CASE NO. 20-10830

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TERRENCE HARMON; SHERLEY WOODS,
AS ADMINISTRATRIX FOR THE ESTATE OF OSHEA TERRY,

Plaintiffs - Appellants

VS.

CITY OF ARLINGTON, TEXAS; BAU TRAN,

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS – FORT WORTH DIVISION
CIVIL ACTION NO. 4:19-CV-00696-O

BRIEF OF BAU TRAN
DEFENDANT - APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

A. PARTIES

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs incorporated into their Complaint a video, released by the Arlington Police Department and available on YouTube, that depicts events underlying their claims against Appellees - Police Officer Tran and the City of Arlington. The District Court correctly applied controlling law and granted Defendant Appellee Tran's Motion to Dismiss after the District Court determined Plaintiffs failed to state claims sufficient to overcome Defendant Officer Tran's qualified immunity. Officer Tran believes this matter should be submitted for decision on the briefs. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral arguments. Therefore, oral argument will not be a good use of the Court's time and limited resources. However, if the Court does require oral argument, Appellee Tran's undersigned attorney is prepared to appear, provide argument, and answer questions.

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I. STATEMENT OF JURISDICTION

Appellee Tran does not dispute this Court's jurisdiction to decide this appeal.

II. STATEMENT OF RESPONSE ISSUES

Response Issue No. 1 – The record shows that Officer Tran had probable cause to apprehend immediate serious harm when he fired at Terry, while Tran clung to the side of the fleeing SUV Terry was driving. Therefore, the District Court correctly held Tran's use of deadly force was reasonable under the Fourth Amendment. (*Germane to Appellants' Issue No. 1).*

Response Issue No. 2 – The District Court correctly determined that Officer Tran did not violate Harmon's rights under the Fourth Amendment's ban on unreasonable force because when Officer Tran fired at and intentionally struck only the SUV's driver while Harmon was a passenger, the driver's actions caused Tran to reasonably apprehend serious physical harm. (*Germane to Appellants' Issue No. 2).*

Response Issue No. 3 – Tran has qualified immunity to Plaintiffs' claims because when Tran reasonably apprehended an immediate risk of serious harm from Terry, the driver of the SUV Harmon occupied as a passenger, and Tran then acted to stop the risk by firing at and striking only the driver, no controlling authority held that the Fourth Amendment prohibited Tran's actions. (*Germane to Appellants' Issue No. 1 and 2).*

III. STATEMENT OF THE CASE

A. Summary of Relevant Procedural Matters

Plaintiffs[1] filed their Original Complaint on September 4, 2019 (ROA.7-25). Officer Tran asserted qualified immunity on November 4, 2019 in both his Motion & Brief to Dismiss (ROA.128-158) and his Answer (ROA.159-175). Plaintiffs responded to Tran's Motion to Dismiss by amending their Complaint[2] (ROA.186-206). On January 8, 2020 Tran reasserted qualified immunity in his Second Motion & Brief to Dismiss (ROA.269-299) and in his Answer to the Amended Complaint (ROA.300-317). Plaintiffs responded to Tran's Second Motion to Dismiss on January 22, 2020 (ROA.319-331), Tran Replied on February 5, 2020 (ROA.332-342), the District Court granted Tran's Second Motion to Dismiss on August 12,

[1] Appellants refer to themselves as Plaintiffs throughout their Opening Brief. For consistency, Tran will also refer to Appellants as Plaintiffs throughout his Response Brief.

[2] The Plaintiffs effectively attached to their Complaint a video of the incident, posted on YouTube by the Arlington Police Department. (See Complaint ROA.187 citing the URL for the video (https://www.youtube.com/watch?v=bh08la7J0_s). See Bogie v Rosenberg, 7015 F.3d 693, 609 (7th Cir. 2013), citing Brownmark Films v. Comedy Partners, 682 F.3d 687, 690-91 (7th Cir. 2012). The District Court recognized the video was effectively incorporated into Plaintiffs' Complaint (ROA.344 n. 2), and relied on the video (Order throughout - ROA.343-364). Different portions of the YouTube video originate from different cameras, and will be identified in this Brief as explained in this note. YouTube Video segment at counter 1:00 – 13:14 is identified as originating from the "Primary Officer's Vehicle Dash Camera". (Officer Herlihy was the Primary Officer, and therefore this Dash Camera segment is hereinafter "Herlihy Dashcam"). YouTube Video segment at counter 13:15 – 24:26 is identified as originating from the "Primary Officer's Body Worn Camera" (hereinafter "Herlihy Bodycam"). YouTube segment at counter 24:26 – 30:33 is identified as originating from the "Backup Officer's Body Worn Camera" (Video 24:26).(Officer Tran was the Backup Officer, and therefore this Body Camera segment is hereinafter "Tran Bodycam".

2020 (Order, ROA.343-364) and dismissed the case (Order, ROA.365). Plaintiffs timely filed their Notice of Appeal on August 13, 2020 (ROA.366).

B. Factual Summary

Arlington Police Officer Herlihy was driving on Bowen Road, which is a busy four lane road in Arlington, Texas, when she drew close to a large black SUV near the intersection of Bowen Road and California Lane (Herlihy Dashcam 1:34-2:17).

Herlihy Dashcam 2:17 – Bowen and California intersection, Terry's SUV in right lane.

Terry was driving the SUV and Harmon was a passenger when they were stopped by Officer Herlihy almost immediately after they turned onto California Lane, which is a busy four lane road that intersects with Bowen Road (Complaint, ROA.189 ¶ 18) (Herlihy Dashcam 2:35 to end).[3]

[3] From the time of the stop, to the time when Officer Tran falls off the SUV, the Dashcam shows 47 vehicles traveling on California. (Herlihy Dashcam 2:39 – 13:02).

Herlihy Dashcam 2:35 – Location of stop on California.

During the stop, Officer Herlihy communicated with Terry and Harmon while obtaining identifying information. While Officer Herlihy was talking to the driver Terry and his passenger Harmon, she could smell marijuana emanating from the SUV (Complaint, ROA.189 ¶¶ 19, 20). Officer Herlihy states on the video that she smelled marijuana in their SUV, and Terry appears to nod his head in agreement (Herlihy Dashcam 9:06; Herlihy Bodycam 20:18)[4]. Officer Herlihy told Terry and Harmon that she was going to search their SUV because of the marijuana smell (Herlihy Dashcam 9:30). Terry admitted he has some marijuana – stating it's a "Doobie" (Herlihy Dashcam 9:26; Herlihy Bodycam 20:38)[5].

[4] Officer Tran is visible on the other side of the SUV at that moment (Herlihy Bodycam 20:18).
[5] Officer Tran is visible at this point on the other side of the SUV (Herlihy Bodycam 20:28 –37).

When Defendant Tran arrived on the scene, he approached the stopped SUV from the passenger side where he remained. As Officer Tran is standing next to the stopped SUV, Officer Herlihy is visible on the driver's side standing next to the window occupied by Terry (Tran Bodycam 25:47). Officer Herlihy then moves away from the stopped SUV while Tran remains standing next to the SUV (Complaint, ROA.189 ¶ 21; and Tran Bodycam 26:47-51)[6]. Tran calmly talks to the occupants for the next three minutes (Tran Bodycam 26:47 – 29:49).

Tran asked, "Hey if you don't mind rolling the window down", and Terry complied (Tran Bodycam 26:51) (Complaint, ROA.189 ¶ 22). Tran asked the SUV's occupants if they had smoked them all, and whether there was any more [marijuana] in the vehicle. (Tran Bodycam 27:00-27:05). Tran obviously could also smell marijuana emanating from the vehicle (Complaint, ROA.189 ¶ 20). Tran then asked, "Hey, could you do me a favor and cut the engine?", and Terry turned off the SUV's engine (Tran Bodycam 27:18) (Complaint, ROA.189 ¶ 22). Tran responds, "Thank you, appreciate that." (Tran Bodycam 27:20).

More than two minutes later, Terry rolled up the SUV's windows (Tran Bodycam 29:47) (Complaint, ROA.190 ¶ 30). Almost immediately, Tran yells out, "Hey, hey, hey, hey!", as he reaches with his left hand and grabs the passenger side window glass, and at the same time steps on the SUV's running board, and reaches

[6] Tran's reflection appears on shiny surfaces of Terry's SUV throughout the remainder of the Tran Bodycam recording.

inside the SUV with his right arm. (Tran Bodycam 29:49). Tran's right hand is empty at that point (Tran Bodycam 29:49) [7].

