No.

In the Supreme Court of the United States

CHADRIN LEE MULLENIX,
IN HIS INDIVIDUAL CAPACITY, PETITIONER

v.

BEATRICE LUNA, INDIVIDUALLY AND AS
REPRESENTATIVE OF THE ESTATE OF ISRAEL LEIJA, JR.;
CHRISTINA MARIE FLORES, AS NEXT FRIEND OF
J.L. AND J.L., MINOR CHILDREN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Rather than submit to arrest under a lawfully issued warrant, a suspect led police on an extended nighttime chase at speeds up to 110 miles per hour, during which he told a police dispatcher that he had a gun and would shoot police officers. The defendant officer fired his service rifle from an overpass in an attempt to disable the suspect's vehicle before it reached an officer stationed beneath the overpass and other officers further along the road. The questions presented are:

(1) Viewing the facts from the officer's perspective at the time of the incident, did he act reasonably, under the Fourth Amendment, when an officer in his situation would believe that the suspect posed a risk of serious harm to other officers or members of the public?

(2) Did the law clearly establish that this use of potentially deadly force was unlawful, when existing precedent did not address the use of force against a fleeing suspect who had explicitly threatened to shoot police officers?

PARTIES TO THE PROCEEDING

Petitioner Chadrin Lee Mullenix, in his individual capacity, was the Defendant-Appellant in the court of appeals.

Respondents Beatrice Luna, individually and as representative of the estate of Israel Leija, Jr., and Christina Marie Flores, as next friend of J.L. and J.L., minor children, were the Plaintiffs-Appellees in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provision, Statutes and Rules

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The court of appeals' decision creates two separate circuit splits. And it contradicts *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), which unanimously confirmed that the Fourth Amendment gives police leeway during high-speed car chases to protect the public, and that qualified immunity shields officers from personal liability unless existing precedent establishes "beyond debate" that their conduct was unlawful.

The Fifth Circuit heeded neither of these admonitions. It denied qualified immunity to a police officer who used deadly force against a suspect who not only evaded arrest and initiated a high-speed nighttime car chase but also made explicit threats to use deadly

force against police officers. As interpreted by the court of appeals, the Fourth Amendment forbids an officer to use deadly force against a fleeing suspect unless and until alternative, non-deadly means have failed—even when the suspect has threatened to use deadly force against other officers, and even when alternative means will expose other officers and members of the public to a serious risk of harm. The Fifth Circuit held that this principle was clearly established without identifying any existing precedent considering the use of force against a fleeing suspect who threatened to shoot police officers.

This case therefore presents issues of exceptional importance, as police need proper latitude to protect themselves and the public from dangerous fleeing suspects in high-speed car chases. The Fifth Circuit's decision creates an unprecedented limitation on the use of force, which, if left unreviewed, will have a chilling effect on the seizure of fleeing suspects, thereby increasing the risk to officers and civilians.

OPINIONS BELOW

On August 7, 2013, the United States District Court for the Northern District of Texas denied Petitioner's motion for summary judgment. The district court's order is available at 2013 WL 4017124. *See* Pet. App. 25a–38a.

On August 28, 2014, the Fifth Circuit issued an opinion affirming the district court, with Judge King dissenting. That opinion is available at 765 F.3d 531. *See* Pet. App. 55a–92a. On December 19, 2014, the

Fifth Circuit withdrew its initial opinion, issued a substitute opinion, and denied the petition for rehearing en banc, with Judges Jolly, King, Davis, Jones, Smith, Clement, and Owen dissenting from the denial of rehearing en banc. The Fifth Circuit's substitute opinion is available at 773 F.3d 712. *See* Pet. App. 1a–24a. The Fifth Circuit's order denying the petition for rehearing en banc and the dissenting opinions are available at 777 F.3d 221. *See* Pet. App. 39a–52a.

JURISDICTION

The Fifth Circuit had appellate jurisdiction because the district court's order denying Petitioner's motion for summary judgment was a final decision within the meaning of 28 U.S.C. § 1291 and the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 527–30 (1985).

On December 19, 2014, the Fifth Circuit entered judgment denying Petitioner's petition for rehearing en banc, Pet. App. 53a–54a, and issued a substitute opinion affirming the district court, Pet. App. 1a. Petitioner filed this timely petition for writ of certiorari on March 19, 2015. *See* Sup. Ct. R. 13(1), (3). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents seek damages under 42 U.S.C. § 1983 for an alleged violation of the decedent's rights under the Fourth Amendment.

The Fourth Amendment provides:

> 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.

U.S. Const. amend. IV. Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

STATEMENT

1. At 10:21 p.m. on March 23, 2010, an officer of the Tulia, Texas, Police Department attempted to serve an arrest warrant on Israel Leija, Jr. at a Sonic drive-in restaurant. When the officer informed Leija that he was under arrest, Leija sped away in his car toward Interstate 27, which he entered near mile marker 77. Texas Department of Public Safety ("DPS") Trooper Gabriel Rodriguez joined the pursuit and took the lead. As the chase proceeded north on I-27 at speeds up to 110 miles per hour, Leija made two calls to the Tulia Police Dispatch stating that he had a gun and threatening to shoot police officers. Pet. App. 26a–27a.

As the pursuit continued, several officers joined in the effort to capture Leija. Officer Troy Ducheneaux of the Canyon, Texas, Police Department stopped to set up tire spikes underneath an overpass at Cemetery Road and I-27, near mile marker 103. Other officers prepared to set up tire spikes at two additional locations farther north on I-27. Pet. App. 3a, 27a.

Defendant DPS Trooper Chadrin Mullenix was on patrol thirty miles north of the chase when he responded. Mullenix and the other officers were informed of Leija's threats, Pet. App. 3a–4a, and Mullenix was told that Leija might be intoxicated, Pet. App. 31a. Aware that other officers were preparing to set up tire spikes, Mullenix parked his patrol car on the Cemetery Road overpass above I-27. Pet. App. 4a.

After he reached the overpass, Mullenix informed Rodriguez that he intended to fire his rifle from the bridge to disable Leija's car. Rodriguez responded, "10-4," gave Mullenix his location, and told him that Leija was going 85 miles per hour. Mullenix then asked the Amarillo DPS dispatch to inform his supervisor, Sergeant Robert Byrd, of his plan to fire at Leija's car and to ask whether he thought it was "worth doing."[1] Before the dispatch responded, Mullenix got out of his patrol car, took his rifle from the trunk, and took a shooting position on the south side of the bridge. Pet. App. 4a–5a, 28a. At some point thereafter, the DPS dispatch relayed Sergeant Byrd's message to "stand by" and "see if the spikes work first." Pet. App. 5a. The parties dispute whether or not Mullenix received that message.[2]

As he waited for the pursuit, Mullenix discussed his plan to disable Leija's vehicle with Randall County Sheriff's Deputy Tom Shipman, who reminded Mullenix that there was another officer underneath the

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[1] The parties dispute the details of Mullenix's communication with the Amarillo DPS dispatch. Plaintiffs allege that Mullenix contacted Byrd to "request permission" to fire. Pet. App. 4a. Mullenix testified that he did not need permission but merely asked for Byrd's advice. Pet. App. 4a–5a. Byrd confirmed that Mullenix did not need permission. Pet. App. 83a n.1.

[2] Mullenix stated that he did not hear the response because he did not turn on his outside loudspeakers. Plaintiffs alleged that Mullenix should have been able to hear the response through his police radio, since his trunk was open, or through Ducheneaux's radio underneath the bridge. Pet. App. 5a, 28a–29a.

bridge. Mullenix later testified that he was not sure who was underneath the overpass, where precisely that officer was positioned, or whether that officer had set up tire spikes. Pet. App. 5a.

The pursuit reached Mullenix approximately three minutes after he reached the overpass. When Leija approached, Mullenix fired six rounds at his car. Leija's car continued under the overpass, hit the tire-spike strip set out by Ducheneaux, went out of control, and rolled two-and-a-half times. Pet. App. 4a, 5a, 30a. Shortly afterward, Leija was pronounced dead. His death was caused by a shot to the neck. Pet. App. 6a, 30a. After the pursuit ended, officers discovered that Leija did not have a gun. Pet. App. 3a.

Plaintiffs sued Mullenix, Rodriguez, the Texas DPS, and Texas DPS Director Steve McCraw under the Texas Tort Claims Act and 42 U.S.C. § 1983. Pet. App. 6a–7a. Claims against Rodriguez, McCraw, and the DPS were dismissed. Mullenix moved for summary judgment based on qualified immunity. Pet. App. 7a.

2. The district court denied Mullenix's motion for summary judgment. It determined that at the time of the shooting, clearly established law provided:

> a police officer's use of deadly force is justified only if a reasonable officer in Defendant Mullenix's position had cause to believe that there was an immediate threat of serious physical harm or death to himself which Officer Mullenix has testified did not exist in

> this case—or there existed at the time of the shooting an immediate threat of serious physical harm or death to others.

Pet. App. 35a–36a (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). The summary judgment evidence included Mullenix's testimony that at the time of the shooting, he believed that Leija posed a risk of serious injury or death to the officer under the Cemetery Road overpass, other officers setting out spikes, and possibly citizens in the cities of Canyon and Amarillo if the chase continued. Pet. App. 36a. The court nevertheless denied summary judgment, finding genuine issues of material fact concerning "the existence of an immediate risk of serious injury or death"; whether Mullenix "acted recklessly, or acted as a reasonable, trained peace officer would have acted" in the circumstances; "whether Mullenix did or did not hear, and should have obeyed, the instructions from his superior officer to let the other officers . . . first try the planned non-lethal or less-dangerous methods being utilized to end the high-speed pursuit"; and whether there existed "any *immediate* threat to officers involved in the pursuit [or] to other persons who were miles away from the location of the shooting." Pet. App. 36a–37a.

3.a. On August 28, 2014, a divided panel of the Fifth Circuit affirmed, finding that a genuine issue of material fact as to "[t]he immediacy of the risk posed by Leija" precluded summary judgment. Pet. App. 66a. In the court of appeals' view, two facts "negate[d] the risk factors central to the reasonableness find-

ings" in other cases. Pet. App. 67a. First, Leija's driving did not pose a serious risk because traffic was "light, there were no pedestrians, businesses or residences along the highway, and Leija ran no other cars off the road and did not engage any police vehicles." Pet. App. 69a. Second, "the non-lethal methods that were already prepared were never given a chance to work." Pet. App. 70a. Accordingly, the Fifth Circuit determined that "a jury could find that a reasonable officer would have concluded that the risk Leija posed was not sufficiently immediate so as to justify deadly force, and that the non-lethal methods already in place could stop the chase without the need for deadly force." Pet. App. 75a.

Moving to the second step of the qualified-immunity analysis, the Fifth Circuit concluded:

> At the time of this incident, the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a substantial and immediate threat, violated the Fourth Amendment.

Pet. App. 78a. The Fifth Circuit affirmed the denial of qualified immunity on the ground that "the immediacy of the risk posed by Leija cannot be resolved as a matter of law at the summary judgment stage." *Ibid.*

b. Judge King dissented. She explained that the factual dispute alleged by the majority was "simply a restatement of the objective reasonableness test," which presented a legal question for the court. Pet.

App. 80a. Based on the summary-judgment record, Judge King concluded that Mullenix's conduct was not objectively unreasonable given Leija's threat to shoot police officers, the presence of police officers in Leija's path, and Leija's own culpability for the risks he created. Pet. App. 85a–86a.

Judge King criticized the majority for minimizing the risk Leija posed to Ducheneaux and other officers. She noted that the cases distinguished by the majority concerned suspects who were on foot or in stopped vehicles, giving officers a chance to observe the suspects that was not available to the officers who responded to Leija's high-speed nighttime flight. Pet. App. 86a–87a. In her view, the majority's suggestion that Leija's threat to shoot officers did not create a serious risk—because he was "not fleeing the scene of a violent crime," and "no weapon was ever seen," Pet. App. 87a—"eviscerates the Supreme Court's requirement that we adopt the perspective of a reasonable officer on the scene," Pet. App. 88a.

Responding to the majority's conclusion that Mullenix should have waited to see if non-lethal alternatives stopped the chase, Judge King noted that "Mullenix reasonably believed that deploying tire spikes along the highway posed a significant risk of harm to officers." Pet. App. 88a. She also pointed out that in *Thompson v. Mercer*, 762 F.3d 433 (5th Cir. 2014)—a case distinguished by the majority—the non-lethal methods included shooting at the suspect's tires, and "tire spikes twice failed to stop the suspect's truck." Pet. App. 88a–89a. Given the evidence that tire spikes

presented risks of their own and were often ineffective, an objectively reasonable officer could have concluded that the risks outweighed the potential benefits. Pet. App. 89a.

In light of Mullenix's knowledge that an officer was underneath the overpass, that his flashing patrol lights would alert Leija to his presence, and that operating tire spikes could expose the officer to gunfire, Judge King concluded that the risks presented to Mullenix "were at least as particularized as in the Supreme Court's decisions in *Scott* and *Brosseau* and our decision in *Thompson*, where the officers employing force were not aware of the precise location or identity of the other officers and civilians they were acting to protect." Pet. App. 89a. Regarding the immediacy of the threat, Judge King found it

> difficult to conceive of a threat that is more immediate than the one Leija posed. At the moment Mullenix fired, Leija was seconds away from crossing the path of one of the officers he had threatened to shoot and minutes away from passing several other officers.

Pet. App. 90a. And despite the majority's criticism of Mullenix's plan to disable Leija's car, Judge King pointed out that in *Thompson*, "an officer positioned at the side of the road aimed at and successfully shot the radiator of the fleeing suspect's vehicle." Pet. App. 91a n.3.

4.a. Mullenix filed a petition for rehearing en banc, which the Fifth Circuit denied by a 9-to-6 vote. Pet. App. 40a. In response to Mullenix's rehearing petition, the panel majority withdrew its opinion of August 28, 2014, and issued a substitute opinion affirming the denial of summary judgment. Pet. App. 1a.

In the substitute opinion, most of which was identical to the original opinion, the court of appeals removed all references to the jury and to disputed questions of fact, replacing them with statements to the effect that Mullenix's conduct was objectively unreasonable as a matter of law. *See, e.g.*, Pet. App. 12a. In its discussion of clearly established law, the court altered its formulation slightly to state that "the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a *sufficiently* substantial and immediate threat, violated the Fourth Amendment." Pet. App. 24a (emphasis added).

b. Judge Jolly, joined by six other judges, dissented from the denial of rehearing en banc.[3] Pet. App. 40a. In his dissenting opinion, he criticized the panel's substitute opinion sharply, concluding:

> the panel majority either does not understand the concept of qualified immunity or, in defiance thereof, impulsively determines

[3] Although Judge King dissented from the denial of rehearing en banc, the order denying the en banc petition does not reflect that she voted in the court's en banc poll. Pet. App. 40a.

> the "right outcome" and constructs an opinion to support its subjective judgments, which necessarily must ignore the concept and precedents of qualified immunity.

Pet. App. 40a–41a. Judge Jolly faulted the panel majority for the following errors, among others:

- failing "to recite or accept the clearly established law that applies to car-chase cases," Pet. App. 44a;
- deeming Mullenix's conduct unreasonable based on its subjective judgment "that tire spikes should have been the preferred alternative means for stopping Leija's car," Pet. App. 45a;
- "fail[ing] to heed the Supreme Court's instruction to account for Leija's culpability," *ibid.*;
- failing to view the facts from Mullenix's perspective, Pet. App. 46a;
- failing to grant qualified immunity to Mullenix despite the lack of clear notice that his conduct was unconstitutional, *ibid.*; and
- improperly relieving Plaintiffs of their burden to show that Mullenix was not entitled to qualified immunity, Pet. App. 47a.

Considering the facts known to Officer Mullenix—particularly his knowledge that Leija fled arrest for an extended period, that Leija was suspected of being intoxicated, that Leija said he had a gun and would

shoot any officer he saw, and that Officer Ducheneaux was in Leija's path below Mullenix, Pet. App. 49a—Judge Jolly concluded that the court's opinion "condone[d] second-guessing of split-second decisions—in contravention to the principles of qualified immunity," Pet. App. 50a–51a.

Judge King joined in Judge Jolly's opinion, writing separately to note that the panel majority did not consult her about the withdrawal and substitution of its opinion. Pet. App. 51a. She concluded, "As the law now stands, Mullenix was entitled to qualified immunity." Pet. App. 52a.

REASONS TO GRANT THE PETITION

I. THE FIFTH CIRCUIT CONTRAVENED THIS COURT'S RECENT PRECEDENTS IN ERRONEOUSLY DENYING QUALIFIED IMMUNITY.

A. The Fifth Circuit's Fourth Amendment Analysis Failed to Adopt the Officer's Perspective or Account for Leija's Direct Threat to Shoot Police Officers.

At the first step of a qualified immunity analysis, the question whether an officer's conduct is objectively unreasonable "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Plumhoff*, 134 S. Ct. at 2020 (quoting *Graham*, 490 U.S. at 396). The officer's conduct "must be judged from the perspective of a reasonable officer on the scene, rather than with

the 20/20 vision of hindsight." *Ibid.* (internal quotation marks omitted). Thus, courts must consider only the facts known to the officer "when the conduct occurred." *Saucier v. Katz*, 533 U.S. 194, 207 (2001).

1. The Fifth Circuit violated this cardinal rule by failing to consider the facts from Officer Mullenix's perspective. Instead, with the benefit of hindsight, the court of appeals judged Mullenix's conduct to be unreasonable based on facts not available to him. Its determination that Mullenix's conduct was objectively unreasonable directly contravenes this Court's recent decisions in cases involving high-speed pursuits.

In *Plumhoff*, 134 S. Ct. at 2021, the Court held that officers did not violate the Fourth Amendment when they fired 15 shots at a fleeing suspect even though a collision had brought the high-speed chase "temporarily to a near standstill." Although the threat to other drivers had arguably abated at the time of the shooting, the Court held that the use of force was justified because "all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road." *Id.* at 2022.

Similarly, in *Scott v. Harris*, an officer's use of potentially lethal force was deemed objectively reasonable because of "an actual and imminent threat to the lives of any pedestrians who *might have been present*, to other civilian motorists, and to the officers involved in the chase." 550 U.S. 372, 384 (2007) (emphasis added). The Court recognized an actual and imminent

threat despite video evidence that "when Scott rammed respondent's vehicle it was not threatening any other vehicles or pedestrians. (Undoubtedly Scott *waited* for the road to be clear before executing his maneuver.)." *Id.* at 380 n.7. Notwithstanding the lack of an immediate threat at the moment of impact, *Scott* held, "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Id.* at 386.

Considered in the light of *Scott* and *Plumhoff*, this should have been an *a fortiori* case. At the time he fired his rifle to disable Leija's car, Mullenix knew that Leija had explicitly threatened to shoot any officer he saw, and he knew that a fellow officer was parked underneath the overpass with flashing lights alerting Leija to his presence. Whereas the officers in *Plumhoff* acted when the threat had temporarily abated, Mullenix acted when the threat continued to mount. And unlike *Scott*, the circumstances Mullenix faced presented a particular risk to a specific individual. Mullenix was entitled to take Leija's threat to shoot police officers at face value.

The facts gave Officer Mullenix every reason to believe that Leija posed a risk of serious bodily harm or death to the officer below him, as well as other officers and civilians. It would have been unreasonable for Mullenix, or any other officer in his position, to discount that risk. Without some particular reason to believe that the suspect would not follow through on his

threat to shoot—and Mullenix had none—he did not act unreasonably in using deadly force to stop Leija before he could reach the people he had threatened with deadly force.

