*, 141 S. Ct. 111 (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. *See id.* at 469–70 (Smith, J., dissenting); *see also id.* at 457–69 (Jones, J., joined by Smith, Owen, Ho, Duncan, and Oldham, JJ., dissenting);

id. at 470–73 (Willett, J., dissenting); *id.* at 473–79 (Ho and Oldham, JJ., joined by Smith, J., dissenting); *id.* at 479–85 (Duncan, J., joined by Smith, Owen, Ho, and Oldham, JJ., dissenting).

"The en banc court is not, and should not be, primarily a court of error. . . . The decision to take a case en banc is a prudential one." *United States v. Calderon-Pena*, 383 F.3d 254, 268 (5th Cir. 2004) (per curiam) (en banc) (Smith, J., joined by Barksdale, J., dissenting). Reconsideration of *Ramirez* by the en banc court is the ideal vehicle for the court to modify or overrule *Cole* before it achieves immortality in this court's jurisprudence. The refusal to do that is understandable—given that the panel reached the right result—but it is nonetheless regrettable in the wake of *Cole*.

I respectfully dissent from the denial of rehearing en banc.

Don R. Willett, *Circuit Judge*, joined by Graves and Higginson, *Circuit Judges*, dissenting from the denial of rehearing en banc:

When painter-turned-inventor Samuel Morse sent the first telegraph message—"What hath God wrought?"—he was standing in the chamber of the United States Supreme Court, a place that specializes in sending historic messages. Long before 1844, when Morse tapped out his dots and dashes, and for 177 years since, the Supreme Court has issued countless directives—some more emphatic than others, but all of which we must heed.

In recent months, the Court has signaled a subtle, perhaps significant, shift regarding qualified immunity, pruning the doctrine's worst excesses. The Justices delivered that message in back-to-back cases, both from this circuit and both involving obvious, conscience-shocking constitutional violations.[1] This case is of a piece—yet more troubling. Whereas the Supreme Court's two summary dispositions checked us for holding, on summary judgment, that there was no violation of "clearly established" law, despite obvious constitutional violations, here we held, on a motion to dismiss, that there was no violation of law whatsoever, despite an obvious constitutional violation. By giving a premature pass to egregious behavior, we have provided the Supreme Court yet another message-sending opportunity.

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Gabriel Eduardo Olivas was burned alive. According to the facts alleged in the complaint—which we must accept as true—and drawing all reasonable inferences in Plaintiffs' favor, two police officers tased the suicidal Olivas, despite:

1. knowing that he was soaked in gasoline,

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[1] *Taylor v. Riojas*, 141 S. Ct. 52 (2020), *summarily reversing* 946 F.3d 211 (5th Cir. 2019); *McCoy v. Alamu*, 141 S. Ct. 1364 (2021), *GVR-ing* 950 F.3d 226 (5th Cir. 2020).

2. knowing from recent training that tasers ignite gasoline, and
3. knowing from a fellow officer's explicit warning in that instant, "If we tase him, he's going to light on fire!"

They fired their tasers anyway, knowing full well that using a taser was tantamount to using a flamethrower. Olivas burst into flames and later died.

The district court declined to dismiss the suit, concluding that "more factual evidence is needed to make a determination on defendants' qualified immunity defenses." The panel disagreed, needing nothing more to declare that the officers had done nothing wrong. Case dismissed.

I dissent from the court's denial of rehearing en banc for three reasons:

First, the panel applied a too-stringent standard at the 12(b)(6) stage. Respectfully, the panel assessed Plaintiffs' facts instead of accepting them.[2] The question at the motion-to-dismiss stage is simply stated: Have Plaintiffs alleged "enough facts to state a claim to relief that is plausible on its face"?[3] That's the test—facial plausibility—and these appalling allegations satisfy it.