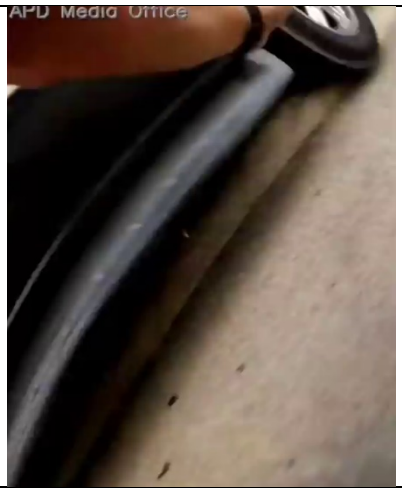
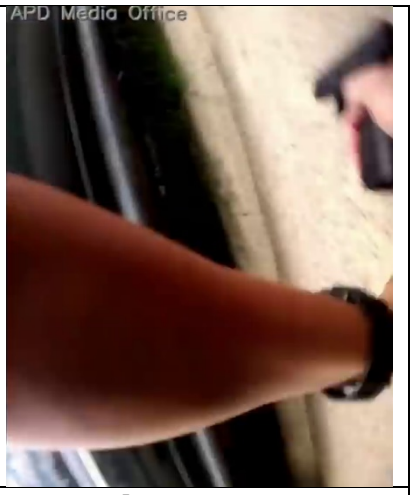
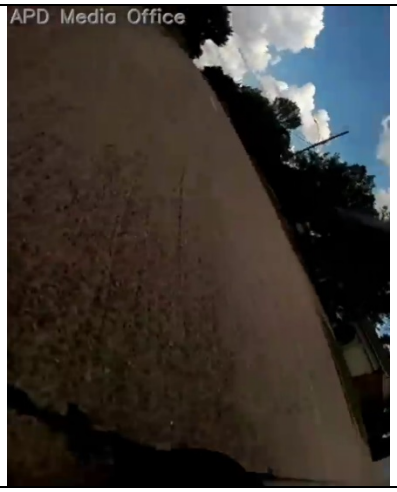
Tran Bodycam 29:49

Tran Bodycam 29:53

Tran's reflection clearly shows that his right hand is on his holstered pistol (Tran Bodycam 29:51 -29:53), and Tran's right hand remains on his holstered pistol, while he continues to stand on the SUV's running board during the next rapidly moving events. While standing on the running board, with his right hand on his holstered pistol, Tran yells, "Hey stop!", while driver Terry leans forward attempting

[7] At one time Appellants attempted to claim Officer Tran immediately reached for his handgun at that point while he was holding onto the SUV (Complaint, ROA.190 ¶¶ 30-31). But the video shows this is untrue, therefore the Court is not bound to accept the mere allegations, but instead should view the facts as depicted in the video. Scott v. Harris, 550 U.S. 372, 380-381 (2007).

to start the SUV's engine (Tran Bodycam 29:51-52). Terry's first unsuccessful attempt to start the engine can be seen. (Tran Bodycam 29:53). Tran's right hand continues to remain on his holstered pistol at that point. Tran then yells, "Stop!" and he turns his body placing his right hand behind his body out of view of the reflection – but his right hand is certainly not inside the passenger window holding a pistol, as alleged in the Complaint (ROA.190 ¶ 32) (Tran Bodycam 29:54). While Tran holds onto the window glass with his left hand and is standing on the SUV's running board, Terry finally turns on the engine – the video records the sound of the engine engaging (Tran Bodycam 29:56-57). The SUV moves forward with Officer Tran holding on. Officer Tran fires shots only after that point (Tran Bodycam 29:57-59). Several seconds later, Tran falls off the SUV and he rolls in the street (Tran Bodycam 30:07-08) as demonstrated in the nine sequential screenshots below. When Terry drove off in the SUV with Officer Tran as an unwilling passenger holding onto the exterior of the SUV, Tran faced great danger. Tran could have been struck by the SUV if (and when) he eventually did fall from the SUV. Tran faced injury from simply landing on the concrete street after falling from the moving SUV. Tran or the SUV could have been hit by another vehicle.

		
Herlihy Dashcam 12:51 – Tran holding onto Exterior of SUV.	***Tran Bodycam 30:07 – Tran's left arm as he falls.***	***Tran Bodycam 30:07 – Tran's left arm & right hand as he hits the ground.***
		
Tran Bodycam 30:08 – Tran's foot & elbow as he rolls.	***Tran Bodycam 30:08 – Tran's left hand as he rolls.***	***Tran Bodycam 30:08– Tran's left arm as he rolls.***
		
Tran Bodycam 30:08 – Tran upside down rolling next to SUV.	***Tran Bodycam 30:08 – Tran continues to roll in street.***	***Tran Bodycam 30:09 – Tran in street (handgun shown on right), SUV on grass on wrong side of street.***

IV. STATEMENT OF STANDARDS OF REVIEW & BURDENS

A. De Novo Standard of Review for Rule 12(b)(6) Dismissal

The District Court dismissed the claims against the Defendants – Appellees Officer Tran and the City of Arlington pursuant to Fed. R. Civ. P. 12(b)(6) (ROA.343 n.1, 345-346). Review is therefore de novo. Lowrey v. Texas A&M Univ. Sys., 117 F.3d 242, 246-247 (5th Cir. 1997). Plaintiffs had a burden to provide sufficient allegations to survive a Rule 12(b)(6) Motion to Dismiss by sufficiently pleading nonconclusory facts to state a claim to relief that is plausible on its face. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 561-562 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 669-670 (2009). Because the YouTube Video of the incident was incorporated into the Complaint, this Court is not bound by allegations in the Complaint which are clearly contradicted by the video. On such facts, the video controls (Order ROA.344 n.2, citing Scott, 550 U.S. at 380-81 (2007)).

B. Plaintiffs Have the Burden of Overcoming Both Prongs of Immunity

Officer Tran asserted qualified immunity to Plaintiffs' claims of excessive force (Motion to Dismiss, ROA.269-299; Answer, ROA.300-317). Plaintiffs therefore had the burden of demonstrating the inapplicability of his immunity. Schultea v. Wood, 47 F.3d 1427, 1433-1434 (5th Cir. 1995) (*en banc*); Club Retro, LLC v. Hilton, 568 F.3d 181, 194 (5th Cir. 2009); Morgan v Swanson, 659 F.3d 359, 371 (5th Cir.

2011) (*en banc)*[8]

To overcome qualified immunity, Plaintiffs must meet a two-pronged test. *First*, they must sufficiently assert facts to show that Defendant Tran committed a Constitutional violation under current law. *Second*, they must sufficiently assert facts to demonstrate that Officer Tran's actions were objectively unreasonable in light of the law that was clearly established at the time the events complained of took place.

C. Standards Governing the First Prong of Immunity

Claims of excessive force in the context of arrests or investigatory detentions must be analyzed under the Fourth Amendment's objective reasonableness standard. Graham v. Connor, 490 U.S. 386, 388 (1985). The Supreme Court cautions against the "20/20 vision of hindsight" in favor of deference to the judgment of "reasonable officers on the scene." Saucier v. Katz, 533 U.S. 194, 205 (2001), citing Graham, 490 U.S. at 393-394.

D. Standards Governing the Second Prong of Immunity

To overcome the second prong of Officer Tran's qualified immunity, Plaintiffs must carry a burden of showing a violation of clearly established law in

[8] Curiously, Plaintiffs assert they "reserve the right to challenge this Court's burden framework" (Appellants' Opening Brief p. 16 n.5), but they merely cite a panel's observation that other Circuits have different treatment of burdens on the clearly established law prong of qualified immunity. Joseph on behalf of Joseph v. Bartlett, 2020 WL 6817823, *5 n.19 (5th Cir. Nov. 20, 2020). Joseph in turn cites this Court's *En Banc* Morgan case as a basis for this Circuit placing the burden on Plaintiffs. Under the Circuit's rule of orderliness, only the Supreme Court or this Court sitting *En Banc* can overturn an earlier *En Banc* decision. Mercado v. Lynch, 823 F.3d 276, 279 (5th Cir. 2016). This challenge is waived because it was not raised in the District Court, and there is no extraordinary circumstance to allow this challenge to be first raised on appeal. AG Acceptance Corp. v. Veigel, 564 F.3d 695, 700 (5th Cir. 2009).

the context of the particularized facts circumstances Tran faced. Romero v. City of Grapevine, 888 F.3d 170, 178 n.3 (5th Cir. 2018); Saucier v. Katz, 533 U.S. 194, 201 (2001); Mullenix v. Luna, 577 U.S. ___, 136 S.Ct. 305, 309 (2015); White v. Pauly, ___ U.S. ___, 137 S.Ct. 548, 551-552 (2017); District of Columbia v. Wesby, ___ U.S. ___, 138 S.Ct. 577, 589-90 (2018); Kisela v Hughes, 138 S.Ct. 1148, 1152 (2018); City of Escondido v. Emmons, 139 S.Ct. 500, 503 (2019). The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the Plaintiffs seek to apply. Wesby at 590.