2. Instead of asking whether Officer Mullenix made a reasonable decision, the Fifth Circuit asked whether he made the *right* decision based on information he did not have. The court of appeals determined that Officer Mullenix's use of force was objectively unreasonable because, with the benefit of a fully developed summary-judgment record, it decided that this force was not necessary.[4] According to the Fifth Circuit, the Fourth Amendment required Mullenix to wait and see if the spike strip stopped Leija's car. But at the moment he had to make a decision, Officer Mullenix did not know if spike strips had been laid out below the overpass, much less whether they would work. And Mullenix had to consider the possibility that Leija would shoot Officer Ducheneaux whether or not the spike strip stopped his car. The court of appeals had the benefit of knowing that Leija did not have a gun or attempt to shoot Ducheneaux, but Officer Mullenix did not.

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[4] *See* Pet. App. 21a ("[Mullenix's] justification for the use of force was to disable the car, but alternative methods were already in place to achieve the same goal, undermining the asserted necessity for resorting to deadly force at that particular instant."). But as Judge Jolly noted, "the record does not begin to suggest, which alternative—bullets to the engine block or spikes to the tires—would have been less likely to produce a deadly result." Pet. App. 47a.

The Fifth Circuit also minimized the critical information Mullenix *did* have: Leija made two explicit threats to shoot police officers. Instead of considering the significance of those threats to a reasonable officer on the scene, the court of appeals labored to downplay the risk Leija presented:

> [A]lthough Leija had stated to the dispatcher that he was armed and would shoot officers, he was not fleeing the scene of a violent crime, no weapon was ever seen, and at the time of the shooting, most officers and bystanders were miles away, where they would not have been encountered until after the spikes were given a chance to stop the chase.

Pet. App. 18a–19a. This rationalization of Leija's flight is misguided for several reasons. First, whether or not Leija was fleeing the scene of a violent crime is irrelevant; he had expressly threatened (twice) to *commit* a violent crime.[5] Second, as to Leija's failure to brandish a weapon during the chase, Mullenix did

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[5] Leija's threat to shoot police officers arguably constituted a felony under Texas law. *See* Tex. Penal Code § 22.07(a)(6) ("A person commits an offense if he threatens to commit any offense involving violence to any person or property with intent to . . . influence the conduct or activities of a branch or agency of the federal government, the state, or a political subdivision of the state."); *id.* § 22.07(e) ("An offense under Subsection (a)(4), (a)(5), or (a)(6) is a felony of the third degree."); *see also Phillips v. State*, 401 S.W.3d 282 (Tex. App.—San Antonio 2013, pet. ref'd) (upholding conviction based on defendant's statement to 911 operator that he would kill a certain police officer if he was sent to his house).

not have the luxury of waiting to see if Leija followed through on his threat; he had to take it seriously. *See, e.g.*, *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) ("A reasonable officer need not await the 'glint of steel' before taking self-protective action . . . ."); *Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir. 1997) ("[A]n officer is not required to wait until an armed and dangerous felon has drawn a bead on the officer or others before using deadly force."); *cf. Scott*, 550 U.S. at 385 (rejecting the argument that police should have ceased the pursuit instead of ramming the suspect's car, explaining that "the police need not have taken that chance and hoped for the best"). Finally, the statement that "most officers and bystanders were miles away" writes Officer Ducheneaux out of the picture, ignoring the most immediate risk that Mullenix had to consider.

The Fifth Circuit's judgment that Mullenix should have given other officers a chance to stop Leija with tire spikes further minimizes the risk to Officer Ducheneaux. According to the court:

> the facts, taken in the light most favorable to the plaintiffs, also show that officers were trained to deploy spikes in a location where they were able to take a protective position, that there were several pillars at the Cemetery Road overpass and that Ducheneaux had positioned himself behind a pillar as he was trained to do.

Pet. App. 19a. Even if Ducheneaux had taken a protective position, it would not have guaranteed his

safety from Leija. That officers "had been trained to take a protective position while deploying spikes, if possible, so as to minimize the risk posed by the passing driver," Pet. App. 3a, demonstrates an inherent risk. But Ducheneaux's actual position is beside the point: Mullenix "did not actually know Ducheneaux's position or what he was doing beneath the overpass." Pet. App. 19a. The Fifth Circuit therefore had no basis to rely on the "facts" about Ducheneaux's position to conclude that Mullenix did not "reasonably perceive[] an immediate threat at the time of the shooting, sufficient to justify the use of deadly force." Pet. App. 20a.

To the extent it acknowledged the risk to Ducheneaux, the Fifth Circuit faulted Mullenix for making a decision without complete knowledge of the facts. Recognizing that Mullenix did not know what the officer under the bridge was doing, Pet. App. 5a, 19a, the court did not consider how this might have affected his assessment of the risk. Nor did the court consider Leija's relative culpability, contrary to this Court's instruction in *Scott*, 550 U.S. at 384. Instead, the Fifth Circuit suggested that Mullenix should not have acted at all because he "lacked sufficient knowledge to determine whether or not Ducheneaux was in immediate danger from Leija, or whether Mullenix's own actions were decreasing the risk to Ducheneaux." Pet. App. 19a n.2.

Faulting Mullenix for acting without "sufficient knowledge" misses the point. In the line of duty, officers must make decisions and take action based on incomplete or imperfect information. The very purpose

of qualified immunity is "to protect officers from the sometimes hazy border between excessive and acceptable force." *Saucier*, 533 U.S. at 206 (internal quotation marks omitted).

The Fifth Circuit's failure to consider the facts from Mullenix's perspective deprived him of any leeway to make reasonable judgments. A reasonable belief about the risk presented, even if mistaken, may justify the use of greater force than was actually necessary. "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was necessary." *Id.* at 205. Here, Mullenix reasonably believed that Leija intended to shoot Ducheneaux and other officers, so he was justified in using force to stop Leija from reaching them.

B. In Finding Clearly Established Law, the Fifth Circuit Disregarded This Court's Decisions and Concocted a Novel Legal Standard.

1. The Fifth Circuit Ignored This Court's Consistent Warning Not to Rely on General Propositions of Law.

At the second step of the qualified immunity analysis, this Court has established distinct guidelines for courts to identify clearly established law:

> To be clearly established, a right must be sufficiently clear that every reasonable official would [have understood] that what he is

> doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question *beyond debate*.

Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012) (internal citations and quotation marks omitted) (emphasis added). General concepts not rooted in specific facts cannot provide sufficient notice to officers in the line of duty. *See, e.g.*, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) ("The general proposition . . . 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."). This Court has therefore warned courts not to frame the law at a high level of generality.

The Fifth Circuit failed to tailor its statement of law to the circumstances Mullenix faced. Devoting little attention to the question, it stated:

> We need not dwell on this issue. It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.

Pet. App. 22a (quoting *Lytle v. Bexar County*, 560 F.3d 404, 417 (5th Cir. 2009)). At least one court has criticized this very formulation of the law, noting that "[w]hile this general principle is correct, it still begs the question of what constitutes a *sufficient* threat."

Cordova v. Aragon, 569 F.3d 1183, 1193 (10th Cir. 2009). The Fifth Circuit made no attempt to explain why the threat posed by Leija was not "sufficient."

More specific notice is required to deny qualified immunity. This Court has expressly rejected attempts to define the law at a similar level of generality. In *Anderson v. Creighton*, for instance, the Court held that "the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances" did not provide adequate warning that the circumstances of a particular warrantless search "did not constitute probable cause and exigent circumstances." 483 U.S. 635, 640–41 (1987); *cf. Wilson v. Layne*, 526 U.S. 603, 615 (1999) (considering "whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed").

If qualified immunity depends on the application of general principles, an officer's individual liability will likely hinge on an arbitrary choice among various general propositions. In this case, for instance, the court could have found clear support for Officer Mullenix's use of force in the general standard of *Tennessee v. Garner*: "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." 471 U.S. 1, 11 (1985). Leija's threat

to shoot officers gave Mullenix probable cause to believe that Officer Ducheneaux faced a risk of serious injury or death. That belief, even if mistaken, should have entitled him to qualified immunity under *Graham*. *See, e.g.*, *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) ("Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." (quoting *Anderson*, 483 U.S. at 641)); *cf. Fisher v. City of San Jose*, 558 F.3d 1069, 1081 (9th Cir. 2009) ("[T]hreatening to shoot police officers constitutes separate criminal behavior that establishes probable cause for arrest independent of the initial offense.").

Of course, *Graham* is also cast at a high level of generality and therefore cannot provide clear notice in most cases. *See, e.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (holding that the court of appeals erred when it "proceeded to find fair warning in the general tests set out in *Graham* and *Garner*"). A general statement of law can "'clearly establish' the answer, even without a body of relevant case law" only "in an obvious case." *Ibid.* But even if this is not the obvious case for which *Graham* gives a clear answer, probable cause is a more objective standard (and produces a more obvious answer here) than the Fifth Circuit's formulation, which would effectively require courts to second-guess an officer's decision based on a subjective, retrospective judgment that the risk was not "sufficiently substantial and immediate." This defeats the purpose of qualified immunity, which rests on the principle that "officials should not err always

on the side of caution because they fear being sued." *Bryant*, 502 U.S. at 229 (internal quotation marks omitted). Without clear notice that particular conduct is unlawful, and with knowledge that his conduct will be judged on the vague standard of "sufficiency," a reasonable officer has every incentive to err on the side of caution.

2. It Was Not Clearly Established that Police Must Exhaust Non-Lethal Alternatives Before Using Deadly Force Against a Suspect Who Threatened to Shoot Police Officers.

Leija's threat to shoot police officers distinguishes this case from existing precedent regarding the use of force against fleeing suspects. Before an officer may be subjected to personal liability, "existing precedent must have placed the statutory or constitutional question beyond debate." *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam); *Plumhoff*, 134 S. Ct. at 2023. But as of March 2010, neither this Court nor the Fifth Circuit had considered a case in which a suspect made explicit verbal threats to shoot police officers. A rule prohibiting the use of force in these circumstances would therefore require a settled consensus among other courts before a reasonable officer in Texas could be charged with knowledge that his use of force was unlawful. *See, e.g.*, *Plumhoff*, 134 S. Ct. at 2023. The Fifth Circuit identified no such consensus, nor did it cite a single case in which a suspect explicitly threatened to shoot police officers.

The Fifth Circuit's inability to find any comparable authority should have resulted in qualified immunity for Officer Mullenix. Although a decision on indistinguishable facts is not essential, existing precedent must be clear enough to demonstrate, beyond any reasonable disagreement, that particular conduct is clearly *unlawful*. *See, e.g.*, *Saucier*, 533 U.S. at 202 ("If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate."); *cf. Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("[I]f officers of reasonable competence could disagree on th[e] issue, immunity should be recognized.").

But instead of asking whether Officer Mullenix's conduct was *foreclosed* by clearly established law, the Fifth Circuit asked whether clearly established law *supported* his use of force. This put the onus on Mullenix to identify existing precedent that endorsed his specific conduct under the Fourth Amendment. As a result, the Fifth Circuit denied qualified immunity by distinguishing cases finding officers' conduct to be reasonable, including cases decided after the events in question. For instance, when Mullenix relied on *Plumhoff* to argue that his conduct was not clearly established as unlawful,[6] the Fifth Circuit fell back on gen-

[6] While later-decided cases may demonstrate the absence of clearly established law, they cannot provide clear notice that particular conduct is unlawful. *See, e.g.*, *Plumhoff*, 134 S. Ct. at 2023 (citing *Brosseau* to demonstrate the absence of clearly established law in 1999, but noting, "We did not consider later decided

eral principles, responding that *Plumhoff* did not "undermine the clearly established law that an officer may not use deadly force against a fleeing suspect absent a sufficient risk to officers or bystanders." Pet. App. 23a. It then distinguished the Fifth Circuit's decision in *Thompson*—decided, like *Plumhoff*, in 2014—as holding that the use of force "was not clearly established as unreasonable" on different facts. Pet. App. 23a–24a ("[T]he fleeing suspect had stolen a car and kidnapped a woman, had evaded four attempts to stop the car with alternate methods of seizure, and whose driving continued to pose a 'tremendous risk' to the public and other officers." (quoting *Thompson*, 762 F.3d at 440–41)).

In its discussion of clearly established law, the Fifth Circuit did not discuss a single case holding the use of force against a fleeing suspect to be unreasonable on similar facts, much less a case denying qualified immunity. *Cf. Ryburn v. Huff*, 132 S. Ct. 987, 990 (2012) (per curiam) (summarily reversing the denial of qualified immunity where "[n]o decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case"). But because the Fifth Circuit improperly shifted the burden to Officer Mullenix, the absence of existing precedent counted against him.

The Fifth Circuit's flawed analysis also led it to recognize an implicit duty to exhaust non-lethal

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cases because they 'could not have given fair notice to [the officer].'" (quoting *Brosseau*, 543 U.S. at 200 n.4)).

means before using deadly force against a suspect. *See* Pet. App. 23a–24a. If anything, existing precedent would have suggested that officers are *not* required to exhaust non-lethal alternatives before using deadly force. As of 2007, this Court had flatly rejected a "magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Scott*, 550 U.S. at 382. The Fifth Circuit did not identify any subsequent decision from this Court or a settled consensus among the lower courts to establish such a precondition, and none exists. *See, e.g.*, *Fenwick v. Pudimott*, No. 13-5130, 2015 WL 590295, at *7 n.1 (D.C. Cir. Feb. 13, 2015) (Henderson, J., concurring) ("To the extent the majority opinion implies that law enforcement officers must first try non-lethal means to neutralize a deadly threat or risk violating the Fourth Amendment, it is irreconcilable with a decades-long line of U.S. Supreme Court precedent." (citing *Brosseau*, 543 U.S. at 197-98; *Garner*, 471 U.S. at 11)).

In fact, the court of appeals' recognition of a duty to exhaust non-lethal means conflicts directly with this Court's decision in *Brosseau*. In that case, an officer shot a driver from behind to protect "other officers on foot who [she] *believed* were in the immediate area" and "any other citizens who *might be* in the area." 543 U.S. at 197 (emphases added). This Court held that the officer was entitled to qualified immunity even though the driver "had just begun to flee and . . . had not yet driven his car in a dangerous manner." *Plumhoff*, 134 S. Ct. at 2023.

Given the lack of authority addressing the use of force against suspects who expressly threaten to shoot police officers, Mullenix's conduct—even if it were unreasonable—fell somewhere in the border between excessive and acceptable force. It follows that it would not have been "clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier*, 533 U.S. at 202; *cf. id.* at 210 (Ginsburg, J., concurring in the judgment) ("Taking into account the particular circumstances confronting the defendant officer, could a reasonable officer, similarly situated, have believed the force employed was lawful?"). But the Fifth Circuit never asked that question.[7] As a result, it failed to grant Mullenix the qualified immunity to which he is entitled.

II. THE FIFTH CIRCUIT'S DECISION CREATES TWO SEPARATE CIRCUIT SPLITS.

A. The Fifth Circuit's Holding that Mullenix's Conduct Was Objectively Unreasonable Conflicts with Decisions of the First, Sixth, Eighth, and Eleventh Circuits.

The Fifth Circuit's holding that Mullenix's conduct was objectively unreasonable conflicts with decisions

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[7] Neither did the district court. After formulating clearly established law in a manner that incorporated the question of reasonableness, Pet. App. 35a–36a, the district court denied summary judgment based solely on its conclusion that the reasonableness of Mullenix's conduct presented a genuine issue of material fact. Pet. App. 36a–37a.

in other circuits, which have consistently found the use of deadly force to be reasonable in similar circumstances, even in the absence of a direct threat to shoot police officers.

The Eleventh Circuit in *Quiles v. City of Tampa Police Department*, No. 14-12875, 2015 WL 53707, at *3 (11th Cir. Jan. 5, 2015) (per curiam), held that an officer did not violate the Fourth Amendment by shooting an unarmed suspect who was attempting to escape from an arrest on foot. Because the officer "believed reasonably (although mistakenly) that [he] had stolen and was still in possession of [another officer's] gun," the use of deadly force was reasonable even though the suspect "was running away . . . when he was shot and had not threatened definitely the officers with a gun." *Ibid.* Likewise, here, Mullenix rightfully believed (although mistakenly) that Leija had a gun—and Leija had even threatened to shoot police officers.

Long v. Slaton, 508 F.3d 576, 581 (11th Cir. 2007), explicitly rejected an argument that alternative means should have been used before an officer fired shots at a suspect attempting to flee in a car. The Eleventh Circuit held that an officer did not act unreasonably when he fired several shots at a mentally unstable suspect who was backing away from the officer in the officer's own patrol car. Even if the suspect did not pose an "immediate" threat, the court held that "the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect." *Ibid.* The court noted that the officer gave the suspect

clear warning (an option not available to Mullenix), and it rejected the plaintiffs' argument that the officer should have used "alternative means . . . such as shooting out the tires of the cruiser, using spike strips, or allowing [the suspect] to leave." *Id.* at 583.

In *Cass v. City of Dayton*, 770 F.3d 368 (6th Cir. 2014), the Sixth Circuit held that an officer did not act unreasonably when he shot a fleeing driver when any danger to officers on the scene had passed. The officer's use of force was deemed reasonable because he reasonably believed that the driver "posed a continuing risk to the other officers present in the immediate vicinity." *Id.* at 377. Here, the danger to Officer Ducheneaux had not passed, and even if it had, Leija posed a continuing risk to other officers.

The First Circuit in *McGrath v. Tavares*, 757 F.3d 20 (1st Cir. 2014), *cert. denied*, 135 S. Ct. 1183 (2015), held that an officer acted reasonably in firing multiple shots at a driver who was attempting to resume a high-speed chase after crashing into a stone wall and a telephone pole. The officer fired two shots when the car was driving toward him and two more when it was driving away from him, possibly toward another officer. *Id.* at 28. The First Circuit held that the officer's conduct was objectively reasonable given the risk to himself, the risk to another officer, and the risk that the driver "'would once again pose a deadly threat for others' if he had resumed his flight." *Id.* at 29 (quoting *Plumhoff*, 134 S. Ct. at 2022). In this case, Mullenix fired shots immediately before Leija reached Officer

Ducheneaux and shortly before he would have reached other officers if the chase continued.

In *Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012), the Eighth Circuit ruled that an officer did not violate the Fourth Amendment when he fired eight shots at an unarmed suspect who was approaching him on foot with his hands raised or extended to his sides. The victim had not brandished a firearm, and bystanders yelled that the suspect was unarmed. The officer's use of deadly force was nevertheless deemed reasonable because the suspect was intoxicated, the officer had been told that the suspect was armed, and the officer "was in no position—with [the victim] continuing toward him—to verify which version was true." *Id.* at 966–67; *see also Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (holding that an officer who fired his pistol from a moving police car in an attempt to disable the engine of a fleeing eighteen-wheeler did not act unreasonably where previous efforts, including "shots at its tires and radiator" by officers on the side of the road, did not end the chase). Here, Mullenix also had been told the suspect was armed, and Mullenix was in no position to verify that fact.

In this case, Mullenix reasonably concluded that Leija presented a threat of serious physical harm. Mullenix was told Leija was armed, Leija was driving towards Ducheneaux, and Mullenix had no chance to verify the facts before Leija reached Ducheneaux. Leija's threat to shoot police officers eliminated any doubt about the risk he presented. Officer Mullenix's attempt to eliminate that risk was not unreasonable,

as confirmed by precedents in the First, Sixth, Eighth, and Eleventh Circuits.

B. The Fifth Circuit's Finding of Clearly Established Law Conflicts with Decisions of the Tenth and D.C. Circuits.

The Fifth Circuit's holding that Mullenix's conduct violated clearly established law creates a separate circuit split with the Tenth and D.C. Circuits.