Second, the panel held that setting Olivas on fire was perfectly lawful under the Fourth Amendment. Igniting Olivas could not have been unreasonable, the panel surmised, because "the officers had no apparent options to avoid calamity," and it was "not apparent what might have been done differently to achieve a better outcome."[4] Such speculation is out of place at the motion-to-dismiss stage. This is exactly why we have discovery. In what legal

[2] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[O]f course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable.").

[3] *Id.* at 570 ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.").

[4] *Ramirez v. Guadarrama*, 844 F. App'x 710, 716 (5th Cir. 2021).

universe is it not even *plausibly* unreasonable to knowingly immolate someone?

Third, the panel opinion is at odds with recent Supreme Court decisions reinvigorating the "obviousness" principle in cases involving clear constitutional abuses. Twice in recent months, the Court has directed this court to be less reflexive in granting qualified immunity in cases involving, and absolving, egregious behavior. Taking Plaintiffs' horrific allegations as true—*as we must at this stage*—these officers knowingly inflicted the very tragedy they were called to prevent. It seems incontestable that this case, at minimum, merits factual development.

I

Standards matter. The panel quoted the correct 12(b)(6) standard but blurred it with a heightened one.[5] This is an appeal from the district court's refusal to dismiss, meaning:

- We *must* accept the facts in the complaint as true.[6]
- "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."[7]
- Dismissal is appropriate only when a plaintiff has not alleged "enough facts to state a claim to relief that is plausible

[5] "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff[s]." *Ramirez*, 844 F. App'x at 713 (quoting *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007)).

[6] *Twombly*, 550 U.S. at 555 (describing "the assumption that all the allegations in the complaint are true (even if doubtful in fact)").

[7] *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

on its face" and has failed to "raise a right to relief above the speculative level."[8]

- We *must* allow discovery if those facts permit a "reasonable expectation that discovery will reveal evidence of ille-gal[ity]."[9]

In sum, at the motion-to-dismiss stage, "it is the defendant's conduct as alleged in the complaint that is scrutinized."[10]

These are commands, not suggestions.

The panel opinion, however, invoked something resembling summary-judgment review, hesitating over "disputed facts," crediting the officers' allegations instead of Plaintiffs', and speculating about what nonlethal options the officers had—declaring that Officer Guadarrama fired first and had a "readily apparent justification for use of his taser" and that Officer Jefferson fired second and "had good reason" to tase an already-ignited Olivas.[11]

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[8] *Twombly*, 550 U.S. at 555, 570.

[9] *Id.* at 556.

[10] *McClendon v. City of Columbia*, 305 F.3d 314, 322–23 (5th Cir. 2002) (en banc).

[11] *Ramirez*, 844 F. App'x at 714, 716; *accord* https://www.ca5.uscourts.gov/OralArgRecordings/20/20-10055_12-1-2020.mp3, at 5:58–6:04 (asking counsel whether the district court "identified a disputed issue of material fact"). The "who fired first" question is one example of how the panel credited the officers' narrative and second-guessed Plaintiffs' facts rather than accepting them. *Compare*, *e.g.*, Am. Compl. ¶¶ 24, 54, 62–63, 68 (leaving doubt as to whether the tasings were simultaneous or successive), *with Ramirez*, 844 F. App'x at 712 (removing doubt and declaring that Jefferson tased Olivas "in short succession" after Guadarrama). This was not our first qualified-immunity decision to conflate motion-to-dismiss and summary-judgment standards. *See, e.g.*, *Clark v. Massengill*, 641 F. App'x 418, 419 (5th Cir. 2016) ("It is axiomatic that at the summary judgment stage '[w]e must accept all well-pleaded facts as true . . . .'") (internal citation omitted).