V. SUMMARY OF THE ARGUMENT

Plaintiffs failed to carry their burden of defeating both prongs of qualified immunity. Morgan, 659 F.3d at 371. *First*, Plaintiffs did not show that Officer Tran used excessive force when he fired shots at decedent Terry because Terry's actions, which included fleeing in an SUV while Officer Tran clung to the outside of the SUV, provided probable cause for Tran to have an objectively reasonable apprehension of immediate serious harm. Therefore, Tran's use of deadly force did not violate Fourth Amendment reasonableness standards. Tennessee v. Garner, 471 U.S. 1, 11 (1985).

Second, Officer Tran's actions were not prohibited by controlling authority or a large body of persuasive authority decided under sufficiently similar facts (Wesby at 590). The several unpublished cases from this Court, decided under facts that are indistinguishable from the present case, held that officers did not violate the Fourth

Amendment by using deadly force. For example see: Davis v. Romer, 600 Fed. Appx. 926 (5th Cir. 2015)(*per curium*, unpublished). Officer Tran therefore did not violate clearly established law. McClendon v. City of Columbia, 305 F.3d 314, 329 (5th Cir. 2010) (en banc); Kisela v. Hughes, 138 S.Ct. at 1152.

Harmon's claim fails because Officer Tran was authorized to use the deadly force he directed at Terry (which he did not direct at Harmon), and therefore Harmon simply did not experience a violation of any rights under the Fourth Amendment. Blair v. City of Dallas, 666 Fed. Appx. 337, 341-42 (5th Cir. 2016). Because Harmon cannot challenge the second "clearly established law" prong of Officer Tran's qualified immunity, his claim fails for that additional reason. The District Court's judgment in favor of Officer Tran must be affirmed.

VI. ARGUMENT & AUTHORITIES

A. Argument for Response Issue No. 1

Response Issue No. 1 – The record shows that Officer Tran had probable cause to apprehend immediate serious harm when he fired at Terry, while Tran clung to the side of the fleeing SUV Terry was driving. Therefore, the District Court correctly held Tran's use of deadly force was reasonable under the Fourth Amendment. (*Germane to Appellants' Issue No. 1).*

1. Excessive Force Claims are Governed by Fourth Amendment Standards

Plaintiffs claim, that Officer Tran used excessive force when he fired at decedent Terry, must start with an analysis of the governing standards for such a claim. Claims of excessive force are required to be analyzed under the Fourth Amendment and its objective reasonableness standard. Graham, 490 U.S. at 388. In

order to state a claim for excessive force in violation of the Constitution, a plaintiff must allege (1) an injury, which (2) resulted directly and only from the use of force that was clearly excessive; and (3) the excessiveness of which was clearly unreasonable. Tarver v. City of Edna, 410 F.3d 745, 751 (5th Cir. 2005). Courts, however, should not second-guess an officer's judgment, should not expect the officer to have followed the most prudent course of conduct as judged by 20/20 hindsight, and should not forget that 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 ...." Graham 490 U.S. at 390.

When an 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. Tennessee v. Garner, 471 U.S. 1, 11 (1985). "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, …the officer would be justified in using more force than in fact was needed." Saucier, 533 U.S. at 205.

The admissions in the Complaint (ROA.186-206), together with Terry's conduct captured on the YouTube Video defeat any claim that the force used was excessive. As the Supreme Court has explained:

> "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to

> effect it…. Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, …however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."

Graham, 490 U.S. at 396, (internal quotes and citations omitted). When evaluating the use of force, the Court must consider all of the circumstances leading up to the moment of the shooting because such circumstances will inform the Court as to the reasonableness of the Officer's decision-making. Romero, 888 F.3d at 177.

2. The Record Demonstrates Probable Cause Existed for Tran to Believe Terry Posed a Threat of Serious Harm

As long as the facts known to Officer Tran establish probable cause that would allow him to believe Terry posed a threat of serious harm, Tran was authorized to use deadly force to stop that perceived threat. Garner, 471 U.S. at 11. Despite their burden, Plaintiffs' Opening Brief does not provide any analysis whatsoever of the probable cause standard.

This Court must not lose sight of the fact that probable cause is not a very high standard. Probable cause means less than evidence that would justify condemnation or conviction. Maryland v. Pringle, 540 U.S. 366, 371 (2003); Illinois v. Gates, 462 U.S. 213, 231 (1983). The Supreme Court recently discussed application of probable cause. Wesby, 138 S.Ct. at 586. The Court stated probable cause is not a high bar, and deals with probabilities, it requires only a probability or substantial chance of

criminal activity, not an actual showing of such activity. Wesby, 138 S.Ct. at 586. As detailed below, Plaintiffs ignore the recognition that probable cause is not a high bar when they assert Officer Tran's use of force was unreasonable for three main reasons: (1) Officer Tran was not in danger; (2) no one else was in danger; and (3) Tran should have taken different action. All three assertions fail.

3. Tran Had Probable Cause to Believe He Was in Danger

(a) Plaintiffs' misleading and incorrect assertion that Tran was not in danger

Ignoring the totality of circumstances facing Tran, Plaintiffs assert Terry was merely an unarmed suspect detained for a potential misdemeanor, who attempted to end a traffic stop by driving away (Opening Brief p. 28). Plaintiffs assert throughout their Opening Brief, that Officer Tran was never in danger because he was never directly in the path of Terry's SUV when Terry fled with Tran clinging to the SUV (Opening Brief throughout and particularly pp. 17-22 and 29-31). Plaintiffs ignore this Court's controlling standard:

> "The relevant law does not require the court to determine whether an officer was in actual imminent danger of serious injury, but rather, whether the officer reasonably believed that the suspect pose[d] a threat of serious harm to the to the officer or others".

Harris v. Serpas, 745 F.3d 767, 773 (5th Cir. 2014). Plaintiffs first assert that because Tran was on the side of Terry's moving SUV, the SUV was not a threat of harm to Tran because – they claim – the existence of a threat generally turns on whether the person is directly in the vehicle's path (Opening Brief p. 19, citing Kirby v. Duva,

530 F.3d 475, 482 (6th Cir. 2008)). Plaintiffs cite a Ninth Circuit case for their central theme that a moving vehicle can only pose a threat to someone who is in the path of the vehicle because they assert only then is he at risk of being struck by it (Opening Brief p. 19, citing Orn v. City of Tacoma, 949 F.3d 1167, 1174 (9th Cir. 2020)). Plaintiffs note the District Court acknowledged Tran was not in the path of Terry's SUV (ROA.350). Plaintiffs repeat their central theme over and over throughout their Opening Brief as if it is a chanted mantra, and as if such chanting can make their theme come true.[9] While Plaintiffs' rely heavily on the Ninth Circuit's Orn case to support their theme, they ignore a more recent Ninth Circuit case recognizing an officer's qualified immunity for fatally shooting a driver when the officer was hanging onto and being dragged by the fleeing vehicle at the time the officer shot the driver. Adame v. Gruver, 819 Fed. Appx. 526 (9th Cir. 2020)(unpublished). The officer was not in the vehicle's path, but the Ninth Circuit recognized the officer was