In *Fenwick v. Pudimott*, the D.C. Circuit held that an officer who shot a sixteen-year-old suspected car thief as he tried to drive out of a parking lot was entitled to qualified immunity. It explained that the case, like *Brosseau*, involved a suspect "who posed no immediate threat to any officer or bystander when the officers fired," and officers who "justified their use of deadly force by claiming concern for the safety of other officers and bystanders." 2015 WL 590295, at *5. In the instant case, Mullenix also had every reason to believe that Leija posed an immediate threat to Officer Ducheneaux, the officers stationed up the road, and any bystander who might have been in his way. The law did not clearly establish that Mullenix's response to those threats was unreasonable.

In *Cordova v. Aragon*, the Tenth Circuit held that an officer was entitled to qualified immunity when he shot a fleeing driver in the back of the head. The suspect, whose truck was pulling a trailer with stolen heavy equipment, led police on an extended nighttime chase, during which he drove on the wrong side of the highway and attempted to ram a police car. 569 F.3d

at 1186. The defendant officer started to set out tire spikes, but when the suspect's truck approached him, he gave up the effort, drew his gun, and fired multiple shots, all but one of which hit the side of the suspect's truck. *Id.* at 1187. The court assumed, for purposes of summary judgment, that the officer "was not in immediate danger and that no innocent bystanders were in the vicinity," and it found it likely "that whatever danger he might have perceived had passed by the time he fired the fatal shot." *Ibid*. Finding the law to be "vague on whether the potential risk to unknown third parties is sufficient to justify the use of force nearly certain to cause death," the Tenth Circuit held that the officer was entitled to qualified immunity given precedent authorizing "the use of deadly force when a fleeing suspect poses a threat of serious harm to others," *id.* at 1193. Here, too, clearly established law did not provide that Mullenix had to see if tire spikes worked before firing at Leija's car.

III. THIS IS AN IDEAL VEHICLE TO ADDRESS THE QUESTIONS PRESENTED AND PROVIDE GUIDANCE ON THE APPLICATION OF *PLUMHOFF*.

This is an ideal vehicle for providing needed guidance on the important issue of police conduct while pursuing a fleeing suspect. The Fifth Circuit expressly ruled on both the reasonableness of Mullenix's conduct, Pet. App. 9a–21a, and whether the law was clearly established, Pet. App. 21a–24a. And both issues have been well vetted by the court of appeals.

Judge King wrote a thorough dissent from the majority's initial opinion; the panel majority issued a substitute opinion; and Judge Jolly's dissent from the denial of rehearing en banc highlights the profound consequences of the panel majority's substituted opinion.

While some qualified immunity cases may turn on fact-bound inquiries, the Fifth Circuit's opinion here announced propositions of law with a higher level of generality. The court held that (1) a fleeing suspect's threat to shoot police officers is not sufficient for an officer to use deadly force, Pet. App. 19a–20a, and (2) an officer cannot use deadly force until alternative means have been used to disable a car, Pet. App. 21a. Those legal questions are squarely presented for the Court's consideration. And the Fifth Circuit cited *Plumhoff* repeatedly, so this is also a good vehicle to provide guidance to the courts of appeals in applying this Court's recent precedent.

Nor are there any jurisdictional issues, as orders denying summary judgment based on a claim of qualified immunity are immediately appealable under the collateral-order doctrine. *Plumhoff*, 134 S. Ct. at 2018–19. The interlocutory posture does not counsel against review in qualified immunity cases. The Court has frequently granted certiorari to review summary judgment motions denying qualified immunity. *See, e.g.*, *id.* at 2018; *Scott*, 550 U.S. at 376; *Saucier*, 533 U.S. at 199–200. After all, qualified immunity is an "immunity from suit," and this immunity would be "irretrievably lost" if only "reviewed on appeal from a final judgment." *Plumhoff*, 134 S. Ct. at 2019.

This case is therefore an ideal vehicle for the Court to provide needed guidance to the courts of appeals on the important issue of police conduct while pursuing a fleeing suspect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13–10899

United States Court of Appeals
Fifth Circuit
FILED
December 19, 2014

Lyle W. Cayce
Clerk

BEATRICE LUNA**,** Individually and as Representative of the Estate of Israel Leija, Jr.; CHRISTINA MARIE FLORES, as Next Friend of J.L. and J.L., Minor Children,

Plaintiffs–Appellees

v.

CHADRIN LEE MULLENIX, In His Individual Capacity,

Defendant–Appellant

Appeal from the United States District Court
for the Northern District of Texas

Before HAYNES and GRAVES, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

We withdraw our prior opinion of August 28, 2014, *Luna v. Mullenix,* 765 F.3d 531 (5th Cir.2014), and substitute the following.[1]

This § 1983 excessive use of force case arises from the shooting and death of Israel Leija, Jr. by Texas Department of Public Safety (DPS) Trooper Chadrin Mullenix during a high-speed pursuit. The district court denied Mullenix's motion for summary judgment on the issue of qualified immunity, holding that multiple genuine disputes of material fact existed as to the qualified immunity analysis. Because we conclude that Mullenix is not entitled to summary judgment on qualified immunity, we affirm.

I. Factual and Procedural Background

On March 23, 2010, at approximately 10:21 p.m., Sergeant Randy Baker of the Tulia Police Department followed Israel Leija, Jr. to a Sonic Drive–In to arrest him on a motion to revoke misdemeanor probation. The arrest warrant had been filed because (1) Leija had failed to complete all of his hours of community service, and (2) a new complaint of domestic violence had been filed against Leija, who was on probation. After some discussion with Baker, Leija fled the scene and headed north towards Interstate Highway 27 ("I–27"), with Baker in pursuit. Texas DPS Trooper Gabriel Rodriguez was on patrol nearby and took the lead in the pursuit. Around mile marker 77, Leija en-

[1] Judge King, a member of the original panel in this case, did not participate in the consideration of this opinion. This matter is decided by a quorum. 28 U.S.C. § 46(d).

tered I–27 and continued north, with Rodriguez directly behind him. During the approximately 18 minutes that the pursuit lasted, Rodriguez followed Leija and captured the pursuit on his video recorder. The video supports the plaintiffs' assertions that although the pursuit proceeded north on 1–27 at speeds between 85 and 110 miles per hour, traffic on the dry roadway was light; Leija remained on the paved portion of the road with his headlights on, did not run any vehicles off the road, did not collide with any vehicles, and did not cause any collisions; there were no pedestrians or stopped vehicles along the road; and all of the pursuit occurred in rural areas, without businesses or residences near the interstate, which was divided by a wide center median.

As the pursuit headed north on I–27, other law enforcement units joined. Officer Troy Ducheneaux of the Canyon Police Department deployed tire spikes underneath the overpass at Cemetery Road and I–27. DPS Troopers set up spikes at McCormick Road, north of Cemetery Road. Other police units set up spikes at an additional location further north, for a total of three spike locations ahead of the pursuit. The record reflects that officers had received training on the deployment of spikes, and had been trained to take a protective position while deploying spikes, if possible, so as to minimize the risk posed by the passing driver.

During the pursuit, Leija twice called the Tulia Police Dispatch on his cell phone, claiming that he had a gun, and that he would shoot at police officers if they did not cease the pursuit. This information was relayed to all officers involved. It was discovered later that Leija had no weapon in his possession.

DPS Trooper Chadrin Mullenix was on patrol thirty miles north of the pursuit, and also responded. Mullenix went to the Cemetery Road overpass, initially intending to set up spikes at that location, but ultimately decided to attempt to disable the car by shooting it. He positioned his vehicle atop the Cemetery Road bridge, twenty feet above I–27, intending to shoot at the vehicle as it approached. Mullenix planned to use his .223 caliber M–4 rifle to disable the vehicle by shooting at its engine block, although he had never attempted that before and had never seen it done before. The district court noted that "[t]here is no evidence—one way or another—that any attempt to shoot out an engine block moving at 80 mph could possibly have been successful." Mullenix testified that he had been trained in shooting upwards at moving objects, specifically clay pigeons, with a shotgun. He had no training on how to shoot at a moving vehicle to disable it.

Mullenix's dash cam video reflects that once he got to the Cemetery Road overpass, he waited for about three minutes for the pursuit to arrive. Mullenix relayed to Officer Rodriguez that he was thinking about setting up with a rifle on the bridge. Rodriguez replied "10–4," told Mullenix where the pursuit was, and that Leija had slowed down to 85 miles per hour. Mullenix then asked the Amarillo DPS dispatch to contact DPS Sergeant Byrd, Mullenix's supervisor, to tell Byrd that he was thinking about shooting the car and to ask whether the sergeant thought that was "worth doing." According to plaintiffs' allegations, he contacted Byrd to "request permission" to fire at the vehicle. Mullenix denies that he requested or needed "permission," but

stated that he "asked for what [Byrd] advised" and asked to "get his advice." Mullenix did not wait for a response from Sergeant Byrd, but exited his patrol vehicle, took out his rifle, and took a shooting position on the bridge. During this time, the dispatcher relayed a response from Sergeant Byrd to "stand by" and "see if the spikes work first." Mullenix alleges that he was unable to hear that instruction because he had failed to turn on his outside loudspeakers, thereby placing himself out of communication with his dispatch or other officers involved in the pursuit. Plaintiffs allege that since the trunk was open, Mullenix should have heard the response. Mullenix did have his radio microphone on him. During the waiting minutes, Mullenix had a short, casual conversation with Randall County Sheriff's Deputy Tom Shipman about whether he could shoot the vehicle to disable it. When Shipman mentioned to Mullenix that there was another officer beneath the overpass, Mullenix replied that he did not think he would hit that officer.

As the two vehicles approached, Mullenix fired six rounds at Leija's car. There were no streetlights or ambient lighting. It was dark. Mullenix admitted he could not discern the number of people in Leija's vehicle, whether there were passengers, or what anyone in the car was doing. Mullenix testified that at the time of the shooting, he was not sure who was below the overpass, whether Ducheneaux had actually set up spikes there, or where Ducheneaux was positioned beneath the overpass. After Mullenix fired, Leija's car continued north, engaged the spike strip, hit the median and rolled two and a half times. In the aftermath of the shooting, Mullenix remarked to his supervisor,

Sergeant Byrd, "How's that for proactive?" Mullenix had been in a counseling session earlier that same day, during which Byrd intimated that Mullenix was not being proactive enough as a Trooper.

Leija was pronounced dead soon after the shooting. The cause of death was later determined to be one of the shots fired by Mullenix that had struck Leija in the neck. The evidence indicates that at least four of Mullenix's six shots struck Leija's upper body, and no evidence indicates that Mullenix hit the vehicle's radiator, hood or engine block.

The incident was investigated by Texas Ranger Jay Foster. Foster concluded that Mullenix complied with DPS policy and Texas law. The DPS Firearms Discharge Review board reviewed the shooting and concluded that Mullenix complied with DPS policy and Texas law. A grand jury declined to return an indictment of Mullenix. A DPS Office of the Inspector General ("OIG") Report concluded the opposite, that Mullenix was not justified and acted recklessly. The parties disputed the relevance and admissibility of that OIG report, which was subsequently called into question by its author, who testified that he did not have full information on the incident or investigation when he wrote the report. The district court mentioned the report in its statement of facts, but did not further discuss the report.

Beatrice Luna, as the representative of Leija's estate, and Christina Flores, on behalf of Leija's minor child, sued DPS, the Director of DPS Steve McCraw, Trooper Rodriguez, and Trooper Mullenix, in state court, asserting claims under the Texas Tort Claims

Act and 42 U.S.C. § 1983. Defendants removed to federal court. Director McCraw's Motion to Dismiss was granted, and plaintiffs' stipulation of dismissal against DPS and Trooper Rodriguez was granted with prejudice. The sole remaining claim is the § 1983 claim against Mullenix, alleging that he subjected Leija to an unconstitutional use of excessive force in violation of the Fourth Amendment. Mullenix answered and asserted the defense of qualified immunity. After discovery, Mullenix moved for summary judgment on the issue of qualified immunity. On August 7, 2013, the district court issued a memorandum opinion and order denying Mullenix's motion for summary judgment. Mullenix appeals.

II. Discussion

The doctrine of qualified immunity shields "government officials performing discretionary functions ... from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In reviewing a motion for summary judgment based on qualified immunity, we undertake a two-step analysis. First, we ask whether the facts, taken in the light most favorable to the plaintiffs, show the officer's conduct violated a federal constitutional or statutory right. *See Tolan v. Cotton,* —— U.S. ——, 134 S.Ct. 1861, 1865, 188 L.Ed.2d 895 (2014); *Flores v. City of Palacios,* 381 F.3d 391, 395 (5th Cir.2004) (citing *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Second, we ask "whether the de-

fendant's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known." *Flores,* 381 F.3d at 395 (internal quotation marks omitted) (quoting *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)); *see Tolan,* 134 S.Ct. at 1866. We may examine these two factors in any order. *See Pearson v. Callahan,* 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (overruling in part *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Claims of qualified immunity must be evaluated in the light of what the officer knew at the time he acted, not on facts discovered subsequently. *See Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *Lytle v. Bexar Cnty., Tex.,* 560 F.3d 404, 411 (5th Cir.2009). As the Supreme Court has recently reaffirmed, "in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan,* 134 S.Ct. at 1863 (internal quotation marks and alteration omitted) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Our jurisdiction to review a denial of a motion for summary judgment based on qualified immunity is limited to legal questions. *See, e.g., Kinney v. Weaver,* 367 F.3d 337, 346 (5th Cir.2004) (en banc). Because of this jurisdictional limitation, "we consider only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment." *Id.* at 348; *see Flores,* 381 F.3d at

394. We review the objective reasonableness of the defendant government official's actions and the scope of clearly established law de novo. *See Flores,* 381 F.3d at 394. We "may review the district court's conclusion that issues of fact are material, but not the conclusion that those issues of fact are genuine." *Id.*

A. Constitutional Violation

Under the first prong of the qualified immunity analysis, the plaintiffs must produce facts sufficient to show that Mullenix's actions violated Leija's Fourth Amendment rights. *Tolan,* 134 S.Ct. at 1865; *Flores,* 381 F.3d at 395. "[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). To show a violation, the plaintiffs must produce facts sufficient to show that Leija suffered (1) an injury; (2) which resulted directly from a use of force that was clearly excessive to the need; and (3) the force used was objectively unreasonable. *Goodson v. City of Corpus Christi,* 202 F.3d 730, 740 (5th Cir.2000). "This is an objective standard: 'the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.' " *Ramirez v. Knoulton,* 542 F.3d 124, 128–29 (5th Cir.2008) (quoting *Graham,* 490 U.S. at 396, 109 S.Ct. 1865).

"There are few, if any, bright lines for judging a police officer's use of force; when determining whether an officer's conduct violated the Fourth Amendment, we must slosh our way through the factbound morass of reasonableness." *Lytle,* 560 F.3d at 411 (internal

quotation marks and alteration omitted) (quoting *Scott v. Harris,* 550 U.S. 372, 383, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007)). "To gauge the objective reasonableness of the force used by a law enforcement officer, we must balance the amount of force used against the need for force," paying "careful attention to the facts and circumstances of each particular case." *Flores,* 381 F.3d at 399. "The intrusiveness of a seizure by means of deadly force is unmatched." *Garner,* 471 U.S. at 9, 105 S.Ct. 1694; *see Flores,* 381 F.3d at 399. Balanced against this intrusion are "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." *Lytle,* 560 F.3d at 411.

When deadly force is used, it is clear that the severity and immediacy of the threat of harm to officers or others are paramount to the reasonableness analysis. *See Plumhoff v. Rickard,* —— U.S. ——, 134 S.Ct. 2012, 2021, 188 L.Ed.2d 1056 (2014) (concluding that deadly force was not objectively unreasonable where "it is beyond serious dispute that Rickard's flight posed a grave public safety risk"); *Scott,* 550 U.S. at 386, 127 S.Ct. 1769 (noting that the use of deadly force was not objectively unreasonable when "[t]he car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others"); *see also Garner,* 471 U.S. at 11, 105 S.Ct. 1694 ("Where the suspect poses no immediate threat to the officer ... the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."); *Thompson v. Mercer,* 762 F.3d 433,

440 (5th Cir.2014) (noting that "the question is whether the officer had reason to believe, at that moment, that there was a threat of physical harm"); *Hathaway v. Bazany,* 507 F.3d 312, 320 (5th Cir.2007) (noting that the "reasonableness of an officer's use of deadly force is ... determined by the existence of a credible, serious threat to the physical safety of the officer or to those in the vicinity"); *Bazan ex rel. Bazan v. Hidalgo Cnty.,* 246 F.3d 481, 493 (5th Cir.2001) ("The excessive force inquiry is confined to whether the Trooper was in danger at the moment of the threat that resulted in the Trooper's shooting Bazan."); *Vaughan v. Cox,* 343 F.3d 1323, 1330 (11th Cir.2003) ("Genuine issues of material fact remain as to whether [the suspects'] flight presented an immediate threat of serious harm to [the police officer] or others at the time [the officer] fired the shot.").

With regard to high-speed chases, the Supreme Court has held that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Scott,* 550 U.S. at 386, 127 S.Ct. 1769; *see also Plumhoff,* 134 S.Ct. at 2021–22 (applying *Scott* to a case involving the shooting of a suspect in a high-speed chase). Likewise, this court has recently held that a sheriff who used an assault rifle to intentionally shoot a fleeing suspect as he approached in a truck, after a lengthy, dangerous chase, did not violate the Fourth Amendment. *Thompson,* 762 F.3d at 438. These cases, however, do not establish a bright-line rule; "a suspect that is fleeing in a motor vehicle is not so inherently

dangerous that an officer's use of deadly force is *per se* reasonable." *Lytle,* 560 F.3d at 416. Instead, *Scott, Plumhoff* and *Thompson* are simply applications of the Fourth Amendment's reasonableness requirement to particular facts. *See Plumhoff,* 134 S.Ct. at 2020–22; *Scott,* 550 U.S. at 382–83, 127 S.Ct. 1769; *Thompson,* 762 F.3d at 438. "Nearly any suspect fleeing in a motor vehicle poses some threat of harm to the public. As the cases addressing this all-too-common scenario evince, the real inquiry is whether the fleeing suspect posed such a threat that the use of deadly force was justifiable." *Lytle,* 560 F.3d at 415; *see Thompson,* 762 F.3d at 438.

Mullenix asserts that, as a matter of law, his use of force was not objectively unreasonable because he acted to protect other officers, including Officer Ducheneaux beneath the overpass and officers located further north up the road, as well as any motorists who might have been located further north. However, accepting plaintiffs' version of the facts (and reasonable inferences therefrom) as true, these facts are sufficient to establish that Mullenix's use of deadly force was objectively unreasonable. *See Newman v. Guedry,* 703 F.3d 757, 762 (5th Cir.2012) ("Mindful that we are to view the facts in a light most favorable to Newman, and seeing nothing in the three video recordings to discredit his allegations, we conclude, based only on the evidence in the summary-judgment record, that the use of force was objectively unreasonable in these circumstances."); *Haggerty v. Tex. Southern Univ.,* 391 F.3d 653, 655 (5th Cir.2004) ("In an interlocutory appeal in which the defendant asserts qualified immunity, to the extent that the district court found that

genuine factual disputes exist, we accept the plaintiff's version of the facts (to the extent reflected by proper summary judgment evidence) as true."); *see also Tolan,* 134 S.Ct. at 1863 ("[I]n ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.").