Interestingly, the panel also merged the two steps of the immunity inquiry, rejecting Plaintiffs' claim on the constitutional merits while also assessing whether the

Unable to ascertain the best alternative or to resolve these disputed facts, the panel ruled for the officers. But that's exactly the point—how could we have disputed facts? This is 12(b)(6). There has been no discovery. Instead, we must determine whether the alleged facts, if proven true, could plausibly demonstrate excessive force. Guesswork about whether the officers had "apparent justification" or a "good reason" to tase a gasoline-soaked Olivas, or alternatives to doing so, is misplaced at this stage. The issue is whether this case goes to discovery, not to trial. "At this stage, we do not determine what actually is or is not true; we only ask whether Plaintiffs' plausible allegations state a claim."[12]

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officers violated clearly established law. 844 F. App'x at 713 ("The reasonableness of the official's conduct and the degree to which the particular right in question was clearly established are thus merged into one issue for purposes of the qualified immunity analysis."); *id.* at 713–14 (turning to the "first prong" of the immunity analysis yet stating, "Plaintiffs have the burden of showing that such a right existed and that this was clearly established at the time of the incident."); *id.* at 715 & n.3 (mentioning "clearly established" twice and relying on "fair notice"). But even had the panel expressly pivoted on step two, my conclusion would be unchanged. The officers indeed had "fair notice" because they were literally warned—by a fellow officer on the scene—that if they tased Olivas, "he's going to light on fire!"

This case reveals an additional inconsistency in our qualified-immunity precedent. Some of our decisions reviewing 12(b)(6) dismissals on immunity grounds recognize the "obviousness" principle when assessing "clearly established" law, and others do not. This panel, for example, in deeming the officers' conduct reasonable, remarked that the only published Fifth Circuit cases cited by Plaintiffs "do not resemble" what happened here. *Ramirez*, 844 F. App'x at 715. By contrast, this court in *Alexander v. City of Round Rock* denied qualified immunity at the motion-to-dismiss stage despite the fact that "officers in this circuit" had not "faced this precise factual situation before," holding that "taking the facts as alleged," the violation was obvious and thus "clearly established." 854 F.3d 298, 305 (5th Cir. 2017).

[12] *Converse v. City of Kemah*, 961 F.3d 771, 779–80 (5th Cir. 2020) (reversing a 12(b)(6) dismissal on qualified-immunity grounds because the allegations were adequate to support an inference that the officers' knowledge rose to the level of deliberate indifference).

II

The panel held that tasing a combustible Olivas did not violate his constitutional protection against excessive force. More to the point, such a claim was not even facially *plausible*. I have a different view: "As the facts are alleged . . . the [Fourth] Amendment violation is obvious."[13]

According to the panel, igniting Olivas does not get past the constitutional inquiry, whether the force was plausibly excessive. For support, the panel cited the rule that "reasonableness of a government official's use of force must be judged from the perspective of a reasonable official on the scene, not with the benefit of 20/20 hindsight."[14] Fair point, but wholly inapt here. There is no need for 20/20 hindsight when there is 20/20 foresight. *Before* they discharged their tasers, Officers Guadarrama and Jefferson were affirmatively warned by "a reasonable official on the scene"—their fellow officer, right then and there, who shouted, "If we tase him, he's going to light on fire!" Not only that, the officers had recently been trained on the fiery consequences of deploying tasers in the presence of gasoline.

Second, the panel stressed that because Olivas "posed a substantial and immediate risk of death or serious bodily injury to himself and everyone in the house," it was reasonable for the officers to tase Olivas to "prevent Olivas from lighting himself on fire."[15] But according to the complaint, the officers' tasing Olivas is what turned risk into reality, engulfing him in flames

[13] *See Hope v. Pelzer*, 536 U.S. 730, 738 (2002) ("As the facts are alleged by Hope, the Eighth Amendment violation is obvious.").

[14] *Ramirez*, 844 F. App'x at 716.

[15] *Id.* at 714.

and *ensuring* that he "posed a substantial and immediate risk of death or serious bodily injury to himself and everyone in the house."

The complaint alleges a plausible Fourth Amendment violation, and an obvious one at that. 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. Perhaps discovery would have supplied crucial facts that cut the officers' way. But we have stumbled through the looking glass when we conclude—as a matter of constitutional law at the motion-to-dismiss stage—that government officials can burn someone alive and not even be troubled with discovery.