[9] To support their mantric assertion that Officer Tran was never in danger because he was not directly in the path of Terry's fleeing SUV, Plaintiffs cite numerous cases involving facts that are not like the facts in this case – *none of the cited cases involve an officer holding onto the side of a vehicle as the vehicle flees the scene*. Instead, the common fact-pattern in each of the cases Plaintiffs cite all involve appeals of rulings on officers' dispositive motions asserting qualified immunity, and in each case it was disputed as to whether the officers were directly in the vehicles' paths or whether the vehicles posed danger to others at the time shots were fired. The courts were therefore *required to assume the officers were not in the path of the vehicles*, or that no one else faced danger from the vehicles. These cited cases are as follows: Kirby v. Davis, 530 F.3d 475, 482 (6th Cir. 2008); Orn v. City of Tacoma, 949 F.3d 1167, 1174 (9th Cir. 2020); Lytle v. Bexar County, 560 F.3d 404 (5th Cir. 2009); Smith v. Cupp, 430 F.3d 766, 773-74 (6th Cir. 2005); Vaughn v. Cox, 343 F.3d 1323, 1330 (11th Cir. 2003); Godawa v. Byrd, 798 F.3d 457, 465-66 (6th Cir. 2015); Cowan *Ex. Rel*. Estate of Cooper v. Breen, 352 F.3d 756, 763 (2nd Cir. 2003); Abraham v. Raso, 183 F.3d 279, 293-94 (3rd Cir. 1999); Scott v. Edinburgh, 346 F.3d 752, 757-58 (7th Cir. 2003); Reavis Estate of Cole v. Frost, 967 F.3d 978, 994 (10th Cir. 2020); and Williams v. Strickland, 917 F.3d 763, 770 (4th Cir. 2019).

at risk of falling and being run over by the fleeing suspect's moving car. Adame, 819 Fed. Appx. at 529. Plaintiffs' theme ignores Adame, and requires this Court to ignore facts demonstrated on the YouTube Video which Officer Tran discusses in the following sections.

(b) Plaintiffs ignore portions of the YouTube Video which demonstrate the danger included Terry's possible marijuana intoxication as he fled

The YouTube Video demonstrates the District Court correctly held that Officer Tran would have an objectively reasonable perception of a substantial chance (probable cause) that he was at risk of serious harm as he unwillingly held on to the side of the SUV while Terry feloniously fled from the scene (ROA.348-352). (See Tex. Penal Code § 38.04(b)(1)(B) which establishes the crime of fleeing from an Officer while driving a vehicle).

Terry fled at a time when the District Court recognized Tran had adequate reason to suspect Terry was driving under the influence of marijuana (ROA.350), which is another offense under Texas law. Tex. Penal Code §§ 49.01(2)(A) and 49.04(a). The District Court recognized Terry's suspected marijuana intoxication added to Officer Tran's apprehension of imminent harm and his subsequent reasonable response (ROA.350-352). Plaintiffs barely mention the SUV smelled of marijuana, but they *ignore* the District Court's recognition that this fact must be considered as part of the totality when analyzing the reasonableness of Officer Tran's use of force (Opening Brief pp. 2 and 5). Romero, 888 F.3d at 177.

The District Court recognized that the probable cause analysis of reasonableness for using deadly force on a suspect fleeing in a vehicle depends on the totality of the facts and circumstances of the case, and the relative danger posed by the suspect to the officer or others (ROA.349), citing Lytle v. Bexar County, 560 F.3d 404, 416-17 (5th Cir. 2009).

The District Court did not reach this recognition that Terry was driving under the influence of marijuana in a vacuum (ROA.350). The primary officer (Herlihy) could smell marijuana emanating from the SUV – Plaintiffs admit this in their Complaint (ROA.189 ¶¶ 19, 20). Herlihy states that she smelled marijuana in the SUV, and Terry appears to nod his head in agreement (Herlihy Dashcam 9:06; Herlihy Bodycam 20:18). Tran is present, visible in the bodycam video, and obviously hears this, and is in a position to also smell the marijuana (Herlihy Bodycam 20:18). Shortly after, Terry stated that he had "a doobie" [a marijuana cigarette] (Herlihy Dashcam 9:26; Herlihy Bodycam 20:38). Tran can also be seen in Herlihy's bodycam at the point that Terry admits that he has a doobie (Herlihy Bodycam 20:28-37). A few minutes later, Tran even asked the SUV's occupants if they had smoked them all, and whether there is anymore (marijuana) in the vehicle (Tran Bodycam 27:00-27:05).

According to Plaintiffs, the offense of driving while intoxicated was at most a Class B misdemeanor under Texas Penal Code § 49.04 (ROA.325). However, the courts recognize that an intoxicated driver can be considered to have committed a

crime of violence, and can be considered potentially dangerous while driving. This Court has held that as long as a suspected intoxicated driver was sitting behind the steering wheel of a stopped vehicle, the driver posed a potential danger to officers and others, even while stopped. Brothers v. Zoss, 837 F.3d 513, 519 (5th Cir. 2016). In Brothers, 837 F.3d at 519 n. 12, this Court cited the Seventh Circuit's Smith v. Ball State, 295 F.3d 763, 769 (7th Cir. 2002) case to support this Court's recognition of the danger a suspected intoxicated driver poses to the officers and the public as long as the driver remains behind the steering wheel of his vehicle – even if the vehicle is stopped. In Smith, the Seventh Circuit stated that an officer dealing with a stopped suspected intoxicated driver must have the discretion to remove the driver from the vehicle. "Anything less would allow an unfit driver to retain control of his or her car." Smith, 295 F.3d at 769.

This Court recognized that a motor vehicle can be used as a dangerous weapon, and therefore the suspected offense of driving while intoxicated was properly considered a serious offense. Brothers, 839 F.3d at 519.

Courts have held that driving under the influence can be considered a crime of violence for purposes of sentence enhancement, because that crime presents a serious risk of physical injury to others. U.S. v. De Santiago-Gonzalez, 207 F.3d 261, 264 (5th Cir. 2000); U.S. v. Trejo-Galvan, 304 F.3d 406, 409 (5th Cir. 2002). And finally, a Sixth Circuit case recognized that with one exception, all of the Circuits that had considered whether DWI was a crime of violence for purposes of

enhancement of sentencing guidelines, only one circuit – the Eighth – had concluded that DWI should not be treated as a crime of violence. U.S. v. Veach, 455 F.3d 628, 636-37 (6th Cir. 2006).

When Officer Tran had reason to suspect Terry was under the influence of marijuana, and when Terry engaged the SUV's engine and put it in gear and drove forward, with Tran holding onto the SUV, the potential danger became immediate. (Tran Bodycam 27:00-27:05 and 29:47-29:57). The District Court recognized this danger. (ROA.350-351). The Ninth Circuit recognized an indistinguishable danger. Adame, 819 Fed. Appx. at 529. Plaintiffs completely ignore these facts when they claim that there was no danger to Officer Tran as he held onto the side of the SUV while the potentially marijuana-intoxicated Terry attempted to flee.

(c) Terry's actions demonstrate his determination to feloniously flee

Plaintiffs ignore other facts the District Court considered about Terry's conduct. The District Court recognized "while Terry was unarmed, his actions gave Tran a reasonable apprehension of serious physical harm as a passenger on the fleeing vehicle." (ROA.350). The District Court concluded that Terry's actions in attempting to flee were consistent with evading arrest and potentially driving while intoxicated (ROA.351). The District Court recognized that Tran had used several verbal warnings to try to get Terry to stop the vehicle, but Terry nonetheless continued his actions (ROA.351). The District Court recognized that Terry started the engine and rolled up the windows and began to accelerate the vehicle all while

ignoring Tran's repeated verbal warnings (ROA.351).

The YouTube Video proves that Terry committed these acts. Tran had asked Terry to roll the windows down and Terry had complied (Tran Bodycam 26:51). Tran then calmly asked Terry to cut the engine, and Terry did so (Tran Bodycam 27:18). All of this occurred during a calm discussion between Officer Tran and the SUV's occupants, lasting about three minutes (Tran Bodycam 26:47-29:49).

Several minutes after Terry had complied with Tran's request to cut off the SUV's engine and roll down its windows, suddenly Terry starts to roll the SUV windows back up. Officer Tran immediately yells out "Hey, Hey, Hey, Hey", and Tran reaches with his left hand to grab the passenger side window glass (Tran Bodycam 29:47-29:49) (See screenshots at p. 6 above). Officer Tran then steps onto the SUV's running board as he grabs the window glass with his left hand and reaches into the SUV with his empty right hand (Tran Bodycam 29:49-29:53). Tran then yells "Hey Stop!" while Terry is attempting to start the SUV's engine (Tran Bodycam 29:51-52). Terry ignores Officer Tran's order, and continues starting the SUV's engine (Tran Bodycam 29:53). The engine then engages, and Terry drives forward in the SUV (Tran Bodycam 29:56-57). Terry's actions clearly demonstrate he was very determined to leave the scene even with Officer Tran holding onto the side of the SUV, and despite Tran's orders. When Terry took off with Officer Tran holding onto the side of the SUV, Terry was so determined, he did not heed the danger Officer Tran also faced from other vehicles. The YouTube video shows that

a vehicle was approaching in the oncoming traffic lane at the moment Terry took off (Herlihy Dashcam 12:47-12:49). It was only after Officer Tran had repeatedly yelled at Terry, and after Tran had given an order which Terry ignored, and after the SUV began moving forward, that Tran first fired shots (Tran Bodycam 29:57-29:59).