Many of the facts surrounding Leija's flight from police, viewed in the light most favorable to the plaintiffs, negate the risk factors central to the reasonableness findings in cases like *Scott, Plumhoff* and *Thompson.* According to the plaintiffs' version of the facts, although Leija was clearly speeding excessively at some times during the pursuit, traffic on the interstate in the rural area was light. There were no pedestrians, no businesses and no residences along the highway, and Leija ran no other cars off the road and engaged no police vehicles. Further, there is evidence showing that Leija had slowed to 85 miles per hour prior to the shooting. Spike systems, which could have ended the pursuit without resort to deadly force, had already been prepared in three locations ahead of the pursuit. In *Scott* and *Plumhoff,* on the other hand, multiple other methods of stopping the suspect through alternate means had failed, the suspects were traveling on busy roads, had forced multiple other drivers off the road, had caused collisions with officers or innocent bystanders, and at the time of the shooting were indisputably posing an immediate threat to bystanders or other officers in the vicinity. *See Plumhoff,* 134 S.Ct. at 2017–18, 2021–22; *Scott,* 550 U.S. at 379–80, 383–84, 127 S.Ct. 1769. Likewise, in *Thompson,* this court found that the officers had tried "four

times" to stop the chase with "alternate means of seizure before resorting to deadly force" to stop a driver who posed "extreme danger to human life." *Thompson,* 762 F.3d at 438, 440. The *Thompson* court explained that

> even the Thompsons concede that their son represented a grave risk when he "reached speeds exceeding 100 miles per hour on the interstate, when he ran numerous stop signs, when he had 'recklessly' driven on the wrong side of the road, [and] when he avoided some road spikes [and] took officers down Blue Flat Road where a horse was loose." Indeed, parts of the police camera footage might be mistaken for a video game reel, with Keith disregarding every traffic law, passing other motorists on the left, on the right, on the shoulder, and on the median. He occasionally drove off the road altogether and used other abrupt maneuvers to try to lose his pursuers. The truck was airborne at least twice, with Keith struggling to regain control of the vehicle. In short, Keith showed a shocking disregard for the welfare of passersby and of the pursuing law enforcement officers.

Id. at 438.

To the extent that we must view facts in accordance with the video, *see Scott,* 550 U.S. at 378–80, 127 S.Ct. 1769; *Thompson,* 762 F.3d at 439, the video supports the plaintiffs' version of the facts. In *Scott,* the plaintiff argued that the force used was unreasonable because the driver posed "little, if any actual threat to pedestrians or other motorists." *Scott,* 550 U.S. at 378, 127 S.Ct. 1769. However, the Court said,

> [t]he videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

Id. at 379–80, 127 S.Ct. 1769. The Court relied on the video to resolve disputed facts, holding that the video "blatantly contradicted" the plaintiff's version of the facts, "so that no reasonable jury could believe it." *Id.* at 380, 127 S.Ct. 1769. Likewise, in *Thompson,* the plaintiffs argued that the threat posed by the chase had ended because the rural road was empty by the time of the shooting, but this court found that "the Thompsons' characterization of the scene is belied by the video evidence," which showed multiple cars pulling over to avoid the chase, and dangerous conditions on the road, which had limited visibility and no shoulder for cars to pull onto. *Thompson,* 762 F.3d at 439. Here, however, the video supports the plaintiffs' assertions that during the pursuit, traffic on the divided

highway was light, there were no pedestrians, businesses or residences along the highway, and Leija ran no other cars off the road and did not engage any police vehicles.

Further, in concluding that the use of force was not objectively unreasonable, the *Thompson* opinion relies repeatedly on the fact that the officers had made four attempts to disable the vehicle with "alternate means of seizure before resorting to deadly force." *Thompson,* 762 F.3d at 438, 440. With regard to the existence of a Fourth Amendment violation, the holding of *Thompson* is that "after multiple other attempts to disable the vehicle failed, it was not unreasonable for Mercer to turn to deadly force to terminate the dangerous high-speed chase." *Id.* at 438. The opinion later similarly concludes that "law enforcement reasonably attempted alternate means of seizure before resorting to deadly force," *id.* at 440, and discusses this fact twice in its discussion of whether the law was sufficiently clearly established, *id.* at 440–41. In the instant case, there were spikes already in place under the bridge, and officers prepared to deploy spikes in two additional locations up the road. Yet Mullenix fired his rifle at Leija's vehicle before Leija had encountered any of the spikes. In contrast to *Thompson,* the alternative methods of seizure that were already prepared were never given a chance to work before Mullenix resorted to deadly force.

We certainly do not discount Leija's threats to shoot officers, which he made to the Tulia dispatcher and which were relayed to Mullenix and other officers. However, allegedly being armed and in a car fleeing are not, by themselves, sufficient to establish that

Leija posed such an imminent risk of harm that deadly force was permitted. In a case involving the shooting of a suspect, we have stated that the "core issue" is "whether the officer reasonably perceived an immediate threat." *Reyes v. Bridgwater,* 362 Fed.Appx. 403, 408 (5th Cir.2010). "[T]he focus of the inquiry is the act that led the officer to discharge his weapon." *Id.* at 406 (internal quotation marks and alteration omitted) (quoting *Manis v. Lawson,* 585 F.3d 839, 845 (5th Cir.2009)); *see also Bazan,* 246 F.3d at 493 ("The excessive force inquiry is confined to whether the Trooper was in danger at the moment of the threat that resulted in the Trooper's shooting."). The factual scenario here is substantially different, in terms of the imminence and immediacy of the risk of harm, from situations where we have granted qualified immunity to officers who shot an armed suspect, or a suspect believed to be armed. *See Ramirez,* 542 F.3d at 127, 129 (suspect stopped by the side of the road after a brief chase displayed a gun, repeatedly ignored police commands, was located yards from police officers, and brought his hands together in a manner that indicated he may have been reaching for the gun, prompting officer to shoot him); *Ballard v. Burton,* 444 F.3d 391, 402–03 (5th Cir.2006) (mentally disturbed suspect "refused to put down his rifle, discharged the rifle into the air several times while near officers, and pointed it in the general direction of law enforcement officers"); *Reese v. Anderson,* 926 F.2d 494, 500–01 (5th Cir.1991) (suspect stopped after a high-speed chase refused to exit the car, refused to follow police commands, repeatedly raised and lowered his hands, turned away from the officer and reached

lower toward the floorboard, prompting the officer to shoot him); *compare Reyes,* 362 Fed.Appx. at 407 (fact issue precluded qualified immunity where suspect was armed with a knife, but made no threatening gesture or motion), *with Harris v. Serpas,* 745 F.3d 767, 773 (5th Cir.2014) (qualified immunity granted to officer where video confirmed that suspect "was standing up out of bed and had raised the knife above his head at the time the shots were fired"). We discuss these cases not because we hold that an officer must actually see a weapon before taking action to protect himself or others from the suspect, but because they illustrate that, even when a weapon is present, the threat must be sufficiently imminent at the moment of the shooting to justify deadly force.

In *Thompson,* the court did note the existence of a stolen gun in the car of the fleeing suspect as a fact that supported its conclusion that the suspect posed an "ongoing threat of serious harm," even though the officer had no way of ascertaining whether the suspect intended to use the weapon. *Thompson,* 762 F.3d at 439 (quotation omitted). However, in *Thompson,* the officer also knew at the time of the shooting that the suspect was fleeing in a stolen car with a stolen weapon, had abducted a woman during his flight, and that the "unidentified suspect was admittedly suicidal and had already acted with utter desperation in attempting to evade law enforcement." *Id.* Thus, the court found that the officer was "justified in assuming" that the presence of the stolen weapon contributed to the continuing threat posed by suspect. *Id.*

Here, although Leija had stated to the dispatcher that he was armed and would shoot officers, he was

not fleeing the scene of a violent crime, no weapon was ever seen, and at the time of the shooting, most officers and bystanders were miles away, where they would not have been encountered until after the spikes were given a chance to stop the chase. On appeal, Mullenix relies heavily on the presence of Ducheneaux beneath the overpass, and the risk that Leija could shoot Ducheneaux as he sped by. However, he also testified that he did not actually know Ducheneaux's position or what he was doing beneath the overpass.[2] Mullenix argues that he knew that an officer had to be positioned near a roadway to deploy spikes, but the facts, taken in the light most favorable to the plaintiffs, also show that officers were trained to deploy spikes in a location where they were able to take a protective position, that there were several pillars at the Cemetery Road overpass and that Ducheneaux had positioned himself behind a pillar as he was trained to do. Further, just prior to the shooting, Sheriff's Deputy Shipman mentioned Ducheneaux's presence beneath the overpass, and Mullenix replied only that he did not think *he* would hit Mullenix; he did not indicate that he perceived a threat to Ducheneaux from Leija. In this situation, the facts, viewed

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[2] We do not hold that an officer must necessarily have another officer that he believes to be in danger in his sightline at the time he takes action. We merely state that the facts, viewed in favor of the plaintiffs, are sufficient to show that Mullenix-positioned atop a bridge in the dark of night, and eventually out of contact with other officers-lacked sufficient knowledge to determine whether or not Ducheneaux was in immediate danger from Leija, or whether Mullenix's own actions were decreasing the risk to Ducheneaux.

in the light most favorable to the plaintiffs, do not establish that Mullenix reasonably perceived an immediate threat at the time of the shooting, sufficient to justify the use of deadly force.

The plaintiffs also point to evidence in the record showing that Mullenix heard the warning that Leija had said he had a gun six minutes before the shooting, and went to the bridge and waited three minutes for Leija's car to approach. During this period Mullenix had time to consider his approach, including time to ask for his supervisor's opinion, inform Rodriguez of his intentions, and discuss the feasibility of shooting the car with Shipman. This is not the type of "split-second judgment" that officers must make when faced with an imminent risk of harm to themselves or others. *See Plumhoff,* 134 S.Ct. at 2020; *Graham,* 490 U.S. at 396–97, 109 S.Ct. 1865; *Hathaway,* 507 F.3d at 320–21. Although Mullenix relies heavily on the assertion that it is up to the "officer on the scene" to make judgments about the use of deadly force, Mullenix was not the only, or even the primary, officer on the scene. Officer Rodriguez was immediately in pursuit of Leija, and multiple other officers from various law enforcement agencies were on the scene at Cemetery Road and were at multiple locations further north along I–27, planning to deploy tire spikes to stop the suspect. There is no evidence that any other officer from any of the law enforcement agencies involved in the pursuit, hearing the same information that Mullenix heard, including the information regarding Leija's threats, decided that deadly force was necessary or warranted. Further, via the dispatcher, Mullenix asked his supervisor, Sergeant Byrd, about his

plan to shoot at the car. It is undisputed that Sergeant Byrd advised Mullenix to "stand by" and "see if the spikes work first." While Mullenix contends he did not hear his supervisor's command to stand by, plaintiffs proffered evidence that he could have heard that command. If plaintiffs' evidence is taken as true, it supports the conclusion that Mullenix acted objectively unreasonably. Lastly, Mullenix testified that he intended to shoot the engine block of the car in an attempt to disable it, although there is no evidence that shooting at the engine is a feasible method of immediately disabling a car. His justification for the use of force was to disable the car, but alternative methods were already in place to achieve the same goal, undermining the asserted necessity for resorting to deadly force at that particular instant.

We conclude that the plaintiffs have produced facts that, viewed in their favor and supported by the record, establish that Mullenix's use of force at the time of the shooting was objectively unreasonable under the Fourth Amendment.

B. Clearly Established Law

Under the second prong of the qualified immunity analysis, plaintiffs must show that Mullenix's actions violated a constitutional right that was sufficiently clearly established. *Flores,* 381 F.3d at 395. For a right to be clearly established, "[t]he contours of that right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against

the backdrop of the law at the time of the conduct." *Brosseau v. Haugen,* 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). "The central concept [of the test] is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.' " *Kinney,* 367 F.3d at 350 (quoting *Hope,* 536 U.S. at 740, 122 S.Ct. 2508). Further, while the Supreme Court has stated that "courts should define the 'clearly established' right at issue on the basis of the 'specific context of the case,' " it has also recently reminded us that we "must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Tolan,* 134 S.Ct. at 1866 (quoting *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151).

While Mullenix devotes the bulk of his argument to this prong of the qualified immunity analysis, "We need not dwell on this issue. It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Lytle,* 560 F.3d at 417. "This holds as both a general matter and in the more specific context of shooting a suspect fleeing in a motor vehicle." *Id.* at 417–18 (internal citations omitted) (citing *Kirby v. Duva,* 530 F.3d 475, 484 (6th Cir.2008); *Vaughan,* 343 F.3d at 1332–33); *see also Sanchez v. Fraley,* 376 Fed.Appx. 449, 452–53 (5th Cir.2010) (holding that "it was clearly established well before [April 23, 2007] that

deadly force violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," and "the threat of serious harm must be immediate"); *Reyes,* 362 Fed.Appx. at 406 ("Unlike some areas of constitutional law, the question of when deadly force is appropriate—and the concomitant conclusion that deadly force is or is not excessive—is well-established.").

Mullenix points to the Supreme Court's recent decision in *Plumhoff* to argue that the law was not clearly established. The *Plumhoff* Court relied primarily on *Brosseau,* which held that as of 1999 it was not clearly established that it was objectively unreasonable force "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Brosseau,* 543 U.S. at 195–97, 200, 125 S.Ct. 596. However, *Plumhoff* holds only that where a fleeing suspect "indisputably posed a danger both to the officers involved and to any civilians who happened to be nearby," a police officer's use of deadly force is not clearly established as unreasonable. *Plumhoff,* 134 S.Ct. at 2021–22, 2023; *see Brosseau,* 543 U.S. at 200, 125 S.Ct. 596. It does not, however, undermine the clearly established law that an officer may not use deadly force against a fleeing suspect absent a sufficient risk to officers or bystanders. *See Lytle,* 560 F.3d at 417–18. *Thompson* is no different. Similar to *Plumhoff,* it holds that the officer's use of force to stop a high-speed chase was not clearly established as unreasonable where the fleeing suspect had stolen a car and kidnapped a woman, had evaded four attempts to

stop the car with alternate methods of seizure, and whose driving continued to pose a "tremendous risk" to the public and other officers. *Thompson,* 762 F.3d at 440–41.

At the time of this incident, the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a sufficiently substantial and immediate threat, violated the Fourth Amendment.[3]

III. Conclusion

For the foregoing reasons, we AFFIRM the denial of summary judgment.

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[3] Mullenix makes a separate argument that the district court relied on inadmissible summary judgment evidence, specifically the OIG report concluding that Mullenix's actions were not justified. This report was later called into question by its author, who testified that it was not based on a full review of the incident. However, there is no indication in the district court's order that it relied on the OIG report in denying summary judgment, and we likewise do not rely on it. If there are questions as to its admissibility, the district court can resolve those in due course as the litigation proceeds.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

BEATRICE LUNA, Individually and as Representative of the Estate of ISRAEL LEIJA, JR., Deceased, and CHRISTINA MARIE FLORES, as Next Friend of J.L.L. and J.V.L., Minor Children,	§	
	§	CIVIL ACTION
PLAINTIFFS,	§	CAUSE NUMBER
vs.	§	
	§	2:12–CV–152–J
DPS TROOPER CHADRIN LEE MULLENIX, in his Individual Capacity,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A total of six rifle rounds were filed by Texas Department of Public Safety Trooper Chadrin Lee Mullenix at a fleeing automobile driven by Israel Leija, Jr., who died as a direct result of multiple wounds from that gunfire. Defendant Mullenix moves for summary judgment in this civil rights case on the basis of qualified immunity. The Plaintiffs and the Defendant have also filed counter-motions raising objections to

all or parts of certain filed summary judgment exhibits.

Background Facts

On the evening of March 23, 2010.[1] Sgt. Randy Baker of the Tulia, Texas, Police Department was searching for Israel Leija, Jr. to serve a misdemeanor arrest warrant on Leija. At approximately 10:21 p.m., Baker spotted Leija's car at a Sonic Drive In and moved to effect an arrest. Baker approached Leija's vehicle and informed Leija that he was under arrest. Leija, who was never taken into custody, fled the scene and headed north towards Interstate Highway Number 27 (I–27), with Baker in pursuit. Texas DPS Trooper Gabriel Rodriguez joined in the pursuit, taking the lead.

At approximately mile marker 77 of I–27, Leija entered a rural stretch of I–27 and began heading north on I–27, with Rodriguez directly behind him in pursuit. During the approximately 18 minutes that the pursuit lasted, Rodriguez followed Leija, capturing the pursuit on his video recorder.[2] Traffic on the dry roadway was light.

The pursuit proceeded north on I–27 at speeds up to 110 mph. During the entire pursuit, Leija remained on the paved portion of the road with his headlights on. Although Leija did exceed the speed limit and did

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[1] The Court notes that the pleadings state two different dates on which the police shooting occurred—March 23, 2010, and October 23, 2010. Defendant Mullenix agreed in his deposition that the shooting occurred on the evening of March 23, 2010.

[2] Copies of police videos are included in Plaintiffs' filed Appendix as exhibits.

refuse to stop, he did not run any vehicles off the roadway, did not collide with any vehicles, and did not cause any collisions. There were no pedestrians along the route that were in danger of being hit by Leija, and no disabled vehicles. All of the pursuit occurred in rural areas. There were no businesses or residences located in proximity to the controlled-access interstate highway. The roadway was divided by a wide center median, mostly flat, dry, and the weather that night was good.

During the pursuit, Leija twice called the Tulia Police Dispatch on his cell phone. Leija claimed that he had a gun, and that he would shoot at a police officer if they didn't back off. Leija in fact had no weapon in his possession, which would later be confirmed by law enforcement.

As the pursuit headed north on I–27, other law enforcement units joined in. Officer Troy Ducheneaux of the Canyon, Texas, Police Department deployed tire spikes underneath the overpass at Cemetery Road and I–27, about mile marker 103. Troopers Chris Ecker and Dennis Brassfield set up spikes at McCormick Road, which was north of Cemetery Road. Other police units set up spikes at a location further north, for a total of at least three spiking locations on I–27 ahead of Leija.

DPS Trooper Chadrin Mullenix also responded to the pursuit. With knowledge that other units were setting up spikes at other locations, *possibly* including underneath the Cemetery Road overpass, Mullenix decided not to deploy his spike system. Instead, Mullenix positioned his vehicle atop the Cemetery Road

bridge, about twenty feet above the I–27 roadway. Mullenix testified in his deposition that he intended to shoot down at Leija's moving vehicle as it approached, hoping that he could use his .223 caliber M–4 rifle to take out the engine block of the vehicle.[3] Mullenix testified that he had never attempted such a shot before, had not been trained for it, and had never seen such a tactic done. He testified that he had, however, been trained in shooting upwards, at moving clays, with a shotgun.

Mullenix testified that he contacted his Amarillo DPS dispatch to ask them to contact his supervisor, DPS Sgt. Robert Byrd, to—Plaintiffs' allege—"request permission" to fire at the vehicle. Mullenix denies that he requested "permission." He alleges that he did not need anyone's "permission" before he fired because, under DPS policy and the specific circumstances at that place and time, the decision to fire was up to him and him alone.

In any event, not waiting in his vehicle on a response from Sgt. Byrd, Mullenix exited his patrol vehicle, closed his car door, opened his trunk, took out his rifle, left the trunk lid open, and took a shooting position above the edge of the grassy median, near the center of the Cemetery Road bridge, on the South side. Mullenix crouched behind the concrete bridge's railing, waiting for the pursuit to arrive at his location.

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[3] There is no evidence in this record about the metal composition, type, weight in grains, or power of the ammunition used by Mullenix, or the metal composition of the engine block in Leija's vehicle. There is no evidence—one way or another—that any attempt to shoot out an engine block moving at 80 mph could possibly have been successful.