Accepting as true Plaintiffs' allegations and drawing reasonable inferences in their favor, Officers Guadarrama and Jefferson knew that tasing Olivas would engulf him in flames. This is not, as the panel opinion says, "determin[ing] what Guadarrama or Jefferson was actually thinking at the time."[16] Accounting for these alleged facts is entirely objective; it simply takes stock of the information allegedly available to the officers, "the facts that were knowable to" them at the time of the incident.[17]

Well, what *should* these officers have done? After all, this was a suicidal man drenched in gasoline experiencing a severe mental health crisis. A perfectly sensible question—but a premature one. Perhaps the panel is correct that "the officers had no apparent options."[18] Perhaps, as Plaintiffs allege, there were options galore, with the officers picking the *one* measure of

[16] *Ramirez*, 844 F. App'x at 716 n.5.

[17] *White v. Pauly*, 137 S. Ct. 548, 550 (2017).

[18] *Ramirez*, 844 F. App'x at 716.

force that was obviously off limits—a flamethrower. I cannot predict, at this stage, whether discovery will substantiate the existence of superior alternatives.[19] But exploring that vital question is precisely why discovery exists.

Rule 26 vests district courts with broad discretion in managing the factfinding process.[20] Discovery can be tightly circumscribed, if need be. As the district court sensibly stated here, it can tailor the scope of discovery to factual evidence "needed to make a determination on defendants' qualified immunity defenses." Rule 12(b)(6) is not license to pull the plug on cases that may strike judges as doubtful or nettlesome. Here, on this undeveloped, pre-discovery record, Plaintiffs need only allege facts permitting a reasonable inference that tasing a gasoline-soaked Olivas plausibly amounted to excessive force.

And in the end, alternatives are *not the point*. My colleagues assert, without authority, that specifying superior alternatives is an element of any Fourth Amendment claim.[21] This requirement, they say, protects the Constitution from becoming "a font of excessive-force tort law."[22] To be sure, identifying alternatives is likely to be important as a *practical* matter: A jury is more likely to deem challenged conduct unreasonable when the plaintiff details hypothetical, reasonable alternatives. But that goes to the burden of persuasion and the ultimate question of liability, not to the

[19] *Contra ante*, at 3 (Oldham, J., concurring) ("The dissent suggests the officers had 'options galore' . . . .").

[20] FED. R. CIV. P. 26; *see also Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (discussing the various procedural techniques available to the district court to avoid "unnecessary and burdensome discovery or trial proceedings").

[21] *Ante*, at 1–5 (Oldham, J., concurring).

[22] *Id.* at 1.

elements of the claim or the facts that must be alleged to survive a motion to dismiss.

This is true for several reasons. First, whether conduct was "*unreasonable*" is the question designated by the text of the Fourth Amendment.[23] We therefore must probe the reasonableness of conduct challenged (what officers actually did), not the reasonableness of conduct imagined (what officers could have done).

Second, to the extent further clarity is needed, the Supreme Court has already provided it: "The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means."[24] The Court said nothing about this concept being unidirectional in favor of finding searches reasonable.[25]

Third, our circuit has adopted no rule that requires plaintiffs to plead alternatives as an element of a Fourth Amendment claim. The Ninth Circuit, by contrast, expressly endorses consideration of alternatives in certain

[23] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[24] *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *accord United States v. Martinez-Fuerte*, 428 U.S. 543, 556–57 n. 12 (1976). Our sister circuits dependably heed this commonsense admonition. *See*, *e.g.*, *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995) ("The Fourth Amendment inquiry focuses not on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within a range of conduct which is objectively 'reasonable' under the Fourth Amendment. Alternative measures which 20/20 hindsight reveal to be less intrusive (or more prudent), such as waiting for a supervisor or the SWAT team, are simply not relevant to the reasonableness inquiry."); *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) ("[T]he appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them." (citing, inter alia, *Illinois*, 462 U.S. at 647)).