(d) Terry subjected Officer Tran to deadly danger by fleeing with Tran holding onto the SUV

While it is true that Tran was not directly in the path of the SUV, there is no doubt that by holding onto the moving SUV, Tran was certainly immediately adjacent to the trajectory of the SUV. He was certainly at great danger of being struck by the SUV if he had either fallen from it or jumped off of it when it began moving. Adame, 819 Fed. Appx. at 529. The series of screenshots from the YouTube Video show how frighteningly close Tran was to the path of the SUV when he did finally fall from it, and he rolled immediately adjacent to the SUV's moving wheels. (See this Brief's page 8 with nine screenshots.) While events shown in the eight screenshots from Tran's Bodycam occur after Officer Tran fired the shots, he certainly would have faced the same danger if he had fallen off before firing shots (or jumped off as Plaintiffs suggested) (Opening Brief pp.26-27). The YouTube video shows the point when Officer Tran did fall, and Tran bounces and rolls on the concrete street before he stands up. (Herlihy Dashcam 12:58-13:01).

Any reasonable person should share the common knowledge that riding on a moving vehicle can lead to a person falling off, and being killed or seriously injured.

The vehicle the person is riding on can strike and kill a person who falls or jumps off the vehicle. In fact, an October 12, 2018 WFAA Channel 8 news story reported the death of a woman who was thrown from a car after she climbed onto it in an effort to thwart a robbery. The car she was riding on reportedly ran over her.[10]

Courts have addressed the dangers passengers face when riding on the outside of a moving vehicle. A Texas court rejected a products liability claim against a manufacturer of a pickup truck when the person seriously injured by falling out of the bed of the moving truck asserted that the manufacturer should have placed a warning on the truck. Roland v. DaimlerChrysler Corp., 33 S.W.3d 468, 470 (Tex. App. – Austin 2000). The Roland Court discussed the fact that it should be immediately apparent to an ordinary and reasonable observer that there is a potential for ejection from the bed of a pickup truck when one is not restrained, and the Court firmly believed people have a sufficient intuitive grasp of the basic laws of physics so that the dangerous consequences of a vehicle's sudden start, stop, or turn are understood and appreciated as a matter of common knowledge. The Court had no difficulty recognizing that in the face of such common knowledge, **riding unrestrained on the outside of a pickup truck constituted an open and obvious danger as a matter of law**. Roland, 33 S.W.3d at 470-71.

To protect minors from the dangers of riding on the outside of a moving

[10] A link to that news report is as follows: https://www.wfaa.com/article/news/crime/woman-dies-after-being-flung-from-suspected-robbers-car-outside-irving-motel/287-603838007.

pickup truck, Texas has adopted a statute that makes it an offense for any person to operate an open bed pickup or flatbed truck when a child younger than 18 years of age is occupying the bed of the truck. Tex. Transp. Code § 545.414. Even falling from a golf cart being driven on a concrete road can result in serious injuries. See Jenks v. New Hampshire Motor Speedway, 841 F.Supp.2d 533, 535 (N.H. 2012). It is certainly common knowledge that riding on the outside of a moving vehicle is an open and obvious danger for the simple reason that the rider who falls off of the moving vehicle faces serious injuries from striking the pavement – even if the rider is not hit by that moving vehicle or another vehicle on the roadway.[11]

This Court need look no further than a pair of Fourth Circuit cases Plaintiffs cite to understand how a court correctly applies the law when an officer is not in the direct path of a moving vehicle, but instead is immediately adjacent to trajectory of the vehicle as was Tran here. Plaintiffs cite Waterman v. Batton, 393 F.3d 471, 482 (4th Cir. 2005) (Opening Brief p. 34). The Fourth Circuit found there was no Fourth Amendment violation when officers shot a vehicle's driver because even though the officers were not in the immediate path as the vehicle headed toward them, they were only slightly out of its path and could have been hit "in a second" if the vehicle had

[11] In Brothers, the driver of the stopped pickup truck fell to the street from his driver's seat when officers pulled him from his stopped pickup. The driver suffered serious injuries simply from striking the pavement. 837 F.3d at 516, 519. Under the specific circumstances in Brothers, involving a fall from a stopped vehicle, this Court considered the serious injuries unforeseeable. Nonetheless, the case demonstrates that serious injuries can result from an uncontrolled fall to pavement.

only made a slight change in its trajectory. 393 F.3d at 482.

Plaintiffs also cite Williams v. Strickland, 917 F.3d 763, 769 (4th Cir. 2019) (Opening Brief p. 35). In Williams, the Fourth Circuit held that a Fourth Amendment violation had been stated by the Plaintiffs because there was a material fact dispute about whether the officers were or were not either in the path of a vehicle or immediately adjacent to the trajectory of the moving vehicle when they fired. However, the Fourth Circuit recognized that under its earlier analysis in the Waterman case, an officer immediately adjacent to the trajectory of a moving vehicle does not violate the Fourth Amendment when he shoots the driver. 917 F.3d at 769. There is no doubt that Tran, holding onto the side of the moving SUV, was immediately adjacent to the path of the SUV and could have been run over or hit by the SUV whether he fell from it or jumped off of it (as Plaintiffs suggest he should have done). (See screenshots at p. 8 and Tran Bodycam 30:07-30:09.)

The record demonstrates that an objectively reasonable officer in Officer Tran's shoes could have suspected Terry of the offenses of driving while intoxicated by marijuana, and fleeing to evade arrest, and doing so in a very determined manner after he had been ordered not to do so. Tran certainly had probable cause to believe he faced an immediate risk of serious injury or death.

(e) Courts uniformly recognize Officers do not violate the Fourth Amendment when firing at the driver of a fleeing vehicle while the Officer is riding on the outside of the vehicle

Plaintiffs cite not a single case in which a court held that an officer violated the Fourth Amendment by shooting at the driver of a fleeing vehicle that fled while the officer was holding onto the vehicle. Diligent research by the undersigned has not located a single case wherein a court held that an officer violated the Fourth Amendment by using deadly force directed at the driver of a fleeing vehicle who fled while the officer was holding onto the outside of the moving vehicle. The cases in which officers are holding onto a vehicle, while the vehicle flees, uniformly hold that the officers did not violate the Fourth Amendment when the officers fired shots at the driver.

In the same federal district and division (Northern District of Texas, Fort Worth Division) in which the subject incident happened, another District Court considered a case involving a police officer holding onto a vehicle as it was fleeing down the street. Woolery v. City of Mineral Wells, 2005 WL 755762 *6 (N.D. Tex. 2005). That District Court held the officer had not violated the suspect's constitutional rights under Fourth Amendment standards when the officer fired into the moving vehicle as he rode on the outside of the vehicle, because the officer reasonably feared for his life. Woolery, 2005 WL 755762 *5-6.

More recently, in another case in the Northern District of Texas, Fort Worth Division, a police officer found himself in circumstances that are indistinguishable

from the facts in the present case. Davis v. Romer, 600 Fed. Appx. 926 (5th Cir. 2015) (per curium, unpublished). In Davis, police officers saw the driver of a Ford Expedition (a large SUV similar to the SUV in this case) commit a number of traffic infractions. An officer made a traffic stop, and determined that he would arrest the driver. When the driver refused to exit the vehicle, the officer reached inside to try to open the vehicle. Davis, 600 Fed. Appx. at 927. With the officer's arm inside the SUV, the driver started driving toward a service road. After the vehicle started moving, the officer jumped onto the SUV's running board. (In contrast, here Officer Tran was already standing on the running board when he tried reaching inside the vehicle – which was not moving at the time Tran first reached inside.) Davis, 600 Fed. Appx. at 927-28. In Davis, the officer then drew his handgun and fatally shot the driver. This Court considered these facts – indistinguishable from the present case – and this Court concluded that the Davis Plaintiffs had not shown the officer's conduct was objectively unreasonable under Fourth Amendment standards. Davis, 600 Fed. Appx. at 930. This Court focused on the fact that the officer was on the running board of the fleeing vehicle when he fired the fatal shots. In the face of that undisputed fact, this Court said:

> "We therefore conclude that at the time of the shooting, [the officer] had reason to believe that there was a serious threat of physical harm to him."