During this time, DPS dispatch responded that Sgt. Byrd declined to give permission to shoot, but instructed instead for Mullenix to wait and give the spikes a chance to work.

Mullenix alleges that he was unable to hear that instruction because he had failed to turn his outside loudspeakers on, thereby placing himself out of communication with his dispatch for the time that it took the pursuit to arrive at his location. Mullenix did have his radio microphone on him. During the waiting minutes, Mullenix had a recorded radio conversation with Randall County Sheriff's Deputy Tom Shipman about whether Mullenix could disable the vehicle by shooting it, and how and where to shoot the vehicle to best accomplish disabling it. Nearby, north of and below Mullenix, was Officer Ducheneaux's police vehicle, which did have its external loudspeakers turned on. Plaintiffs allege that because Mullenix's trunk was open he should have been able to hear his police radio, even though his car doors were closed and his external loudspeakers were not turned on. Plaintiffs further allege that Mullenix should have been able to hear on Ducheneaux's police radio the order not to fire on Leija.

Mullenix testified that he had a clear view towards the south and was able to make out the headlights of Leija's vehicle, with Rodriguez in pursuit, as they crested a low rise south of the Cemetery Road overpass. Because of the darkness, Mullenix was unable to see any actions of Leija, anything within his vehicle, or see whether there were other people inside of the vehicle. He assumed that there were no other persons inside the vehicle because, he testified, if there

were Officer Rodriguez probably would have told him about them. Rodriguez testified that he could only see the back of Leija's head and hands as Rodriguez followed in pursuit.

As the two vehicles approached, Mullenix pointed his rifle down onto Leija's vehicle and fired six rounds as the vehicle closed the gap towards the overpass. There is no testimony in this record where any of the six shots landed, except for the round or rounds which penetrated the windshield and killed Leija. There is no evidence that Mullenix hit the vehicle's radiator, hood or engine block. There is evidence that he hit Leija's upper body with four or more of his six shots.

After Leija's vehicle passed underneath the overpass, engaging the tire spike strip deployed there by Officer Ducheneaux, Leija's vehicle went out of control, rolling into the center median north of the overpass. There is evidence that, unknown to Officer Mullenix when he fired, there were at least two vehicles passing in the southbound lanes of the interstate at this time. During the incident, Officer Ducheneaux's vehicle was parked on the center median on the north side of the bridge.

Leija was pronounced dead a short time later. The cause of death was determined to be one or more of the shots fired by Mullenix that had fatally struck Leija in the neck, shoulder, upper arm, and possibly in his face. Subsequent examination of the crime scene by the DPS accident team revealed that Leija did not have a firearm inside his vehicle, and that Leija had not recently fired a firearm.

In the immediate aftermath of the shooting, Mullenix remarked to his supervisor, Sgt. Byrd, "How's that for proactive?" Mullenix's comment referred to a counseling session earlier in the same evening, during which Mullenix had been counseled, encouraged and/or criticized by Byrd for not being "proactive" enough as a Trooper. Byrd acknowledged that Mullenix had been having personal difficulties around this time, and that Mullenix was failing to live up to Byrd's expectations of how a DPS Trooper should be doing his job.

Defendant Mullenix testified in his deposition that, as of March 23, 2010, he had never met Leija, did not have any knowledge about Leija's criminal record, had no information that Leija had ever committed a violent crime or a felony, and did not personally know Leija. Mullenix testified that he did not know what the arrest warrant for Leija was for, but did know that an arrest warrant existed and that Leija was fleeing arrest. He testified that he had no information, at the time of the shooting, to lead him to believe that Leija was suicidal in any way. He did know that Leija was speeding, had told the Tulia dispatcher that he had a weapon with him in the car, and had been informed that Leija might be intoxicated.

A subsequent DPS review of the incident by the Office of Inspector General concluded that the claim by Trooper Mullenix that he used his firearm as a tool to disable Leija's vehicle was not justified given the high speed of the fleeing vehicle, the elevated position Mullenix chose to deploy, the amount of time Mullenix took to discuss using his firearm with Trooper Rodri-

guez and Deputy Shipman, and Mullenix's conversation with the DPS communications operator to request permission to shoot at Leija's vehicle. The DPS IG concluded that the evidence did not justify Mullenix's actions, and that the firearm discharge was reckless and without due regard for the safety of Canyon PD Officer Ducheneaux or Leija. The IG concluded that the evidence did not justify the use of deadly force, and that a classification of "Not Justified" was appropriate. *See* Plaintiff's Appendix Exhibit 7. The Defendant argues that the IG's conclusions are based upon inadequate information, are not reliable, are not relevant, are not properly authenticated, lack foundation, and should be ignored.

Legal Standards

A motion for summary judgment should be granted if the movant shows that there is no genuine issue as to any material fact. Fed. R. Civ. Pro. 56(a). A party who moves for summary judgment has the burden of identifying the parts of the pleadings and discovery on file that, together with any affidavits, show the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmovant must set forth specific facts that show a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To determine whether a genuine issue of material fact exists, courts must resolve all ambiguities of fact in favor of the nonmoving party. *Id.* Summary judgment is mandated if the nonmovaant fails to sufficiently establish the existence of an element essential to her case on which

she bears the burden of proof at trial. *Nebraska v. Wyoming,* 507 U.S. 584, 590, 113 S.Ct. 1689, 123 L.Ed.2d 317 (1993); *Celotex Corp.,* 477 U.S. at 322; *Cutrera v. Bd. of Supervisors of La. State Univ.,* 429 F.3d 108, 110 (5th Cir.2005); *Patrick v. Ridge,* 394 F.3d 311, 315 (5th Cir.2004).

Qualified Immunity

Qualified immunity is a defense that protects government officials from suit when they exercise the discretionary functions of their office. See *Harlow v. Fitzgerald,* 457 U.S. 800, 815, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In order to overcome a defense of qualified immunity, a plaintiff must establish that: "(1) the official violated a statutory or constitutional right, and (2) the right was 'clearly established at the time of the challenged conduct." *Morgan v. Swanson,* 659 F.3d 359, 371 (5th Cir.2011) (citing *Ashcroft v. al-Kidd,* ––– U.S. ——, ——, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011)). The court may examine these factors in any order. *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (*overruling in part Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). It is the Plaintiffs' burden to present evidence that a defendant is not entitled to qualified immunity when the defense is raised. *See Bazan ex rel. Bazan v. Hidalgo County,* 246 F.3d 481, 489 (5th Cir.2001).

Claims of qualified immunity are not judged on twenty-twenty hindsight, or in light of knowledge ascertained after an event, but by looking through the eyes of the officer, considering what that officer knew about the situation at the time force was used. *Graham v. Connor,* 490 U.S. 386, 396–97, 109 S.Ct. 1865,

104 L.Ed.2d 443 (1989); *Poole v. City of Shreveport,* 691 F.3d 624, 630 (5th Cir.2012).

Constitutional Violation

The use of deadly force for apprehension is a seizure subject to the reasonableness requirement of the Fourth Amendment. *Tennessee v. Garner,* 477 U.S. 1, 7, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1985). To support an allegation of excessive force, a plaintiff must show, "(1) an injury, (2) which resulted directly and only from the use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Ontiveros v. City of Rosenberg, Tex.,* 564 F.3d 379, 382 (5th Cir.2009) (citing *Freeman v. Gore,* 483 F.3d 404, 410 (5th Cir.2007). When examining whether the excessiveness was clearly unreasonable, a court should consider, "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." *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The immediacy of the threat and the reasonableness of the use of force are contested in this case.

Objective Unreasonableness

The Court must also consider whether the Defendant's use of force, though a violation of the Fourth Amendment, was nevertheless objectively reasonable in light of clearly established law at the time the challenged conduct occurred. *Bush v. Strain,* 513 F.3d 492, 501 (5th Cir.1998). "The central concept is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long

as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.' " *Id.* at 502 (citing *Kinney v. Weaver,* 367 F.3d 337, 350 (5th Cir.2004) (*en banc*) (quoting *Hope v. Pelzer,* 536 U.S. 730, 740, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002))). "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." *Graham v. Connor,* 471 U.S. 386, 396–7, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1989). An officer's use of deadly force is reasonable against a moving vehicle when there exists "a credible, serious threat to the physical safety of the officer or to those in the vicinity." *Hathaway v. Bazany,* 507 F.3d 317 (5th Cir.2007). In *Tennessee v. Garner,* the Supreme Court determined that "use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable ... where the suspect poses no immediate threat to the officer and no threat to others." *Tennessee v. Garner,* 471 U.S. at 11.

Discussion and Analysis

The Court has considered the contested exhibits only to the extent that they are competent summary judgment evidence. The Court notes that many of the specific facts alleged by the Defendant to be "undisputed" are, in fact, strongly disputed, are speculative, are questions of reasonable interpretation for a jury, and/or are genuine issues of disputed material facts.

It was clearly established law as of March 23, 2010 that a police officer's use of deadly force is justified

only if a reasonable officer in Defendant Mullenix's position had cause to believe that there was an immediate threat of serious physical harm or death to himself which Officer Mullenix has testified did not exist in this case—or there existed at the time of the shooting an immediate threat of serious physical harm or death to others. *See Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989). Defendant Mullenix testified during his deposition that he believed he was justified in firing on Leija because he believed there was a risk of serious injury or death to other officers, either the officer he did not see but thought might be somewhere under the Cemetery Road bridge, or to other officers further up the interstate who were setting out tire spikes, or even possibly to innocent bystanders in the cities of Canyon or Amarillo, if Leija traveled that far north.

As to the existence of an immediate risk of serious injury or death to other officers or to innocent bystanders, the summary judgment evidence in this case presents genuine issues of material fact as to whether that risk did, or did not, exist. Trooper Mullenix testified that he thought an officer was somewhere under the bridge because he saw a patrol car down there, with its overhead lightbar flashing. He did not believe Officer Ducheneaux was there, because he thought Ducheneaux was further north setting out tire spikes. Mullenix testified that he did not know who down there, or where the unknown officer was located at the time, and that he did not know whether he or she was inside or outside their patrol car or behind a bridge pillar. Mullenix testified, however, that he discharged his rifle to protect the unknown officer from possibly

being fired upon by Leija as he drove by at 80 or so miles per hour, and to protect other persons Mullenix believed were farther north in possibly vulnerable positions.

There are genuine issues of fact as to whether Trooper Mullenix acted recklessly, or acted as a reasonable, trained peace officer would have acted in the same or similar circumstances. Plaintiffs have tendered evidence raising the issue whether a reasonable officer would not have fired because of the possibly resulting increased risk to persons traveling southbound on I–27 at the time, or to Officer Ducheneaux. The evidence in the record raises the issue whether Mullenix was justified in his decision to fire six times upon Israel Leija, Jr., or whether a reasonable officer would not have fired at all given Mullenix's lack of relevant training and the caliber of weapon he utilized for this attempted stop. There are genuine issues of material fact as to whether Mullenix did or did not hear, and should have obeyed, the instructions from his superior officer to let the other officers responding to the situation first try the planned non-lethal or less-dangerous methods being utilized to end the high-speed pursuit. There also exist genuine questions of material fact as to the existence of any *immediate* threat to officers involved in the pursuit, including Officers Ducheneaux or Rodriguez, or an immediate threat to other persons who were miles away from the location of the shooting at issue in this case.

Conclusions

For all of the foregoing reasons, summary judgment can not be granted on the specific facts of this case. Defendant's motion for summary judgment is

therefore denied.

This is not to be construed as a ruling that any summary judgment exhibit is or is not admissible as a trial exhibit. The Court will consider objections to trial exhibits when and if the specific exhibits or portions thereof are offered at trial, and proper objections are timely made.

It is SO ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13–10899

United States Court of Appeals
Fifth Circuit
FILED
December 19, 2014

Lyle W. Cayce
Clerk

BEATRICE LUNA, Individually and as Representative of the Estate of Israel Leija, Jr.; CHRISTINA MARIE FLORES, as Next Friend of J.L. and J.L., Minor Children,

Plaintiffs–Appellees

v.

CHADRIN LEE MULLENIX, In His Individual Capacity,

Defendant–Appellant

Appeal from the United States District Court for the Northern District of Texas, Amarillo

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ON PETITION FOR REHEARING EN BANC

(Opinion August 28, 2014, 765 F.3d 531)

Before KING, HAYNES, and GRAVES, Circuit Judges.

ON PETITION FOR REHEARING EN BANC
PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

In the en banc poll, 6 judges voted in favor of rehearing (Judges Jolly, Davis, Jones, Smith, Clement, and Owen), and 9 judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Elrod, Southwick, Haynes, Graves, Higginson, and Costa).

ENTERED FOR THE COURT:

/s/ James E. Graves, Jr.

JAMES E. GRAVES, JR.

United States Circuit Judge

E. GRADY JOLLY, Circuit Judge, dissenting from the Denial of Rehearing En Banc, joined by KING, DAVIS, JONES, SMITH, CLEMENT and OWEN, Circuit Judges:

Certainly, I have great personal respect for all members of the instant panel. But, I will be candid: My impression is that the panel majority either does not understand the concept of qualified immunity or,

in defiance thereof, impulsively determines the "right outcome" and constructs an opinion to support its subjective judgments, which necessarily must ignore the concept and precedents of qualified immunity.

The concept of qualified immunity assumes that law enforcement officers want to respect the constitutional rights of citizens who violate the law or are suspected of violating the law. *Accord Ashcroft v. al-Kidd,* —— U.S. ——, 131 S.Ct. 2074, 2085, 179 L.Ed.2d 1149 (2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments" and "protects all but the plainly incompetent or those who knowingly violate the law." (internal quotation marks and citation omitted)). For an officer to respect those constitutional rights, he must know or have reasonable understanding of what the legal standards are that govern his conduct. *Presley v. City of Benbrook,* 4 F.3d 405, 409 (5th Cir.1993) ("[T]he essence of qualified immunity [is] that an officer may make mistakes that infringe constitutional rights and yet not be held liable where, given unclear law or uncertain circumstances, it cannot be said that she knew she was violating a person's rights."). The only means for an officer to have that understanding is by notice of the law through the decisions of the courts. Officers cannot be held liable for a violation of legal standards when there are three or four versions of the law applicable to judging the officers' decisions and responses to criminal suspects, arrestees, or those committing crimes. *McClendon v. City of Columbia,* 305 F.3d 314, 332 (5th Cir.2002) (en banc) (Qualified immunity must be granted "if a reasonable official would be left

uncertain of the law's application to the facts confronting him."); *Del A. v. Edwards,* 855 F.2d 1148, 1150 (5th Cir.1988) ("When the law is unclear ... the official ... require[s] protection [in the form of qualified immunity] so that fear of suit will not cloud the decision-making process."). Consequently, the constitutional law must be clearly established so as to provide reasonable notice of an officer's duties to citizens. To give such required notice, the right at issue cannot be defined at a high level of generality if it is to have any meaning that serves the purpose of qualified immunity. *Anderson v. Creighton,* 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (warning that "if the test of 'clearly established law' were to be applied at [a high] level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of [qualified immunity and plaintiffs] . . . would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."). Furthermore, qualified immunity recognizes that, even where constitutional rights are clearly established, an officer should not be liable for his conduct unless his conduct was unreasonable in the light of the clearly established law. *Accord Brosseau v. Haugen,* 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) ("Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.").

The initial task here is to define the clearly established law that governs the specific facts of this case. If such law cannot reasonably be defined, the inquiry

ends, and the officer is not liable because he had no notice of the rights that he was bound to respect. If there is clearly established law, the qualified immunity analysis then asks: given the factual situation the officer confronted, was his conduct unreasonable in the light of the clearly established law of which he reasonably had notice. This final question acknowledges that, on some occasions, the safety of the public or the safety of the officers and the safety of surrounding lives is so at risk that the officer must make a snap judgment that requires him to act notwithstanding the lapidary principles of the law at issue.

The panel majority regrettably has demonstrated its lack of grasp of these qualified-immunity principles in fundamental ways and has done so from the beginning of its efforts to decide this case, through its present unexplained and puzzling reversal of positions:

• At the outset, the majority was doggedly determined to send this case to a jury against all precedent and notwithstanding Judge King's clear—and unanswered—dissent. My impression is confirmed by the evolution of the majority's approach from its earlier opinion [1] to today's substitute. In the first version, the majority holds that a jury is needed to determine whether Mullenix's conduct was reasonable under the Fourth Amendment. In its new opinion, the majority nods to the need for a jury, but it

[1] *Luna v. Mullenix,* 765 F.3d 531 (5th Cir.2014), vacated and replaced by *Luna v. Mullenix,* 773 F.3d 712 (5th Cir.2014). *Luna v. Mullenix,* 765 F.3d 531 (5th Cir.2014), vacated and replaced by *Luna v. Mullenix,* 773 F.3d 712 (5th Cir.2014).

proceeds to hold that not one of the facts supporting Mullenix's decision to disable Leija's car to prevent his continued threat to the police and the public is legally sufficient to render the shooting objectively reasonable under the Fourth Amendment. The panel's complete turnaround of its earlier dogmatic assertions, with no explanation, leaves the bench and bar to wonder: What is going on here? The confusing nature and unorthodox analysis of the opinion—both initially and on rehearing—will surely befuddle all readers; not the least, those officers who consider themselves familiar with the clearly established law of the Supreme Court and this Court.[2]

• The majority fails to recite or accept the clearly established law that applies to car-chase cases, and then dismissively states, "We need not dwell on this issue." "Dwelling" would have led to objective analysis of the relevant standard, articulated by the U.S. Supreme Court in *Scott v. Harris,* 550 U.S. 372, 386 [127 S.Ct. 1769, 167 L.Ed.2d 686] (2007) (holding in clear, easily understood language, "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious

[2] Given the majority's conclusions on rehearing, it is hard to see what issues remain other than damages and attorney's fees. The majority moved from improperly committing a question of law to the jury to rendering, in essence, an unprecedented liability verdict against Mullenix. The majority's subjective view of the case is clear, but its legal analysis remains, at best, cloudy.

injury or death.").[3]

• The majority irrationally concludes that Trooper Mullenix's conduct was unreasonable—based on its own, subjective predilections, supported by arguments made of straw; in particular, that tire spikes should have been the preferred alternative means for stopping Leija's car.

• The majority fails to heed the Supreme Court's instruction to account for Leija's culpability.[4] It was Leija, after all, who placed himself and the public in danger when he fled arrest while intoxicated, traveled at excessive speeds for miles and miles, threatened to shoot officers in pursuit, and swerved around numerous vehicles. It was Leija's choices and actions—not Mullenix's—that led to his demise. Leija put innocent lives at risk; Mullenix responded and tried to restore public safety. The majority ignores Leija's culpability, making him an innocuous

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[3] *See also Pasco ex rel. Pasco v. Knoblauch,* 566 F.3d 572, 581 (5th Cir.2009) ("Stuck between the choice of letting a presumptively intoxicated and reckless driver continue unabated or bumping the suspect off the road, [the officer] chose the course of action that would potentially save the lives of individuals who had no part in creating the danger. Although this choice ended tragically with [the driver's] death, the balancing test indicates that [the officer's] actions were reasonable.").