[25] *But see ante*, at 3–4 (Oldham, J., concurring).

excessive-force cases.[26] What is more, we *have* something like this rule for Eighth Amendment claims.[27] Unlike my colleagues, I am not persuaded that an Eighth Amendment rule—let alone an antitrust rule—should be construed as a necessary element for a Fourth Amendment claim.[28] Certainly, the same pleading standard applies to all substantive claims.[29] But what is necessary to satisfy that standard depends on the nature of the substantive claim.

Nor am I persuaded that engrafting this extraneous element onto Fourth Amendment claims is the *only* way to protect government actors' judgment.[30] The Constitution is certainly not a font for excessive-force tort

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[26] *Compare* Manual of Model Civil Jury Instructions 9.25 (U.S. Court of Appeals for the Ninth Circuit 2021) ("In determining whether the officer used excessive force in this case, consider all of the circumstances known to the officer on the scene, including . . . the availability of alternative methods . . . ."), *with* Pattern Jury Instructions 10.1 (U.S. Court of Appeals for the Fifth Circuit 2020) (mentioning no consideration of alternatives). Even in the Ninth Circuit, where alternatives are explicitly considered as a factor in some cases, it's only one factor among the totality of circumstances, it's not an element of the claim: "In *some* cases, for example, the availability of alternative methods of capturing or subduing a suspect *may* be a factor to consider." *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (emphases added); *accord id.* at 703. *See also Scott*, 39 F.3d at 915 (declining to focus on alternatives).

[27] *Compare* Pattern Jury Instructions 10.7 (U.S. Court of Appeals for the Fifth Circuit 2020) (permitting juries to consider whether an Eighth Amendment prisoner plaintiff has proven that officers tried to "temper the severity of a forceful response").

[28] *Contra ante*, at 2 (Oldham, J., concurring) (citing *Baze v. Rees*, 553 U.S. 35, 47–52 (2008)); *see also id.* at 4–6 (discussing *Twombly*). *See Graham v. Connor*, 490 U.S. 386, 397–99 (1989) (disagreeing that courts must consider Eighth Amendment standards in Fourth Amendment claims, given the differences in the amendments, "[w]hatever the empirical correlations between 'malicious and sadistic' behavior and objective unreasonableness may be").

[29] *See ante*, at 4–6 (Oldham, J., concurring).

[30] *Contra ante*, at 4–5 (Ho, J., concurring) ("I fear that officers will choose to stand by and watch, rather than to protect and to serve, if the rules of engagement are unclear

law; neither is qualified immunity an impenetrable shield against every manner of wrongdoing, however ghastly. Respectfully, my colleagues risk the latter pole, but the Fourth Amendment demands no such choice. On the contrary, the Fourth Amendment requires nuanced, fact-specific consideration, perhaps more than any other constitutional provision.[31]

These officers faced a harrowing, fast-moving situation, no question. But we cannot dispense with discovery as to the reasonableness of officers' actions whenever circumstances are difficult. This is not second-guessing what the officers did. It's simply, and unremarkably, recognizing that facts matter—in fact, facts are *all* that matter—and we must actually gather some in order to determine if these officers acted unreasonably.

III

Finally, the panel opinion collides with recent warnings from the Supreme Court summarily negating grants of qualified immunity for obvious constitutional violations.[32] Twice in recent months, the Supreme Court has vacated immunity grants. Both cases were from this circuit. And while these quiet, "shadow docket" actions may not portend a fundamental rethinking of qualified immunity, the Court seems determined to dial back the doctrine's harshest excesses. If not reconsidering, the Court is certainly recalibrating. Most importantly here, the Court is warning us to tread more carefully when reviewing obviously violative conduct.

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and unknowable at the time of the incident—determinable only after discovery is completed.").