This Court went on to reject the Davis Plaintiffs' attempt to rely on Garner because at the time the officer fired shots, it was undisputed he was standing on the running

board of the moving vehicle as it was being driven, and the suspect's actions clearly put the officer in harm's way, and there was a very real danger the officer would sustain serious injury or death. Davis at 931. Here it is undisputed Officer Tran had ordered Terry not to start the SUV. It is undisputed Tran yelled at driver Terry to stop when Terry was trying to turn on the vehicle's engine. It is undisputed that Tran was standing on the SUV's running board before the vehicle began moving, and Tran reached his right arm inside the vehicle before the SUV began moving. (Tran Bodycam 29:47-29:56). And finally, after these undisputed events, Tran did not fire shots at the driver Terry, until Terry had turned on the SUV's engine, put it in gear, and began driving forward. (Tran Bodycam 29:57). Tran clearly did not violate Fourth Amendment standards.

Another case from this Court involved police officers with arms inside the window of a vehicle that was driven with the officers dragged as unwilling passengers on the outside of the vehicle. Mazoch v. Carrizales, 733 Fed. Appx. 179, 180-81 (5th Cir. 2018) (per curium, unpublished). In that case, the suspect drove his vehicle only about 20 feet with the officers' arms trapped inside. The driver stopped his vehicle, made no additional movements and kept his hands on the steering wheel, but one of the officers immediately fired at the driver and hit him. Mazoch, 733 Fed. Appx. at 180-81. This Court concluded that the officer who fired had reason to believe that her partner was trapped under the stopped vehicle when she fired. This Court held there was no violation of Graham's Fourth Amendment reasonableness

standards. Mazoch, 733 Fed. Appx. at 182, citing Graham, 490 U.S. at 396.

The Mazoch case defeats positions that are central Plaintiffs' mantric theme that Tran faced no danger. *First*, Plaintiffs have complained that Tran fired too quickly after Terry's SUV had begun moving, and had only traveled a short distance. But in Mazoch, the suspect's vehicle had only moved about 20 feet before the officer fired. *Second*, Plaintiffs also have claimed that because Tran was on the outside of the vehicle and not in its path of travel, he faced no danger. But in Mazoch, this Court had no difficulty recognizing the danger the officers faced. The officer who fired a shot alleged that she had fallen about 10-15 feet to the side of the vehicle. The justification for her shot, after the car stopped, was her fear that her partner had ended up underneath the car. Mazoch, 733 Fed. Appx. at 181. Here, Tran clearly could have ended up beneath the SUV. The screenshots at page 8 of this Brief demonstrate just how close Tran was to the moving SUV's wheels as he fell.

This Court considered another fact situation indistinguishable from the present case. Owens v. City of Austin, 259 Fed. Appx. 621 (5th Cir. 2007). In Owens, police officers made a traffic stop of a car. 259 Fed. Appx. at 622. The driver made a complete stop but would not turn off the engine. The officer ordered the driver to open his door, but the driver could not do so because his door was blocked. When the officer ordered the driver to get out of the car, the driver refused. The officer then reached into the car with his left hand, while holding his handgun in his right hand. While the officer's left arm, and also possibly his right were inside the car, the driver

accelerated and the officer was dragged when the car moved. While being dragged, the officer fired shots killing the driver. 259 Fed. Appx. at 622-23. This Court held that considering the fact that the officer was dragged by a moving vehicle, his use of force was not unreasonable under Fourth Amendment standards. Owens, 259 Fed. Appx. at 624. Here, Officer Tran was holding onto the window of Terry's SUV with his left hand, and initially reached inside the SUV with his empty right hand. Officer Tran did not reach for his handgun until it was clear that Terry was disobeying Tran's orders and turning on the engine of the SUV. Officer Tran only fired when Terry's SUV took off with Tran holding on. Plaintiffs try to distinguish the Owens case based on their assertion that the officer's arm was trapped in the car (Opening Brief p. 21). However, this Court held that it was immaterial whether the officer's arm was trapped inside the vehicle due to the driver holding the door shut or due to the forward momentum of the vehicle. Owens, 259 Fed. Appx. at 624 n.1.

The YouTube Video demonstrates Officer Tran was an unwilling passenger on the outside of Terry's SUV as Terry attempted to feloniously flee, at a point when Officer Tran reasonably suspected Terry could be under the influence of marijuana, and all of this took place on a four-lane busy street. Tran reasonably suspected he faced an imminent risk of serious harm. Garner, 471 U.S. at 11. His use of deadly force therefore did not violate the Fourth Amendment objective reasonableness standards established by Graham, 490 U.S. at 387, 394-95.

4. Officer Tran Had Probable Cause to Believe Terry Was a Danger to Others

Plaintiffs rely heavily on Lytle v. Bexar County, 560 F.3d 404 (5th Cir. 2009) for their proposition that when Terry feloniously fled, he did not pose a danger to anyone else (Opening Brief pp. 22-26). The facts controlling this Court's decision in Lytle were that the suspect's vehicle had fled from police officers, collided with a third party's car, and after the collision, and while the police officer's pursuing vehicle was stopped, the suspect reversed his vehicle to free itself from the collision, and the suspect began to drive his vehicle away. After that point, when the suspect had driven about 3 or 4 houses away from the officer, there were no bystanders in the path of the vehicle, and neither the suspect's vehicle nor any of the occupants posed a threat of harm to the officer or anyone else. The officer fired at the vehicle without warning. Lytle, 560 F.3d at 407, 409. This Court had no choice but to hold, under the controlling facts, that the officer's use of force was unreasonable because the officer was a safe distance from the vehicle, there were no bystanders in danger, and no one else faced a danger. Lytle at 413.

It is important to recognize that if the officer had fired while the suspect's vehicle was backing away from the point of the collision, or had fired *immediately after the suspect vehicle was backing up,* this Court stated the officer would likely be entitled to qualified immunity due to the threat of immediate and serious physical harm the officer would have been facing. Lytle at 412.

The Sixth Circuit considered a case similar to this case. Williams v. City of Grosse Point, 496 F.3d 482, 486-87 (6th Cir. 2007). Officers stopped Williams' car, and when Williams tried to drive away, the officer stuck his handgun inside Williams' car, and grasped Williams' car. Williams rolled over a curb, the officer lost his grasp on the car and fell. In the next instant the officer shot Williams. 496 F.3d at 486-87. Even though the officer's video did not show any other pedestrians or vehicles in the camera view, the Court agreed that Williams' actions caused the officer to have a reasonable fear that Williams posed an immediate threat to officers, pedestrians or other vehicles in the immediate vicinity. 496 F.3d at 487. The Sixth Circuit held that Williams' actions showed Williams was not intimidated by police presence, he was actively avoiding arrest, and he showed reckless disregard for the safety of all those around him. *Id.*

Terry's actions here were similar to, but more dangerous than the suspect driver's actions in Williams. Terry, who could have been under the influence of marijuana, disobeyed Tran's orders and feloniously fled while Tran was holding onto the outside of Terry's moving SUV. It was only at that point that Tran fired shots[12]. During the time of the traffic stop, 47 vehicles drove past Terry's SUV

[12] Ignoring this Court's comments in Lytle, 560 F.3d at 412 about the officer waiting too long to fire, the Plaintiffs argue that Officer Tran fired too soon because he fired as soon as Terry began moving the SUV. The officer in Williams likewise fired the instant after he lost his grasp on the fleeing vehicle, without violating the Fourth Amendment by instantly firing. 496 F.3d at 487. This Court recently affirmed an officer's immediate use of deadly force against the driver of a pickup truck who was attempting to flee after ignoring the officer's orders and backed up striking the officer's partner. Goldston v. Anderson, 775 Fed. Appx. 772, 773 (5th Cir. 2019).

(Herlihy Dashcam 2:39-13:02). At the very moment Terry began moving the SUV, while Officer Tran was clinging to the outside, another vehicle drove past in the oncoming lane (Herlihy Dashcam 12:47-12:49). Shortly after Tran had fallen off the SUV, at a point when Terry's SUV had crossed all four lanes of California, driven onto the grass, and veered back across California (after he had been shot), another vehicle is approaching on California while Terry's SUV is on the wrong side of the road (Herlihy Dashcam 13:04-13:05).