[4] *See Scott,* 550 U.S. at 384, 127 S.Ct. 1769 (stating that a court should "take into account not only the number of lives at risk, but also their relative culpability"); *id.* ("It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that [the officer] confronted.").

actor rather than a man bent on escape at all costs.[5]

• The majority views the facts of this case through hindsight, substituting its own notions for controlling precedent. In the Delphic milieu of an appellate court, the majority condemns Mullenix for his real-time decision to shoot at the car's engine block and proceeds to challenge his judgment for not waiting to see what, if any, effect the tire spikes might have on Leija's flight. In so doing, the majority fails to give Mullenix "breathing room to make reasonable but mistaken judgments" and, in so doing, strips him of the qualified immunity to which he is entitled.[6]

• The majority demonstrates a lack of understanding of qualified immunity and its purpose as set out by the Supreme Court: to "protect officers from the sometimes 'hazy border between excessive and acceptable force,' " especially when—as here, because the majority refused to accept the clearly established law governing car chases—officers lack notice that their conduct is clearly established as unconstitutional.[7] *See Carroll v. Carman,* [—— U.S. ——] 135 S.Ct. 348, 350 [—— L.Ed.2d ——] (2014) ("[E]xisting

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[5] *Id.* ("We have little difficulty in concluding it was reasonable for [the officer] to take the action that he did.").

[6] *Carroll v. Carman,* —— U.S. ——, 135 S.Ct. 348, 350, —— L.Ed.2d —— (2014) (quotation marks omitted).

[7] *Saucier v. Katz,* 533 U.S. 194, 206, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) ("Qualified immunity operates ... to protect officers from the sometimes 'hazy border between excessive and acceptable force,' and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." (citation omitted)), *overruled in part by Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

precedent must have placed the statutory or constitutional question *beyond debate*." (quotation marks omitted) (emphasis added)).

• As noted, the majority creates a phantom argument based on no record fact of any kind: that Mullenix chose "deadly force" when shooting at Leija's engine instead of choosing an alternate, non-deadly means for stopping the car. Even though the record does not begin to suggest, which alternative—bullets to the engine block or spikes to the tires—would have been less likely to produce a deadly result, the majority assumes an avuncular role and subjectively concludes, without any record support, that the tire spikes would have been the better choice. It then relies solely on that appellate post hoc unsupported opinion for its mantra that Mullenix made an unwise choice. Even more perfidious to the record, the majority repeats that Mullenix's plan was to shoot Leija himself. There was never such a plan. The plan was to shoot the engine block of the car. This unsupported, made up, shoot-to-kill "fact" reflects the reckless, unwarranted liberties that the majority takes to reach its predetermined "right result."

To comprehend how far the panel majority drifts from understanding that it is the *plaintiffs' burden* to show that Mullenix is *not* entitled to qualified immunity, one must only consider the undisputed facts that the majority attempted to avoid or to mitigate in its initial opinion and, now exposed, attempts to dismiss as inconsequential:

• Equipped with a warrant, an officer attempted to effect Leija's arrest at a Sonic Drive–In in Tulia,

Texas.

• Rather than submit to that arrest, Leija fled in his car at speeds up to 110 mph.

• His flight lasted approximately eighteen minutes and covered more than twenty-five miles of interstate, plus some distance over city streets in Tulia, Texas.

• Leija's flight took him past ten interstate on-ramps.

• Leija sped at times down the center of the road, with his car straddling the left and right lanes; he swerved between lanes; and he changed lanes without using his blinker.

• Leija raced past eight vehicles in the northbound lane of the interstate: four passenger vehicles, one bus, two tractor trailers, and one truck carrying a large trailer. Some of these vehicles were in the right-hand lane as Leija sped past; others were partially on the right shoulder, waiting for Leija to race by them. There were more than fifty cars in the southbound lane of the interstate. Many of these vehicles had to pull off the road to escape Leija's path.

• Leija plausibly was believed to be intoxicated.

• During the high-speed chase, Leija called the police dispatch officer two times. Both times, Leija said that he had a gun and that he would shoot any officer he saw if law enforcement did not stop its pursuit. The dispatch officer relayed these threats to the pursing officers, including Trooper Mullenix.

• Leija was rapidly approaching Officer Ducheneaux, Trooper Mullenix, and other officers on the scene.

• Leija's car, gun, and intoxication posed risks to Officer Ducheneaux, who was setting up tire spikes near Trooper Mullenix's location.

• Leija's gun and intoxication posed risks to Troopers Rodriguez, who was in the chase car, and Mullenix, who was exposed on the bridge.

• Mullenix intended to shoot down at Leija's car as it approached, hoping that he could use his rifle to take out the car's engine block.

• Trooper Mullenix relayed his plan to disable Leija's car to the driver of the chase car, Trooper Rodriguez. Rodriguez responded, "10–4."

• Mullenix also had a brief conversation with a deputy about whether Mullenix could disable Leija's car by shooting it and how and where to shoot the car to best accomplish disabling it.

• When he fired his weapon, Trooper Mullenix knew (1) a warrant was issued for Leija's arrest, (2) Leija was fleeing arrest at high speeds and had been fleeing arrest for some time, (3) Leija was believed to be intoxicated, (4) Leija had a gun and said he would shoot at any officer he saw, (5) Officer Ducheneaux was below Mullenix's position and in Leija's path, and (6) Trooper Rodriguez was following Leija in his patrol car.

The majority finds Leija's threats to public safety neither immediate nor imminent. So, under the majority's view, when, if ever, is an officer's conduct shielded by qualified immunity except to employ spikes on the highway? Speed is not a compelling factor, if traveling between 85 and 110 miles per hour is not enough. Nor is obvious danger to other motorists, given that Leija (1) passed eight other vehicles, including a passenger bus; (2) passed fifty cars in the oncoming lanes; (3) raced by ten on-ramps to communities unknown; (4) drove recklessly; and (5) was thought to be drunk. Imminent danger from repeated threats to shoot pursuing officers apparently adds nothing. Nor does peril to officers in chase cars or on roadways. Nor does the *collective* weight of these factors impress the majority as a significant danger to the safety of the officers and public.[8]

The panel's contrary conclusion makes it impossible for an officer to understand whether and when his decision to disable a fleeing suspect's car will expose him to personal liability. Through its misunderstanding and misstatement of binding precedent, the panel condones second-guessing of split-second decisions—

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[8] The panel further misunderstands binding precedent of the Supreme Court when the panel requires an immediate threat of harm before force can be used to stop high-speed flight. The Supreme Court expressly stated that there is no "magical on/off switch that triggers rigid preconditions [such as an imminent threat of harm] whenever an officer's actions constitute 'deadly force.'" *Scott,* 550 U.S. at 382, 127 S.Ct. 1769. Instead, the Court adopted a case-specific test of reasonableness: "[A]ll that matters is whether [an officer's] actions were reasonable." *Id.* at 383, 127 S.Ct. 1769.

in contravention to the principles of qualified immunity.

Finally, the only redeeming aspect of this opinion is that it is such an outlier and so contrary to previous precedents that it can, and will, be dismissed under our strict rule that one panel cannot overrule precedent of earlier opinions. *Ford v. Cimarron Ins. Co.,* 230 F.3d 828, 832 (5th Cir.2000) ("We are a strict *stare decisis* court. Thus, one panel of this court cannot disregard, much less overrule, the decision of a prior panel." (quotation marks omitted)).

Because our Court is derelict in failing to employ the en banc procedures to rid this outlier from the law books, I respectfully dissent from the decision to deny rehearing en banc.

KING, Circuit Judge, joining Judge Jolly's dissent from the denial of rehearing en banc:

Although I was a member of the panel in this case, I was not consulted when the panel majority decided to vacate its original opinion and to issue a new one. I do not join the new opinion.

As for the merits of the new opinion and the decision of the en banc court to deny rehearing en banc, I join Judge Jolly's opinion. I would point out that other law enforcement officers involved in this event thought it advisable to wait to see if the spikes worked. Mullenix voiced particular concern about Leija's threats to shoot officers and elected to try to shoot out the engine block of Leija's car and thereby end his dangerous flight. That may have been a mistaken judgment; in my view, it was not an unreason-

able one. But, as Judge Jolly points out, qualified immunity protects reasonable but mistaken judgments in an emergency situation like this one. As the law now stands, Mullenix was entitled to qualified immunity.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Seal]
Certified as a true copy and issued as the mandate on Jan 12, 2015

Attest: /s/ Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 19, 2014
Lyle W. Cayce
Clerk

No. 13-10899

D.C. Docket No. 2:12-CV-152

BEATRICE LUNA, Individually and as Representative of the Estate of Israel Leija, Jr.; CHRISTINA MARIE FLORES, as Next Friend of J.L. and J.L., Minor Children,

Plaintiffs-Appellees

v.

CHADRIN LEE MULLENIX, In His Individual Capacity,

Defendant-Appellant

Appeal from the United States District Court for the

Northern District of Texas, Amarillo

Before HAYNES and GRAVES, Circuit Judges.*

JUDGMENT ON PETITION FOR REHEARING EN BANC

This cause came on to be heard on rehearing en banc without oral argument.

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. Our prior opinion of August 28, 2014 is withdrawn; and it is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

* Judge King, a member of the original panel in this case, did not participate in the consideration of this opinion. This matter is decided by a quorum. 28 U.S.C. § 46(d).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-10899

United States Court
of Appeals
Fifth Circuit
FILED
August 28, 2014

Lyle W. Cayce
Clerk

BEATRICE LUNA, Individually and as Representative of the Estate of Israel Leija, Jr.; CHRISTINA MARIE FLORES, as Next Friend of J.L. and J.L., Minor Children,

Plaintiffs–Appellees

v.

CHADRIN LEE MULLENIX, In His Individual Capacity,

Defendant–Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before KING, HAYNES, and GRAVES, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

This § 1983 excessive use of force case arises from the shooting and death of Israel Leija, Jr. by Texas Department of Public Safety (DPS) Trooper Chadrin Mullenix during a high-speed pursuit. The district court denied Mullenix's motion for summary judgment on the issue of qualified immunity, holding that multiple genuine disputes of material fact existed as to the qualified immunity analysis. We affirm.

I. Factual and Procedural Background

On March 23, 2010, at approximately 10:21 p.m., Sergeant Randy Baker of the Tulia Police Department followed Israel Leija, Jr. to a Sonic Drive–In to arrest him on a motion to revoke misdemeanor probation. The arrest warrant had been filed because (1) Leija had failed to complete all of his hours of community service, and (2) a new complaint of domestic violence had been filed against Leija, who was on probation. After some discussion with Baker, Leija fled the scene and headed north towards Interstate Highway 27 ("I–27"), with Baker in pursuit. Texas DPS Trooper Gabriel Rodriguez was on patrol nearby and took the lead in the pursuit. Around mile marker 77, Leija entered I–27 and continued north, with Rodriguez directly behind him. During the approximately 18 minutes that the pursuit lasted, Rodriguez followed Leija and captured the pursuit on his video recorder. The video supports the plaintiffs' assertions that although the pursuit proceeded north on 1–27 at speeds between 80 and 110 miles per hour, traffic on the dry roadway was light; Leija remained on the paved portion of the road with his headlights on, did not run any vehicles off the road, did not collide with any vehicles,

and did not cause any collisions; there were no pedestrians or stopped vehicles along the road; and all of the pursuit occurred in rural areas, without businesses or residences near the interstate, which was divided by a wide center median.

As the pursuit headed north on I–27, other law enforcement units joined. Officer Troy Ducheneaux of the Canyon Police Department deployed tire spikes underneath the overpass at Cemetery Road and I–27. DPS Troopers set up spikes at McCormick Road, north of Cemetery Road. Other police units set up spikes at an additional location further north, for a total of three spike locations ahead of the pursuit. The record reflects that officers had received training on the deployment of spikes, and had been trained to take a protective position while deploying spikes, if possible, so as to minimize the risk posed by the passing driver.

During the pursuit, Leija twice called the Tulia Police Dispatch on his cell phone, claiming that he had a gun, and that he would shoot at police officers if they did not cease the pursuit. This information was relayed to all officers involved. It was discovered later that Leija had no weapon in his possession.

DPS Trooper Chadrin Mullenix was on patrol thirty miles north of the pursuit, and also responded. Mullenix went to the Cemetery Road overpass, initially intending to set up spikes at that location, but ultimately decided to attempt to disable the car by shooting it. He positioned his vehicle atop the Cemetery Road bridge, twenty feet above I–27, intending to shoot at the vehicle as it approached. Mullenix planned to use his .223 caliber M–4 rifle to disable the

vehicle by shooting at its engine block, although he had never attempted that before and had never seen it done before. The district court noted that "[t]here is no evidence—one way or another—that any attempt to shoot out an engine block moving at 80 mph could possibly have been successful." Mullenix testified that he had been trained in shooting upwards at moving objects, specifically clay pigeons, with a shotgun. He had no training on how to shoot at a moving vehicle to disable it.

Mullenix's dash cam video reflects that once he got to the Cemetery Road overpass, he waited for about three minutes for the pursuit to arrive. Mullenix relayed to Officer Rodriguez that he was thinking about setting up with a rifle on the bridge. Rodriguez replied "10–4," told Mullenix where the pursuit was, and that Leija had slowed down to 80 miles per hour. Mullenix then asked the Amarillo DPS dispatch to contact DPS Sergeant Byrd, Mullenix's supervisor, to tell Byrd that he was thinking about shooting the car and to ask whether the sergeant thought that was "worth doing." According to plaintiffs' allegations, he contacted Byrd to "request permission" to fire at the vehicle. Mullenix denies that he requested or needed "permission," but stated that he "asked for what [Byrd] advised" and asked to "get his advice." Mullenix did not wait for a response from Sergeant Byrd, but exited his patrol vehicle, took out his rifle, and took a shooting position on the bridge. During this time, the dispatcher relayed a response from Sergeant Byrd to "stand by" and "see if the spikes work first." Mullenix alleges that he was unable to hear that instruction because he had failed to turn on his outside loudspeakers, thereby

placing himself out of communication with his dispatch or other officers involved in the pursuit. Plaintiffs allege that since the trunk was open, Mullenix should have heard the response. Mullenix did have his radio microphone on him. During the waiting minutes, Mullenix had a short, casual conversation with Randall County Sheriff's Deputy Tom Shipman about whether he could shoot the vehicle to disable it. When Shipman mentioned to Mullenix that there was another officer beneath the overpass, Mullenix replied that he did not think he would hit that officer.

As the two vehicles approached, Mullenix fired six rounds at Leija's car. There were no streetlights or ambient lighting. It was dark. Mullenix admitted he could not discern the number of people in Leija's vehicle, whether there were passengers, or what anyone in the car was doing. Mullenix testified that at the time of the shooting, he was not sure who was below the overpass, whether Ducheneaux had actually set up spikes there, or where Ducheneaux was positioned beneath the overpass. After Mullenix fired, Leija's car continued north, engaged the spike strip, hit the median and rolled two and a half times. In the aftermath of the shooting, Mullenix remarked to his supervisor, Sergeant Byrd, "How's that for proactive?" Mullenix had been in a counseling session earlier that same day, during which Byrd intimated that Mullenix was not being proactive enough as a Trooper.

Leija was pronounced dead soon after the shooting. The cause of death was later determined to be one of the shots fired by Mullenix that had struck Leija in the neck. The evidence indicates that at least four of Mullenix's six shots struck Leija's upper body, and no

evidence indicates that Mullenix hit the vehicle's radiator, hood or engine block.

The incident was investigated by Texas Ranger Jay Foster. Foster concluded that Mullenix complied with DPS policy and Texas law. The DPS Firearms Discharge Review board reviewed the shooting and concluded that Mullenix complied with DPS policy and Texas law. A grand jury declined to return an indictment of Mullenix. A DPS Office of the Inspector General ("OIG") Report concluded the opposite, that Mullenix was not justified and acted recklessly. The parties disputed the relevance and admissibility of that OIG report, which was subsequently called into question by its author, who testified that he did not have full information on the incident or investigation when he wrote the report. The district court mentioned the report in its statement of facts, but did not further discuss the report.

Beatrice Luna, as the representative of Leija's estate, and Christina Flores, on behalf of Leija's minor child, sued DPS, the Director of DPS Steve McCraw, Trooper Rodriguez, and Trooper Mullenix, in state court, asserting claims under the Texas Tort Claims Act and 42 U.S.C. § 1983. Defendants removed to federal court. Director McCraw's Motion to Dismiss was granted, and plaintiffs' stipulation of dismissal against DPS and Trooper Rodriguez was granted with prejudice. The sole remaining claim is the § 1983 claim against Mullenix, alleging that he subjected Leija to an unconstitutional use of excessive force in violation of the Fourth Amendment. Mullenix answered and asserted the defense of qualified immunity. After discovery, Mullenix moved for summary

judgment on the issue of qualified immunity. On August 7, 2013, the district court issued a memorandum opinion and order denying Mullenix's motion for summary judgment. Mullenix appeals.

II. Discussion

The doctrine of qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In reviewing a motion for summary judgment based on qualified immunity, we undertake a two-step analysis. First, we ask whether the facts, taken in the light most favorable to the plaintiff, show the officer's conduct violated a federal constitutional or statutory right. *See Tolan v. Cotton,* —— U.S. ——, 134 S.Ct. 1861, 1865, 188 L.Ed.2d 895 (2014); *Flores v. City of Palacios,* 381 F.3d 391, 395 (5th Cir.2004) (citing *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Second, we ask "whether the defendant's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known." *Flores,* 381 F.3d at 395 (internal quotation marks omitted) (quoting *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)); *see Tolan,* 134 S.Ct. at 1866. We may examine these two factors in any order. *See Pearson v. Callahan,* 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (overruling in part *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Claims of qualified immunity must be evaluated in

the light of what the officer knew at the time he acted, not on facts discovered subsequently. *See Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *Lytle v. Bexar Cnty., Tex.,* 560 F.3d 404, 411 (5th Cir.2009). As the Supreme Court has recently reaffirmed, "in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan,* 134 S.Ct. at 1863 (internal quotation marks and alteration omitted) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Our jurisdiction to review a denial of a motion for summary judgment based on qualified immunity is limited to legal questions. *See, e.g., Kinney v. Weaver,* 367 F.3d 337, 346 (5th Cir.2004) (en banc). Because of this jurisdictional limitation, "we consider only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment." *Id.* at 348; *see Flores,* 381 F.3d at 394. We review the objective reasonableness of the defendant government official's actions and the scope of clearly established law de novo. *See Flores,* 381 F.3d at 394. We "may review the district court's conclusion that issues of fact are material, but not the conclusion that those issues of fact are genuine." *Id.*

A. Constitutional Violation

Under the first prong of the qualified immunity analysis, the plaintiffs must produce facts sufficient to show that Mullenix's actions violated Leija's Fourth Amendment rights. *Tolan,* 134 S.Ct. at 1865; *Flores,*

381 F.3d at 395. "[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). To show a violation, the plaintiffs must produce facts sufficient to show that Leija suffered (1) an injury; (2) which resulted directly from a use of force that was clearly excessive to the need; and (3) the force used was objectively unreasonable. *Goodson v. City of Corpus Christi,* 202 F.3d 730, 740 (5th Cir.2000). "This is an objective standard: 'the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.' " *Ramirez v. Knoulton,* 542 F.3d 124, 128–29 (5th Cir.2008) (quoting *Graham,* 490 U.S. at 396, 109 S.Ct. 1865).

"There are few, if any, bright lines for judging a police officer's use of force; when determining whether an officer's conduct violated the Fourth Amendment, we must slosh our way through the factbound morass of reasonableness." *Lytle,* 560 F.3d at 411 (internal quotation marks and alteration omitted) (quoting *Scott v. Harris,* 550 U.S. 372, 383, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007)). "To gauge the objective reasonableness of the force used by a law enforcement officer, we must balance the amount of force used against the need for force," paying "careful attention to the facts and circumstances of each particular case." *Flores,* 381 F.3d at 399. "The intrusiveness of a seizure by means of deadly force is unmatched." *Garner,* 471 U.S. at 9, 105 S.Ct. 1694; *see Flores,* 381 F.3d at 399. Bal-

anced against this intrusion are "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." *Lytle,* 560 F.3d at 411.