[31] *See, e.g.*, *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) ("Use of excessive force is an area of the law in which the result depends very much on the facts of each case . . . .").

[32] "Apparently SUMREVs mean nothing." *Cole v. Carson*, 935 F.3d 444, 473 (5th Cir. 2019) (en banc) (Ho & Oldham, JJ., dissenting), *cert. denied sub nom. Hunter v. Cole*, 141 S. Ct. 111 (2020).

First came *Taylor v. Riojas* last November.[33] The Court summarily reversed our decision granting qualified immunity to prison officials who confined a prisoner for several days in a pair of "shockingly unsanitary cells"—the first cell "covered, nearly floor to ceiling, in massive amounts of feces"[34] (with one officer telling another that Taylor would "have a long weekend"), and the second cell "frigidly cold" and flooded with raw sewage, in which Taylor "was left to sleep naked" (with another officer expressing hope that Taylor would "f***ing freeze").[35] The Supreme Court held that the prison officials had fair warning, without a factually similar case, that these conditions were plainly unconstitutional.[36] The Court stressed that the conditions were deplorable, obviously cruel, degrading, and dangerous, and not outweighed by necessity, exigency, or efforts to mitigate. The Court's per curiam was terse and forceful: "Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution."[37]

Indeed, *Taylor* was the first time in 16 years (and just the third time *ever*) that the Supreme Court expressly found official misconduct to violate "clearly established" law.[38] In *Taylor*, the Court harkened back nearly 20 years to *Hope v. Pelzer*,[39] which held that, when a constitutional violation is sufficiently obvious, qualified immunity can be denied even absent a previous

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[33] 141 S. Ct. 52 (2020), *summarily reversing* 946 F.3d 211 (5th Cir. 2019).

[34] *Id.* at 53 (cleaned up).

[35] *Id.* at 54.

[36] *Id.*

[37] *Id.* at 54.

[38] *See Erwin Chemerinsky: SCOTUS hands down a rare civil rights victory on qualified immunity*, ABA J. (Feb. 1, 2021), https://www.abajournal.com/columns/article/chemerinsky-scotus-hands-down-a-rare-civil-rights-victory-on-qualified-immunity.

[39] 536 U.S. 730 (2002).

case declaring virtually identical conduct unconstitutional.[40] *Hope* promptly went into hibernation, though. And the Court's intervening cases have sent the opposite message: Officers cannot be sued for violating someone's constitutional rights unless the specific actions at issue have previously been held unlawful.[41] *Taylor*, however, declares that the obviousness principle has vitality and that egregiousness matters. In summarily reversing us without full briefing or argument,[42] the Court sent the message that not only were we wrong, we were *obviously* wrong—more specifically, we were obviously wrong about an obvious wrong.

And though a rarity, *Taylor* was not a one-off. Just a few months ago, the Supreme Court doubled down in another case from our circuit, *McCoy v. Alamu*, involving an inmate gratuitously assaulted with pepper spray "for no reason at all" by a prison guard who was angry with another inmate.[43] The Court issued a "grant, vacate, and remand" order directing us to reconsider in light of *Taylor*. The Supreme Court's reliance on *Taylor* confirms that the Court does not consider that case an anomaly, but instead a course correction

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[40] In *Hope v. Pelzer*, the Supreme Court held that shackling a shirtless inmate to a hitching post in a painful position for seven hours beneath the scorching Alabama sun, with little water, no bathroom breaks, and a taunting guard, was "antithetical to human dignity" and obviously unconstitutional. 536 U.S. at 745.

[41] *See, e.g.*, *Wesby v. District of Columbia*, 816 F.3d 96, 102 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) ("[I]n just the past five years, the Supreme Court has issued 11 decisions reversing federal courts of appeals in qualified immunity cases . . . .").

[42] *See Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) ("A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.") (citation omitted); *accord Wearry v. Cain*, 577 U.S. 385, 397 (2016) (Alito, J., dissenting) ("[W]e generally do not decide cases without allowing the parties to file briefs and present argument.").