At any moment, while Terry was dangerously fleeing, and potentially under the influence of marijuana, he could have struck another vehicle. Additionally, Officer Tran was aware that Officer Herlihy was in the immediate vicinity. The Herlihy Dashcam also shows houses with driveways connected to the street are located along the right-hand side of California, and both sides of California have paved sidewalks. (Herlihy Dashcam 2:32-2:39 and 12:47-13:01). At any time, pedestrians or other vehicles could have entered the scene and would have been exposed to Terry's reckless felonious fleeing, potentially while Terry was under the influence of marijuana. The District Court correctly determined that at that point,

> "…Tran is reasonably apprehending imminent danger to himself based on Terry's noncompliance and the general danger of the fleeing vehicle. Accordingly, Tran's use of deadly force was not unreasonable to this threat." (ROA.351).

Tran's use of force did not violate the requirements of Graham, 490 U.S. at 387, 395, or Garner, 471 U.S. at 11.

5. Tran Was Not Required to React Differently

Plaintiffs argue that because Tran allegedly had alternative options available short of shooting, his actions therefore amounted to an unreasonable response to the threat he perceived. (Opening Brief pp. 26-27). Plaintiffs then provide several suggested hypothetical actions.

First, Plaintiffs assert that Tran should have simply stepped away from the SUV (Opening Brief pp. 26-27), and they then reference distinguishable cases from the Ninth and Sixth Circuits. Appellants cite Orn, 949 F.3d at 1167; Kirby, 530 F.3d at 482; and Godawa v. Byrd, 798 F.3d 457, 465-66 (6th Cir. 2015). Notably, Appellants do not cite any Fifth Circuit case. In Orn, 949 F.3d at 1175-1176, the vehicle was moving slowly, and was not a danger to the officer until he stepped into its path. Had he stayed put or stepped out of the way he would not have been in danger. In both Kirby, 530 F.3d at 482 and Godawa, 798 F.3d at 465-66, the drivers never tried to drive at the officers, the vehicles were moving slowly and the drivers were avoiding other vehicles and the officers – who then stepped into the paths and fired. In all three cases the courts had to accept versions of facts that asserted no other person was in danger. But here, if Officer Tran stepped down from the moving SUV, that itself would be dangerous. (See § VI.A.3(d) and screenshots at page 8 of this Brief).

Plaintiffs briefly mention the pending state case against Officer Tran for alleged criminally negligent homicide (ROA. 191 and Opening Brief pp. 7-8), but

make no arguments about, and do not describe, the actual content of the Indictment in Case No. 1593857, in the 213th District Court of Tarrant County, Texas. The screenshot of a portion of the Indictment displays the charge of Tran's alleged negligence:

> THAT BAU NGOC TRAN, HEREINAFTER CALLED DEFENDANT, ON OR ABOUT THE 1ST DAY OF SEPTEMBER 2018, IN THE COUNTY OF TARRANT, STATE OF TEXAS, DID THEN AND THERE, WITH CRIMINAL NEGLIGENCE, TO-WIT: BY PLACING HIMSELF ON THE SIDE OF OSHAE MARQUIS TERRY'S VEHICLE OR BY PLACING HIMSELF IN A POSITION OF EXPOSURE TO IMMEDIATE THREAT OF DEATH OR SERIOUS BODILY INJURY WHEN THERE WERE OTHER REASONABLE ALTERNATIVES AVAILABLE OR BY DISREGARDING THE ARLINGTON POLICE DEPARTMENT'S GENERAL ORDERS , AND AS A RESULT OF SAID CRIMINAL NEGLIGENCE CAUSE THE DEATH OF AN INDIVIDUAL, OSHAE MARQUIS TERRY, BY SHOOTING HIM WITH A FIREARM,

Screenshot of Portion of Indictment in Pending State Case No. 1593857

There is no actionable violation of federal law for alleged negligence in creating a situation where the danger of such a mistake results from the negligence. Young v. City of Killeen, 775 F.2d 1349, 1353 (5th Cir. 1985). A failure to follow a departmental policy does not give rise to a constitutional violation. City and Co. of San Francisco v. Sheehan, 135 S.Ct. 1765, 1777 (2015). The Supreme Court rejected an argument that a defendant's actions cannot be considered to be objectively reasonable, and therefore that defendant loses qualified immunity for violating a statute – unless the statute itself is the basis for the cause of action sued upon. Davis v. Scherer, 468 U.S. 183, 193-94 (1984). But Plaintiffs make no such claim in the District Court, and no such arguments in their Opening Brief, and therefore cannot lay behind a log to do so in a Reply Brief. U.S. v. Brown, 305 F.3d 304, 307 n. 4 (5th

Cir. *cert. denied* 493 U.S. 932 (1989)); U.S. v. Prince, 868 F.2d 1379, 1386 (5th Cir. 1989).

Subsequent to Young, this Court has repeatedly rejected arguments that an officer who allegedly created the danger by his actions, cannot not use deadly force when he then faces an imminent threat of serious harm. In 1992, another Arlington police officer stopped a vehicle, but allegedly made a tactical error when he exited his vehicle and stood in the street near the front of a suspect's vehicle when there was no exit from the street. An internal investigation indicated that such a tactical error invited the truck driver to aim his vehicle at the officer. Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir. 1992), cert. denied 506 U.S. 973. This Court explained that even a negligent departure from established police procedure does not amount to a constitutional violation. Fraire, 957 F.2d at 1276. See also Marlbrough v. Stelly, 814 Fed. Appx. 798, 803 (5th Cir. 2020) citing Fraire.

The Supreme Court rejected an argument that an officer's use of force should be deemed unreasonable under Fourth Amendment standards if the officer allegedly intentionally or recklessly provoked a violent confrontation. County of Los Angeles v. Mendez, 137 S.Ct. 1539, 1546-47 (2017). This Court applied the Mendez analysis to reject a plaintiff's claim officers recklessly created the circumstances leading up to the moment they used force, and therefore acted unreasonably by using force. Hale v. City of Biloxi, 731 Fed. Appx. 259, 263 (5th Cir. 2018). More recently, this Court has rejected a similar argument that an officer created a danger by trying to

intercept a suspect's vehicle, and therefore having created the danger, he could not use deadly force to stop the danger. This Court said such an argument is wholly without merit. Thompson v. Mercer, 762 F.3d 433, 439-440 (5th Cir. 2014). This Court stated it has consistently rejected similar reasoning. In Mercer, this Court also rejected an assertion that law enforcement was constitutionally required to use lesser efforts (than deadly force) to stop a vehicle. 762 F.3d at 440.

In yet another case, this Court cited Fraire and rejected an argument that officers improperly used deadly force because they were negligent in approaching a stopped vehicle instead of remaining behind cover, and by placing themselves in a position of vulnerability, they could not reasonably use deadly force. Carnaby v. City of Houston, 636 F.3d 183, 188-89 (5th Cir. 2011). This Court held the officer's use of deadly force was reasonable.

Plaintiffs next assert Officer Tran should have given some sort of additional warning to Terry before shooting (Opening Brief p. 27). Plaintiffs cite Cole v. Carson, 935 F.3d 444, 453 (5th Cir. 1999, *en banc*); and Garner, 471 U.S. at 11-12. But in Garner, there were no warnings and no orders given by the officer who shot an unarmed, non-dangerous and nonthreatening teenager in the back of the head merely because the teenager was running away on foot. In Cole, there was a fact dispute, as to whether the suspect knew the officers were present and whether the warning was timely.

Here, Terry knew Officer Tran was present, he had talked to Tran for several

minutes (Tran Bodycam 26:47-29:49). Officer Tran repeatedly yelled at Terry while Terry engaged the SUV's engine (Tran Bodycam 29:47 – 29:54). Officer Tran yelled "stop" several seconds before firing (Tran Bodycam 29:54), and Tran only fired after Terry had ignored Tran repeatedly yelling at him (Tran Bodycam 29:57-29:59).

Plaintiffs' only specific suggestion about any additional warning is their suggestion Officer Tran could have fired warning shots (Opening Brief p. 27). This suggestion is based on comments the District Court made. (See Opening Brief p. 27, citing the District Court at ROA.350, which in turn cited Woolery, which involves an incident that took place 18 years ago. Woolery, 2005 WL 755762 *2). Although the Woolery court did not characterize the first shots the officer fired as warning shots, the District Court in this case characterized the officer as firing warning shots, when he fired through the roof of the car into an area that was not the driver's seat (ROA.350 compared to Woolery *2).