When deadly force is used, it is clear that the severity and immediacy of the threat of harm to officers or others are paramount to the reasonableness analysis. *See Plumhoff v. Rickard,* —— U.S. ——, 134 S.Ct. 2012, 2021, 188 L.Ed.2d 1056 (2014) (concluding that deadly force was objectively reasonable where "it is beyond serious dispute that Rickard's flight posed a grave public safety risk"); *Scott,* 550 U.S. at 386, 127 S.Ct. 1769 (noting that the use of deadly force was objectively reasonable when "[t]he car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others"); *see also Garner,* 471 U.S. at 11, 105 S.Ct. 1694 ("Where the suspect poses no immediate threat to the officer . . . the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."); *Thompson v. Mercer,* 762 F.3d 433, 440, 2014 WL 3882460, at *5 (5th Cir. Aug. 7, 2014) (noting that "the question is whether the officer had reason to believe, at that moment, that there was a threat of physical harm"); *Hathaway v. Bazany,* 507 F.3d 312, 320 (5th Cir.2007) (noting that the "reasonableness of an officer's use of deadly force is . . . determined by the existence of a credible, serious threat to the physical safety of the officer or to those in the vicinity"); *Bazan ex rel. Bazan v. Hidalgo Cnty.,* 246 F.3d 481, 493 (5th Cir.2001) ("The excessive force inquiry is confined to

whether the Trooper was in danger at the moment of the threat that resulted in the Trooper's shooting Bazan."); *Vaughan v. Cox,* 343 F.3d 1323, 1330 (11th Cir.2003) ("Genuine issues of material fact remain as to whether [the suspects'] flight presented an immediate threat of serious harm to [the police officer] or others at the time [the officer] fired the shot.").

With regard to high-speed chases, the Supreme Court has held that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Scott,* 550 U.S. at 386, 127 S.Ct. 1769; *see also Plumhoff,* 134 S.Ct. at 2021–22 (applying *Scott* to a case involving the shooting of a suspect in a high-speed chase). Likewise, this court has recently held that a sheriff who used an assault rifle to intentionally shoot a fleeing suspect as he approached in a truck, after a lengthy, dangerous chase, did not violate the Fourth Amendment. *Thompson,* 762 F.3d at 438–40, 2014 WL 3882460, at *4–5. These cases, however, do not establish a bright-line rule; "a suspect that is fleeing in a motor vehicle is not so inherently dangerous that an officer's use of deadly force is *per se* reasonable." *Lytle,* 560 F.3d at 416. Instead, *Scott, Plumhoff* and *Thompson* are simply applications of the Fourth Amendment's reasonableness requirement to particular facts. *See Plumhoff,* 134 S.Ct. at 2020–22; *Scott,* 550 U.S. at 382–83, 127 S.Ct. 1769; *Thompson,* 762 F.3d at 438–40, 2014 WL 3882460, at *4–5. "Nearly any suspect fleeing in a motor vehicle poses some threat of harm to the public. As the cases addressing this all-

too-common scenario evince, the real inquiry is whether the fleeing suspect posed such a threat that the use of deadly force was justifiable." *Lytle,* 560 F.3d at 415; *see Thompson,* 762 F.3d at 438, 2014 WL 3882460, at *4.

Mullenix asserts that his use of force was objectively reasonable as a matter of law because he acted to protect other officers, including Officer Ducheneaux beneath the overpass and officers located further north up the road, as well as any motorists who might have been located further north. However, the district court found that, "As to the existence of an immediate risk of serious injury or death to other officers or to innocent bystanders, the summary judgment evidence in this case presents genuine issues of material fact as to whether that risk did, or did not, exist." We agree. The immediacy of the risk posed by Leija is a disputed fact that a reasonable jury could find either in the plaintiffs' favor or in the officer's favor, precluding us from concluding that Mullenix acted objectively reasonably as a matter of law. *See Scott,* 550 U.S. at 380, 127 S.Ct. 1769 (explaining that whether the driver "was driving in such fashion as to endanger human life" was a "factual issue"); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (explaining that the "inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying [the appropriate] evidentiary standard could reasonably find for either the plaintiff or the defendant").

On this record, the risk posed by Leija's flight is disputed and debatable, and a reasonable jury could conclude that Leija was not posing a "substantial and

immediate risk" at the time of the shooting. *Scott,* 550 U.S. at 386, 127 S.Ct. 1769. Many of the facts surrounding Leija's flight from police, viewed in the light most favorable to the plaintiffs, negate the risk factors central to the reasonableness findings in cases like *Scott, Plumhoff* and *Thompson.* According to the plaintiffs' version of the facts, although Leija was clearly speeding excessively at some times during the pursuit, traffic in the rural area was light. There were no pedestrians, no businesses and no residences along the highway, and Leija ran no other cars off the road and engaged no police vehicles. Further, there is evidence showing that Leija had slowed to about 80 miles per hour prior to the shooting. Spike systems which could have ended the pursuit with non-lethal means had already been prepared in three locations ahead of the pursuit. In *Scott* and *Plumhoff,* on the other hand, multiple other methods of stopping the suspect through non-lethal means had failed, the suspects were traveling on busy roads, had forced multiple other drivers off the road, had caused collisions with officers or innocent bystanders, and at the time of the shooting were indisputably posing an immediate threat to bystanders or other officers in the vicinity. *See Plumhoff,* 134 S.Ct. at 2017–18, 2021–22; *Scott,* 550 U.S. at 379–80, 383–84, 127 S.Ct. 1769. Likewise, in *Thompson,* this court found that the officers had tried "four times" to stop the chase with non-lethal methods, before resorting to deadly force to stop a driver who posed "extreme danger to human life." *Thompson,* 762 F.3d at 438, 440, 2014 WL 3882460, at *4, *6. The *Thompson* court explained that

> even the Thompsons concede that their son represented a grave risk when he "reached speeds exceeding 100 miles per hour on the interstate, when he ran numerous stop signs, when he had 'recklessly' driven on the wrong side of the road, [and] when he avoided some road spikes [and] took officers down Blue Flat Road where a horse was loose." Indeed, parts of the police camera footage might be mistaken for a video game reel, with Keith disregarding every traffic law, passing other motorists on the left, on the right, on the shoulder, and on the median. He occasionally drove off the road altogether and used other abrupt maneuvers to try to lose his pursuers. The truck was airborne at least twice, with Keith struggling to regain control of the vehicle. In short, Keith showed a shocking disregard for the welfare of passersby and of the pursuing law enforcement officers.

Id. at 438, 2014 WL 3882460, at *4.

To the extent that we must view facts in accordance with the video, *see Scott,* 550 U.S. at 378–80, 127 S.Ct. 1769; *Thompson,* 762 F.3d at 438–39, 2014 WL 3882460, at *4, the video supports the plaintiffs' version of the facts. In *Scott,* the plaintiff argued that the force used was unreasonable because the driver posed "little, if any actual threat to pedestrians or other motorists." *Id.* at 378, 127 S.Ct. 1769. However, the Court said,

> [t]he videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than

> a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

Id. at 379–80, 127 S.Ct. 1769. The Court relied on the video to resolve disputed facts, holding that the video "blatantly contradicted" the plaintiff's version of the facts, "so that no reasonable jury could believe it." *Id.* at 380, 127 S.Ct. 1769. Likewise, in *Thompson,* the plaintiffs argued that the threat posed by the chase had ended because the rural road was empty by the time of the shooting, but this court found that "the Thompsons' characterization of the scene is belied by the video evidence," which showed multiple cars pulling over to avoid the chase, and dangerous conditions on the road, which had limited visibility and no shoulder for cars to pull onto. *Thompson,* 762 F.3d at 438–39, 2014 WL 3882460, at *4. Here, however, the video supports the plaintiffs' assertions that during the pursuit, traffic on the divided highway was light, there were no pedestrians, businesses or residences along the highway, and Leija ran no other cars off the road and did not engage any police vehicles, such that a reasonable jury could find that Leija's driving did not

pose an immediate danger to other officers or drivers.

Further, in concluding that the use of force was reasonable, the *Thompson* opinion relies repeatedly on the fact that the officers had made four attempts to disable the vehicle with non-lethal methods before resorting to deadly force. *Thompson,* 762 F.3d at 438–39, 439–40, 2014 WL 3882460, at *4, *6. With regard to the existence of a Fourth Amendment violation, the holding of *Thompson* is that "after multiple other attempts to disable the vehicle failed, it was not unreasonable for Mercer to turn to deadly force to terminate the dangerous high-speed chase." *Id.* at 438, 2014 WL 3882460, at *4. The opinion later similarly concludes that "law enforcement reasonably attempted alternate means of seizure before resorting to deadly force," *id.* at 440, 2014 WL 3882460, at *6, and discusses this fact twice in its discussion of whether the law was sufficiently clearly established, *id.* In the instant case, there were spikes already in place under the bridge, and officers prepared to deploy spikes in two additional locations up the road. Yet Mullenix fired his rifle at Leija's vehicle before Leija had encountered any of the spikes. In contrast to *Thompson,* the non-lethal methods that were already prepared were never given a chance to work.

We certainly do not discount Leija's threats to shoot officers, which he made to the Tulia dispatcher and which were relayed to Mullenix and other officers. However, this fact is not sufficient, as a matter of law, to establish that Leija posed an immediate risk of harm at the time of the shooting. Under the plaintiffs' version of the facts and viewing all inferences in the light most favorable to the plaintiffs, a reasonable jury

could still conclude that there was not a sufficiently immediate threat to justify deadly force. In a case involving the shooting of a suspect, we have stated that the "core issue" is "whether the officer reasonably perceived an immediate threat." *Reyes v. Bridgwater,* 362 Fed.Appx. 403, 408 (5th Cir.2010). "[T]he focus of the inquiry is the act that led the officer to discharge his weapon." *Id.* at 406 (internal quotation marks and alteration omitted) (quoting *Manis v. Lawson,* 585 F.3d 839, 845 (5th Cir.2009)); *see also Bazan,* 246 F.3d at 493 ("The excessive force inquiry is confined to whether the Trooper was in danger at the moment of the threat that resulted in the Trooper's shooting."). The factual scenario here is substantially different, in terms of the imminence and immediacy of the risk of harm, from situations where we have granted qualified immunity to officers who shot an armed suspect, or a suspect believed to be armed. *See Ramirez,* 542 F.3d at 127, 129 (suspect stopped by the side of the road after a brief chase displayed a gun, repeatedly ignored police commands, was located yards from police officers, and brought his hands together in a manner that indicated he may have been reaching for the gun, prompting officer to shoot him); *Ballard v. Burton,* 444 F.3d 391, 402–03 (5th Cir.2006) (mentally disturbed suspect "refused to put down his rifle, discharged the rifle into the air several times while near officers, and pointed it in the general direction of law enforcement officers"); *Reese v. Anderson,* 926 F.2d 494, 500–01 (5th Cir.1991) (suspect stopped after a high-speed chase refused to exit the car, refused to follow police commands, repeatedly raised and lowered his hands, turned away from the officer and reached

lower toward the floorboard, prompting the officer to shoot him); *compare Reyes,* 362 Fed.Appx. at 407 (fact issue precluded qualified immunity where suspect was armed with a knife, but made no threatening gesture or motion), *with Harris v. Serpas,* 745 F.3d 767, 773 (5th Cir.2014) (qualified immunity granted to officer where video confirmed that suspect "was standing up out of bed and had raised the knife above his head at the time the shots were fired"). We discuss these cases not because we hold that an officer must actually see a weapon before taking action to protect himself or others from the suspect, but because they illustrate that, even when a weapon is present, the threat must be sufficiently imminent at the moment of the shooting to justify deadly force.

In *Thompson,* the court did note the existence of a stolen gun in the car of the fleeing suspect as a fact that supported its conclusion that the suspect posed an "ongoing threat of serious harm," even though the officer had no way of ascertaining whether the suspect intended to use the weapon. *Thompson,* 762 F.3d at 439, 2014 WL 3882460, at *5 (quotation omitted). However, in *Thompson,* the officer also knew at the time of the shooting that the suspect was fleeing in a stolen car with a stolen weapon, had abducted a woman during his flight, and that the "unidentified suspect was admittedly suicidal and had already acted with utter desperation in attempting to evade law enforcement." *Id.* at 439, 440–41, 2014 WL 3882460, at *5, 6. Thus, the court found that the officer was "justified in assuming" that the presence of the stolen weapon contributed to the continuing threat posed by suspect. *Id.* at 439, 2014 WL 3882460,

at *5.

Here, although Leija had stated to the dispatcher that he was armed and would shoot officers, he was not fleeing the scene of a violent crime, no weapon was ever seen, and at the time of the shooting, most officers and bystanders were miles away, where they would not have been encountered until after the spikes were given a chance to stop the chase. On appeal, Mullenix relies heavily on the presence of Ducheneaux beneath the overpass, and the risk that Leija could shoot Ducheneaux as he sped by. However, he also testified that he did not actually know Ducheneaux's position or what he was doing beneath the overpass.[1] Mullenix argues that he knew that an officer had to be positioned near a roadway to deploy spikes, but the facts, taken in the light most favorable to the plaintiffs, also show that officers were trained to deploy spikes in a location where they were able to take a protective position, that there were several pillars at the Cemetery Road overpass and that Ducheneaux had positioned himself behind a pillar as he was trained to do. Further, just prior to the shooting, Sheriff's Deputy Shipman mentioned Ducheneaux's presence beneath the overpass, and Mullenix replied only that he did not think *he* would hit Mullenix; he

[1] We do not hold that an officer must necessarily have another officer that he believes to be in danger in his sightline at the time he takes action. We merely state that, given his position atop a bridge in the dark of night, and given all the circumstances of this particular case, a reasonable jury could conclude that Mullenix lacked sufficient knowledge to determine whether or not Ducheneaux was in immediate danger from Leija, or whether Mullenix's own actions were decreasing the risk to Ducheneaux.

did not indicate that he perceived a threat to Ducheneaux from Leija. In this situation, a jury could conclude Mullenix did not reasonably perceive an immediate threat at the time of the shooting, sufficient to justify the use of deadly force.

The plaintiffs also point to evidence showing that Mullenix heard the warning that Leija had said he had a gun six minutes before the shooting, and went to the bridge and waited three minutes for Leija's car to approach. During this period Mullenix had time to consider his approach, including time to ask for his supervisor's opinion, inform Rodriguez of his intentions, and discuss the feasibility of shooting the car with Shipman. Plaintiffs argue that this is not the type of "split-second judgment" that officers must make when faced with an imminent risk of harm to themselves or others. *See Plumhoff,* 134 S.Ct. at 2020; *Graham,* 490 U.S. at 396–97, 109 S.Ct. 1865; *Hathaway,* 507 F.3d at 320–21. Although Mullenix relies heavily on the assertion that it is up to the "officer on the scene" to make judgments about the use of deadly force, Mullenix was not the only, or even the primary, officer on the scene. Officer Rodriguez was immediately in pursuit of Leija, and multiple other officers from various law enforcement agencies were on the scene at Cemetery Road and were at multiple locations further north along I–27, planning to deploy tire spikes to stop the suspect. There is no evidence that any other officer from any of the law enforcement agencies involved in the pursuit, hearing the same information that Mullenix heard, including the information regarding Leija's threats, decided that deadly force was necessary or warranted. Further, via the

dispatcher, Mullenix asked his supervisor, Sergeant Byrd, about his plan to shoot at the car. It is undisputed that Sergeant Byrd advised Mullenix to "stand by" and "see if the spikes work first." While there is a dispute of fact about whether Mullenix heard the instruction to "stand by," Byrd's response certainly bears on the question of whether Mullenix acted unreasonably. Lastly, Mullenix testified that he intended to shoot the engine block of the car in an attempt to disable it, although there is no evidence that shooting at the engine is a feasible method of immediately disabling a car. His justification for the use of force was to disable the car, but non-lethal methods were already in place to achieve the same goal, undermining the asserted necessity for deadly force at that particular instant.

We conclude that whether Leija was posing a substantial and immediate risk of danger to other officers or bystanders, sufficient to justify the use of deadly force at the time of the shooting, is a disputed fact, and we must draw all inferences in favor of the plaintiff. Based on the evidence in the record, a jury could find that a reasonable officer would have concluded that the risk Leija posed was not sufficiently immediate so as to justify deadly force, and that the non-lethal methods already in place could stop the chase without the need for deadly force. We thus cannot conclude that Mullenix's actions were objectively reasonable as a matter of law. *See Vaughan,* 343 F.3d at 1330 (denying a motion for summary judgment on the grounds of qualified immunity when "[g]enuine issues of material fact remain[ed] as to whether [the suspects'] flight presented an immediate threat of serious harm to [the

police officer] or others at the time [the officer] fired the shot").[2]

B. Clearly Established Law

Under the second prong of the qualified immunity analysis, plaintiffs must show that Mullenix's actions violated a constitutional right that was sufficiently clearly established. *Flores,* 381 F.3d at 395. For a right to be clearly established, "[t]he contours of that right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Brosseau v. Haugen,* 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). "The central concept [of the test] is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.'" *Kinney,* 367 F.3d at 350 (quoting *Hope,* 536 U.S. at 740, 122 S.Ct. 2508). Further, while the Supreme Court has stated that "courts

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[2] We of course agree with the dissent that once the relevant facts are determined and all factual inferences are drawn in favor of the non-moving party to the extent supportable by the record, the question of whether the officer acted objectively unreasonably is one of law. *See Scott,* 550 U.S. at 381 n. 8, 127 S.Ct. 1769. Here, however, there are underlying questions of fact, including the immediacy of the risk and whether Mullenix heard his supervisor's direction to "stand by" and "see if the spikes work first."

should define the 'clearly established' right at issue on the basis of the 'specific context of the case,' " it has also recently reminded us that we "must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Tolan,* 134 S.Ct. at 1866 (quoting *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151).

While Mullenix devotes the bulk of his argument to this prong of the qualified immunity analysis, "We need not dwell on this issue. It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Lytle,* 560 F.3d at 417. "This holds as both a general matter and in the more specific context of shooting a suspect fleeing in a motor vehicle." *Id.* at 417–18 (internal citations omitted) (citing *Kirby v. Duva,* 530 F.3d 475, 484 (6th Cir.2008); *Vaughan,* 343 F.3d at 1332–33); *see also Sanchez v. Fraley,* 376 Fed.Appx. 449, 452–53 (5th Cir.2010) (holding that "it was clearly established well before [April 23, 2007] that deadly force violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," and "the threat of serious harm must be immediate"); *Reyes,* 362 Fed.Appx. at 406 ("Unlike some areas of constitutional law, the question of when deadly force is appropriate—and the concomitant conclusion that deadly force is or is not excessive—is well-established.").

Mullenix points to the Supreme Court's recent decision in *Plumhoff* to argue that the law was not

clearly established. The *Plumhoff* Court relied primarily on *Brosseau,* which held that as of 1999 it was not clearly established that it was objectively unreasonable force "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Brosseau,* 543 U.S. at 195–97, 200, 125 S.Ct. 596. However, *Plumhoff* holds only that where a fleeing suspect "indisputably posed a danger both to the officers involved and to any civilians who happened to be nearby," a police officer's use of deadly force is not clearly established as unreasonable. *Plumhoff,* 134 S.Ct. at 2021–22, 2023; *see Brosseau,* 543 U.S. at 200, 125 S.Ct. 596. It does not, however, undermine the clearly established law that an officer may not use deadly force against a fleeing suspect absent a sufficient risk to officers or bystanders. *See Lytle,* 560 F.3d at 417–18. *Thompson* is no different. Similar to *Plumhoff,* it holds that the officer's use of force to stop a high-speed chase was not clearly established as unreasonable where the fleeing suspect had stolen a car and kidnapped a woman, had evaded four attempts to stop the car with non-lethal force, and whose driving continued to pose a "tremendous risk" to the public and other officers. *Thompson,* 762 F.3d at 440, 2014 WL 3882460, at *6.