[43] *McCoy v. Alamu*, 141 S. Ct. 1364 (2021), *GVR-ing* 950 F.3d 226 (5th Cir. 2020).

signaling lower courts to deny immunity for clear misconduct, even in cases with unique facts.

As in *Taylor*, we granted qualified immunity in *McCoy* because there was no case with materially similar facts. And as in *Taylor*, the Court instructed us to try again. The message is low-key but loaded. These two orders make clear that the Court is earnest about reining in qualified immunity's severest applications. This doctrinal clarification may not amount to sweeping reexamination, but the upshot is plain: In cases with "particularly egregious facts," courts must not strain to absolve constitutional violations. Even if the precise fact pattern is novel, there is no need for a prior case exactly on point where the violation is obvious.[44] And a conclusion of obviousness at step two necessarily means that step one has been satisfied; an obvious violation of a "clearly established" right inescapably means that a right has been violated.

The principle uniting these recent rebukes is that the qualified-immunity doctrine does not require judicial blindness. Courts need not be oblivious to the obvious.

One can only speculate how the Supreme Court, having upended us in *Taylor* and *McCoy*, would evaluate today's case. For my part, this case is even clearer, and its holding more jolting, for two reasons: (1) *Taylor* and *McCoy* were appeals following summary judgment, after the cases had been factually developed, whereas this is a motion-to-dismiss case that requires us to take Plaintiffs' allegations as true; and (2) in *Taylor* and *McCoy*, we at least acknowledged there was a constitutional violation, whereas here we held there was no violation at all—not even a plausible one.

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[44] *Compare Taylor*, 141 S. Ct. at 52–54; *McCoy*, 141 S. Ct. at 1364, *with Hunter*, 141 S. Ct. 111, *denying cert. for Cole*, 935 F.3d at 453 (finding a constitutional violation "without dependence on the facts of other cases").

Where is the bottom? In my judgment, nothing better captures the yawning rights-remedies gap of the modern immunity regime[45] than giving a pass to alleged conscience-shocking abuse at the motion-to-dismiss stage and step one of the immunity inquiry.

* * *

This year America commemorates the sesquicentennial of our preeminent civil rights statute, 42 U.S.C. § 1983, the text of which promises a federal remedy for the violation of "any" right—not just "clearly established" ones. Nonetheless, the atextual, judge-created doctrine of qualified immunity shields lawbreaking officials from accountability, even for patently unconstitutional abuses, thus largely nullifying § 1983. The pages of F.3d abound with head-scratching examples:

- stealing $225,000 while executing a search warrant[46]
- shooting a 10-year-old boy in the leg while repeatedly trying to shoot the nonthreatening family dog[47]
- releasing a police dog on a surrendered suspect (since the suspect was *sitting* on the ground while in a prior case the suspect was *lying* on the ground)[48]

But transformation is often born of tragedy.

Samuel Morse's invention of the telegraph was spurred by heartbreak, the death of his wife, news of which arrived by letter, far too late for him to

[45] *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part) ("[Q]ualified immunity often smacks of unqualified impunity.").

[46] *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2793 (2020).

[47] *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020).

[48] *Baxter v. Bracey*, 751 F. App'x 869 (6th Cir. 2018), *cert. denied*, 140 S. Ct. 1862 (2020).

attend her burial. Morse set his mind to developing a way to deliver messages in minutes rather than days or weeks. And years later, in a hushed Supreme Court chamber, Morse transmitted his revolutionary message.

The horrific death of Gabriel Olivas is also suffused in sorrow. And while qualified immunity has enjoyed special solicitude at the Supreme Court, perhaps these "particularly egregious facts"[49] will prompt another meaningful message from the Court, one that marries law with justice (and common sense) and makes clear that those who enforce our laws are not above them.

[49] *Taylor*, 141 S. Ct. at 54.