At the time of this incident, the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a substantial and immediate threat, violated the Fourth Amendment. Because on this record, the immediacy of the risk posed by Leija cannot be resolved as a matter of law at the summary judgment stage, we affirm

the district court's denial of qualified immunity.[3]

III. Conclusion

For the foregoing reasons, we AFFIRM the denial of summary judgment.

KING, Circuit Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the district court's denial of qualified immunity to Chadrin Mullenix. The majority's decision conflicts, in several respects, with Supreme Court precedent and our court's recent decision in *Thompson v. Mercer,* No. 13–10773, 2014 WL 3882460, 762 F.3d 433 (5th Cir.2014). While it is a jury's responsibility to resolve material fact disputes, because no such fact dispute is present here, it is our responsibility as judges to decide whether Mullenix acted objectively unreasonably under the Fourth Amendment. Based on my review of the record, I conclude that Mullenix's use of force was not objectively unreasonable because the threat Israel Leija, Jr. posed to nearby officers, viewed in light of his culpability for that threat, was sufficiently grave to justify the use of a gun to shoot at Leija's vehicle.

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[3] Mullenix makes a separate argument that the district court relied on inadmissible summary judgment evidence, specifically the OIG report concluding that Mullenix's actions were not justified. This report was later called into question by its author, who testified that it was not based on a full review of the incident. However, there is no indication in the district court's order that it relied on the OIG report in denying summary judgment, and we likewise do not rely on it. If there are questions as to its admissibility, the district court can resolve those in due course as the litigation proceeds.

The majority opinion is replete with the uncontradicted facts. It nevertheless purports to identify a single factual dispute precluding summary judgment, explaining: "whether Leija was posing a substantial and immediate risk of danger to other officers or bystanders, sufficient to justify the use of deadly force at the time of the shooting, is a disputed fact, and we must draw all inferences in favor of the plaintiff." But the "fact issue" referenced by the majority—and referred to a jury—is simply a restatement of the objective reasonableness test that applies to Fourth Amendment excessive force claims. As the Supreme Court and our circuit have held, the application of that test is a legal question to be decided by a judge.

In *Scott v. Harris,* decided in 2007, the Supreme Court explained, "[a]t the summary judgment stage . . . once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record, the reasonableness of [an officer]'s actions . . . is a pure question of law." 550 U.S. 372, 381 n. 8, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (internal citations and emphasis omitted). In clarifying this point, the Court was responding to Justice Stevens's argument, in dissent, that "[w]hether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury." *Id.* at 395, 127 S.Ct. 1769 (Stevens, J., dissenting).

This approach accords with our circuit's longstanding view that, under the Fourth Amendment, the determination of the reasonableness of a seizure is a conclusion of law. *See, e.g., Jimenez v. Wood Cnty.,* 621 F.3d 372, 376 (5th Cir.2010), *aff'd en banc,* 660 F.3d

841 (5th Cir.2011); *see also White v. Balderama,* 153 F.3d 237, 241 (5th Cir.1998) ("While it is true that the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application and that proper application of the Fourth Amendment objective reasonableness test requires careful attention to the facts and circumstances of each case, the ultimate determination of Fourth Amendment objective reasonableness is a question of law." (internal quotation marks, citations, and brackets omitted)). More recently, in *Thompson,* we cited *Scott* and rejected the plaintiffs' contention in that case that the question of reasonableness must be submitted to a jury. 762 F.3d at 441, 2014 WL 3882460, at *7 (citing *Scott,* 550 U.S. at 381 n. 8, 127 S.Ct. 1769).

In spite of *Scott* and our circuit's precedent, the majority—without actually identifying any disputed facts—repeatedly suggests that fact disputes remain. The majority's conclusion that summary judgment is inappropriate appears to be based on its belief that jurors could draw different "inferences," albeit based on the *undisputed* summary judgment evidence, about the reasonableness of Mullenix's actions. But the majority confuses factual inferences, which are for a jury to make, with legal conclusions, which are committed to a judge. *See Crowell v. Shell Oil Co.,* 541 F.3d 295, 309 (5th Cir.2008) ("A court is not required to draw legal inferences in the non-movant's favor on summary judgment review."). The majority points to a number of undisputed facts, such as the absence of heavy traffic near Leija, that might weigh against a conclusion that the risk Leija posed justified the level

of force used by Mullenix. That the question whether Mullenix's actions in this case were objectively reasonable is, in the majority's wording, "debatable," however, does not transform what otherwise would be a legal question into a factual question precluding summary judgment. *Cf. Gould v. Davis,* 165 F.3d 265, 269 (4th Cir.1998) ("While the district court is correct that different facts in evidence could be used to support different conclusions as to whether the officers deserve qualified immunity, this does not indicate a *factual* dispute, but rather, a question of law. The district court's order does not point to disputed questions of fact, but rather, disputed legal inferences that could be drawn from what is an undisputed factual record.").

The majority further cites to several decisions in support of its argument that this case should be sent to a jury. In these decisions, however, the courts identified concrete factual disputes precluding summary judgment. *See Tolan v. Cotton,* —— U.S. ——, ——, 134 S.Ct. 1861, 1868, 188 L.Ed.2d 895 (2014) (holding that there were fact disputes "with regard to the lighting, [the plaintiff's] mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting"); *Vaughan v. Cox,* 343 F.3d 1323, 1330 (11th Cir.2003) (holding that there were factual disputes as to whether the suspect intentionally rammed a police vehicle and whether the suspect made aggressive moves immediately before the officer fired); *see also Scott,* 550 U.S. at 380, 127 S.Ct. 1769 (explaining that whether the driver "was driving in such fashion as to endanger human life" was a "fac-

tual *issue,*" but that there was no genuine factual *dispute* in that case (emphasis added)); *Lytle v. Bexar Cnty.,* 560 F.3d 404, 412–13 (5th Cir.2009) (concluding that the direction and distance that the suspect's car was traveling at the moment the officer fired were disputed). No such disputed facts are present here. Accordingly, regardless of whether Mullenix's use of force was reasonable, as I believe, or excessive, this case is ripe to be decided in this appeal.

Given this, I turn next to the primary question presented here: whether, resolving any genuine fact issues[1] and drawing all factual inferences in the plaintiffs' favor, Mullenix's use of force against Leija was objectively unreasonable, as a matter of law, under the Fourth Amendment. "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd,* —— U.S. ——, ——

[1] As I see it, the sole disputed fact in this case is whether Mullenix heard the message relayed from his superior, Sergeant Byrd, that he should "stand by" and "see if the spikes work first." But this fact issue, though genuine, is not material. The uncontradicted testimony of Byrd and other officers was that, under department policy, it was the responsibility of the "officer on the scene" to make judgments about the use of force. Furthermore, Sergeant Byrd's opinion as to whether Mullenix should delay shooting at Leija's vehicle, at best, informs but does not decide whether Mullenix's use of force was objectively unreasonable in light of the risks posed by and to Leija. *See Scott,* 550 U.S. at 375 n. 1, 127 S.Ct. 1769 (observing that "[i]t is irrelevant to our analysis whether [the officer] had permission to take the precise actions he took" when he bumped the fleeing suspect off the road).

–, 131 S.Ct. 2074, 2085, 179 L.Ed.2d 1149 (2011) (internal quotation marks and citation omitted). The Supreme Court has explained that, in applying Fourth Amendment standards, "[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." *Graham v. Connor,* 490 U.S. 386, 396–97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Whether the force used was reasonable is determined "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396, 109 S.Ct. 1865. In "weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing" a suspect, a court must "take into account not only the number of lives at risk, but also their relative culpability." *Scott,* 550 U.S. at 384, 127 S.Ct. 1769.

Applying these legal standards, and considering the facts as a whole, Mullenix's decision to fire at Leija's vehicle was not objectively unreasonable under the Fourth Amendment. As this court recognized in *Thompson,* a fleeing suspect's possession of a firearm presents an independent and grave risk to officers and civilians that may, under certain circumstances, justify firing at the suspect's vehicle, even when doing so poses a significant risk to the suspect's life. The plaintiffs in *Thompson* argued that the officer's actions were unreasonable because, at the time that the officer fired, the suspect "was driving on a 'lonely' rural road and his vehicle had already been disabled" by the

shots that struck its radiator. 762 F.3d at 439, 2014 WL 3882460, at *4. According to the plaintiffs, this showed that the "threat to the officers had already passed." *Id.* at 439, 2014 WL 3882460, at *5. We rejected this argument in no uncertain terms, noting that it "presumes that [the suspect] was only a threat to the extent that the truck was operational," when, in fact, it was "undisputed that [the suspect] was in possession of a stolen firearm and that [the officer] was aware of that fact." *Id.* While we "assume[d] for the purposes of summary judgment that [the suspect] did not" actually intend to use the gun, we concluded that "[the officer] was justified in assuming that there was an ongoing 'threat of serious harm to the officer or others,' even if [the suspect]'s vehicle was already disabled." *Id.* (quoting *Carnaby v. City of Houston,* 636 F.3d 183, 188 (5th Cir.2011)).

Our analysis in *Thompson* compels a similar holding in this case. If anything, the objective threat that Leija would fire at officers or the public was more serious than the threat posed by the suspect in *Thompson.* In *Thompson,* although there was a firearm in the suspect's vehicle, he never threatened to use it. *Id.* at 439, 2014 WL 3882460, at *5. Here, however, Leija twice called the Tulia Police Dispatch on his cell phone, during the pursuit, stating that he had a gun and that he would use it to shoot any law enforcement officers he saw. This information was conveyed to the officers involved in the pursuit, including Mullenix. Mullenix was also aware that there were several officers setting up tire spikes at various locations along the interstate, and that there was a police vehicle, with its lights on, parked underneath the bridge from which

he was planning to fire. Moreover, Leija was highly culpable for the risks he posed, a factor that *Scott* instructs us to consider. 550 U.S. at 384, 127 S.Ct. 1769. Thus, even if the risk of serious injury Mullenix posed to Leija by shooting at his vehicle exceeded the risk of serious injury Leija posed to the officers in this case, Mullenix's actions would not have been unreasonable under the Fourth Amendment.

The majority attempts to distinguish *Thompson,* in part, by pointing to the threat, in that case, posed by the suspect's vehicle during the chase. But that argument is a non sequitur. In concluding, in *Thompson,* that the risk posed by the suspect's possession of a firearm justified the officer's decision to fire at it, we assumed that the vehicle was no longer operational. *Id.* at 439, 2014 WL 3882460, at *5. The majority also points out that the suspect in *Thompson* was suicidal, had stolen a car, and had abducted a woman during the flight (who was released before he was shot). While these facts were, no doubt, relevant to our analysis of the risks in *Thompson,* it would be strange to conclude that the objective risk that Leija would use a gun was not equally great, given that Leija alone specifically indicated his intent to shoot at officers.

The majority further minimizes the risk that Leija posed to Ducheneaux and the other officers positioned along the road by citing several decisions in which a suspect was on foot or in a stopped vehicle.[2] *See, e.g.,*

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[2] The majority also states that Mullenix "did not indicate that he perceived a threat to Ducheneaux from Leija" before firing at Leija's vehicle. Mullenix's subjective perception of a threat, how-

Ballard v. Burton, 444 F.3d 391, 402–03 (5th Cir.2006). In those cases, it was possible for the officers to observe the suspect's weapon, hands, or both, permitting the officers to react quickly before the suspect could use a weapon. *Id.* Here, however, Leija was traveling at high speeds and under cover of night, and Mullenix and the other officers could not see into Leija's vehicle. The officers would not have been able to wait to shoot until after Leija raised his gun (which would not have been visible), without jeopardizing their own lives. *See Larsen ex rel. Sturdivan v. Murr,* 511 F.3d 1255, 1260 (10th Cir.2008) ("A reasonable officer need not await the 'glint of steel' before taking self-protective action; by then, it is often ... too late to take safety precautions." (internal quotation marks and citation omitted)). Equally troubling is the majority's suggestion that, despite Leija's two statements to police dispatchers that he possessed a gun, a reasonable officer could not have concluded that he had a firearm because Leija was "not fleeing the scene of a violent crime" and "no weapon was ever seen." The ma-

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ever, is not material to the objective reasonableness inquiry before us. *See Ashcroft,* 131 S.Ct. at 2080. Moreover, the majority is plainly incorrect on this point. The record reflects that Mullenix's actions were motivated by his belief that Leija would fire his weapon. Mullenix informed another officer over police radio that he was considering firing at Leija's vehicle because "this guy has a weapon and is willing to shoot." The majority asserts that "there is no evidence that any other officer from any of the law enforcement agencies involved in the pursuit ... decided to respond with deadly force." The record shows, however, that Mullenix discussed his plan to shoot at Leija's vehicle with two other officers involved in the pursuit—Rodriguez and Shipman—neither of whom made any effort to dissuade him.

jority's suggestion eviscerates the Supreme Court's requirement that we adopt the perspective of a reasonable officer on the scene and refrain from viewing the facts with "the 20/20 vision of hindsight." *Graham,* 490 U.S. at 396, 109 S.Ct. 1865.

Additionally, while officers should use "non-lethal alternatives" to deadly force, when available, Mullenix reasonably believed that deploying tire spikes along the highway posed a significant risk of harm to officers, including Ducheneaux. Although the officers were trained to protect themselves, to the extent possible, when deploying and operating spikes, such protection was necessarily limited by the officers' need to position themselves near the roadway and to maintain visual contact with oncoming traffic, so that they could use a rope attached to the spikes to pull them in front of the approaching suspect vehicle and then out of the way of approaching police (here, Rodriguez) and other vehicles. There is no evidence suggesting that the officers deploying road spikes could position themselves in a manner that would eliminate their exposure to gunfire from passing vehicles.

The majority notes that, in *Thompson,* the officers tried several alternative methods to stop the chase before the officer shot and killed the suspect. 762 F.3d at 438–39, 440–41, 2014 WL 3882460, at *4, *6. Yet one of these "non-lethal methods," as the majority refers to them, involved an officer firing a shotgun at the suspect's truck tires while that vehicle was in motion. *Id.* at 440–41, 2014 WL 3882460, at *6. It is hard to see how firing at a moving vehicle's tires is any less lethal than shooting at its engine block, given that both pose

a substantial risk that the driver will be unintentionally struck by a bullet. Moreover, the fact that tire spikes twice failed to stop the suspect's truck in *Thompson* only adds to the evidence presented in this case that tire spikes are often ineffective. The Fourth Amendment does not require that an officer have chosen what, in hindsight, appears to be the best course of action—only that the officer's judgments be reasonable in light of the uncertainties inherent in police work. *See Graham,* 490 U.S. at 397, 109 S.Ct. 1865. Here, an objectively reasonable officer could have concluded, under the circumstances, that the risks posed to officers when deploying tire spikes outweighed their potential benefits.

I further question the majority's implication that Mullenix lacked sufficient knowledge to determine whether Ducheneaux was at risk. Mullenix knew that there was an officer below the bridge that he was standing on, that the officer's patrol lights were flashing (alerting Leija to the officer's presence), that the officer was likely operating tire spikes, and that officers operating spikes are often vulnerable to gunfire from passing vehicles. Mullenix also knew that tire spikes are not always effective in stopping vehicles and that there were additional officers located just minutes away along the highway. The risks at stake here were at least as particularized as in the Supreme Court's decisions in *Scott* and *Brosseau* and our decision in *Thompson,* where the officers employing force were not aware of the precise location or identity of the other officers and civilians they were acting to protect. *See Scott,* 550 U.S. at 384, 127 S.Ct. 1769 ("[R]espondent posed an actual and imminent threat

to the lives of any pedestrians who *might have been present*." (emphasis added)); *Brosseau v. Haugen,* 543 U.S. 194, 197, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (granting qualified immunity to an officer who fired at a driver who had not yet driven his car in a dangerous manner to prevent possible harm to "other officers on foot who [she] believed were in the immediate area ... [and] any other citizens who might be in the area." (internal quotation marks and citation omitted)); *Thompson,* 762 F.3d at 439, 2014 WL 3882460, at *5 (holding that it was sufficient for the officer to reasonably believe there "might be other travelers on the road," even though the officer was not "aware of their presence"); *see also Pasco ex rel. Pasco v. Knoblauch,* 566 F.3d 572, 581 (5th Cir.2009) (recognizing that "the holding of *Scott* was not dependent on the actual existence of bystanders—rather, the Court was also concerned about the safety of those who could have been harmed if the chase continued").

The majority also suggests that the harm Leija posed to the officers may have been insufficiently "immediate" to justify Mullenix's use of force. Yet it is difficult to conceive of a threat that is more immediate than the one Leija posed. At the moment Mullenix fired, Leija was seconds away from crossing the path of one of the officers he had threatened to shoot and minutes away from passing several other officers. *Cf. Thompson,* 762 F.3d at 440, 2014 WL 3882460, at *6 (noting that, at the time point the officer fired at the suspect driver, the next town the driver would reach was "approximately a mile away").

Finally, the majority implies that because Mullenix's original intent was to strike the engine block of Leija's vehicle, the lack of evidence that shooting at an engine block is an effective method for disabling a car is somehow relevant. But "Fourth Amendment reasonableness is predominantly an objective inquiry" that "regulates conduct rather than thoughts." *Ashcroft,* 131 S.Ct. at 2080 (internal quotation marks and citation omitted). As the Supreme Court clarified in *Scott,* "in judging whether [an officer]'s actions were reasonable, we must consider the *risk* of bodily harm that [the officer]'s actions posed to [the suspect]." 550 U.S. at 383, 127 S.Ct. 1769 (emphasis added); *see also id.* (explaining that the Fourth Amendment's objective reasonableness test does not depend on whether particular actions fall within the definition of "deadly force"); *Thompson,* 762 F.3d at 438, 2014 WL 3882460, at *4 ("There is no doubt that firing the assault rifle directly into the truck created a significant—even certain—*risk* of critical injury to [the suspect]. Under these circumstances, however, the *risk* was outweighed by 'the extreme danger to human life posed by' reckless vehicular flight." (emphasis added) (citation omitted)). Mullenix's actions would not violate the Fourth Amendment as long as he reasonably believed that the *risks* posed by Leija, viewed in light of Leija's culpability for those *risks,* exceeded the *risk* of harm to Leija from shots fired in the direction of his vehicle. *See Scott,* 550 U.S. at 383–84, 127 S.Ct. 1769.[3]

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[3] It is worth noting that the probability of disabling Leija's car may not be as low as the plaintiffs and the district court presume. In *Thompson,* although the suspect was travelling at high speeds, an officer positioned at the side of the road aimed at and

In my view, Mullenix reasonably weighed these risks.

In conclusion, I recognize that this is a close case. Whether Mullenix is entitled to qualified immunity is debatable. Forced to decide, one or more of my colleagues in the majority might well conclude that Mullenix's actions violated clearly established Fourth Amendment law. While that would not be my conclusion, it would nevertheless be a fair, responsible decision. What we cannot do, on this record, is decline to decide the Fourth Amendment issue and, instead, effectively lateral that decision to a jury. The ultimate issue of objective reasonableness is purely legal, and there are no genuine and material factual disputes preventing us from deciding that issue in this appeal. For that reason, I dissent.

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successfully shot the radiator of the fleeing suspect's vehicle. 762 F.3d at 436, 2014 WL 3882460, at *2.