The Plaintiffs do not make any suggestion as to where Tran should have pointed his handgun if he was to fire warning shots. It is common knowledge that law enforcement agencies throughout the nation issue statements prior to each New Year's Eve and each July Fourth celebration – pleading with the public not to celebrate by discharging firearms into the air because doing so exposes innocent people to danger. It is common knowledge that every year there are reports of innocent people being hit by random gunshots or hit by falling bullets that have been fired into the air to "celebrate" these holidays.

It is preposterous for Plaintiffs to suggest that because Tran did not first fire some sort of random unaimed "warning shots", while he clung to the outside of the moving SUV, Tran acted unreasonably when he fired directly at Terry to immediately stop a deadly threat. At any rate, considering the rapidly moving events, the fact that Tran had repeatedly yelled at Terry and ordered him to stop, there certainly was no Constitutional mandate that Officer Tran take some other step before stopping the deadly threat he reasonably believed Terry created. The District Court did not err by holding that there was no Fourth Amendment violation.

B. ARGUMENT FOR RESPONSE ISSUE NO. 2

Response Issue No. 2 – The District Court correctly determined that Officer Tran did not violate Harmon's rights under the Fourth Amendment's ban on unreasonable force because when Officer Tran fired at and intentionally struck only the SUV's driver while Harmon was a passenger, the driver's actions caused Tran to reasonably apprehend serious physical harm. (*Germane to Appellants' Issue No. 2).*

In this appeal, Harmon's Issue No. 2 is based on an entirely new argument that Harmon was "seized" by Tran's actions (Opening Brief pp. 37-43). In the District Court Harmon claimed he experienced psychological harm because of his proximity to Terry when Officer Tran pointed his handgun at Terry and fired shots at Terry (ROA.190, 203). The District Court correctly recognized that Harmon was seeking relief as a bystander (ROA.352-354). Harmon's new arguments are waived. AG Acceptance, 564 F.3d at 700. Harmon's claims also fail for the reasons explained by the City of Arlington. See Arlington's Brief § IV.D, which Officer Tran adopts by reference. Fed. R. App. P. 28(i)).

1. Harmon Ignores the Existence of Probable Cause for Tran to Apprehend Serious Physical Harm

Harmon's only argument on appeal is his new argument that Officer Tran's use of force directed at Terry must be considered a "seizure" of Harmon. (Opening Brief pp. 37-43). Harmon's argument ignores his burden of defeating the first prong of Officer Tran's qualified immunity. Morgan, 659 F.3d at 371. To carry this burden, Harmon must establish that Officer Tran's actions violated the Fourth Amendment's reasonableness standard. Graham, 490 U.S. at 393-94. The foregoing argument for Response Issue No. 1 establishes Officer Tran had probable cause to apprehend an immediate risk of serious physical harm (ROA.348-352), and his use of deadly force directed at Terry was therefore reasonable under the Fourth Amendment. That argument is incorporated herein by reference.

Plaintiff Harmon cites this Court's case – Blair v. City of Dallas, 666 Fed. Appx. 337, 341-42 (5th Cir. 2016) (Opening Brief p. 38). This Court agreed with the Circuits which typically concluded that:

> "Where the seizure is directed appropriately at the suspect, but inadvertently injures an innocent person, the innocent victim's injury or death is not a seizure that implicates the Fourth Amendment because the means of the seizure were not deliberately applied to the victim."

Blair, 666 Fed. Appx. at 341. This Court then cited several other Circuit Court decisions in which the Courts held no seizure occurred when police officers shot at suspects and hit hostages – when the officers had reasons to fire at the suspects, that were sound under Fourth Amendment standards. See Blair, citing: Milstead v.

Kibler, 243 F.3d 157, 163-64 (4th Cir. 2001), abrogated on other grounds by Pearson v. Callahan, 555 U.S. 223 (2009); Childress v. City of Arapaho, 210 F.3d 1154, 1157 (10th Cir. 2000); Claybrook v. Birchwell, 199 F.3d 350, 354, 359 (6th Cir. 2000); Schaefer v. Goch, 153 F.3d 793, 796-97 (7th Cir. 1998); Medeiros v. O'Connell, 150 F.3d 164, 169 (2nd Cir. 1998); and Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 795 (1st Cir. 1990).

Harmon next cites Jamieson by and through Jamieson v. Shaw, 772 F.2d 1205, 1210 (5th Cir. 1985) and Flores v. City of Palacios, 381 F.3d 391, 397 (5th Cir. 2004) (Opening Brief p. 38). In both of those cases, this Court recognized that the controlling records raised a jury issue as to whether the officers had violated Fourth Amendment standards, when they used deadly force to stop the drivers of fleeing vehicles. In Jamieson, this Court stated that the Complaint was insufficient to allow a court to evaluate whether the need for a deadly roadblock met the Constitutional standards for directing such force at the driver. Jamieson, 772 F.2d at 1211. In Flores, this Court held there was a fact issue as to whether the officer would have a reasonable belief that the driver posed an immediate threat of serious injury when the officer fired into the back of the fleeing vehicle. Flores, 381 F.3d at 393, 399.

Harmon also tried to rely on yet another inapplicable case: Petta v. Rivera, 143 F.3d 895 (5th Cir. 1998). In Petta, this Court held that an officer lacked probable cause to fear an immediate risk of serious harm when he fired shots at a fleeing vehicle. Therefore, the vehicle's passengers would be entitled to bring a Fourth

Amendment excessive force seizure claim, even if they were not hit by the gunshots. Petta, 143 F.3d at 897-98, 900.

In the Jamieson, Flores and Petta cases, the officers did not have probable cause to believe the distant vehicles posed an immediate risk of serious harm that would authorize the officers' seizure by deadly force. Here, because the District Court correctly determined the existence of probable cause to believe the driver Terry posed an immediate risk of serious harm, Harmon simply cannot show that he was the subject of an improper seizure under the Fourth Amendment, regardless of whether or not he was hit by any gunshot Officer Tran fired at Terry.

Additionally, neither in the District Court, nor in this Court has Harmon made any claim that Officer Tran intentionally directed force at Harmon or that Tran fired indiscriminately at the entire SUV from a distance. In fact, Plaintiffs complain that Officer Tran did not try to stop Terry's flight by firing warning shots (Opening Brief p. 27). If Officer Tran had fired such warning shots, or indiscriminately aimed shots from a distance at the entire SUV, then this case would be somewhat similar to this Court's Lytle or Petta cases. See Lytle, 560 F.3d at 415-16; Petta, 143 F.3d at 900.

2. Harmon Was Not Seized by Officer Tran

The facts in this case are undisputed – Officer Tran intentionally fired at and struck only Terry. Because Officer Tran did not intentionally direct his force at Harmon, and because Officer Tran did not indiscriminately fire at a fleeing vehicle from a distance, the District Court correctly recognized Harmon was not a subject

of Officer Tran's use of force, and therefore Harmon was at most a bystander to the use of force directed exclusively at Terry. Harmon therefore cannot establish a Fourth Amendment claim (ROA.352-354).

Harmon disagrees with the District Court's treatment of bystander cases, and tries to distinguish the present case from the bystander cases (Opening Brief pp. 40-43). The District Court recognized that when bystanders were not the target of an officer's gunfire aimed a suspect in a vehicle, and the bystander was not hit, they were at most witnesses or bystanders and simply could not recover. Grandstaff v. Borger, 767 F.2d 161, 172 (5th Cir. 1985) (ROA.352). Harmon recognizes that Grandstaff states the controlling rule (Opening Brief pp. 42-43).

Harmon then tries to distinguish the District Court's analysis of the case Coon v. Ledbetter, 780 F.2d 1158, 1160-61 (1986) (ROA.352). Due to errors in the jury charge, this Court reversed and remanded for a new trial on liability and damages for claims of deprivation of Constitutional rights asserted by only two of the Plaintiffs – the suspect father and his daughter. Ledbetter, 780 F.2d at 1163-65.

The father and daughter were occupants of a trailer when police officers directed a shotgun blast at the trailer, when they knew that both the suspect and his daughter occupied the trailer, and there was apparently no suggestion of the father posing an ongoing danger. This Court rejected the wife's claims because she was not inside the trailer at the time shots were indiscriminately fired at the trailer - the wife only witnessed this take place. Ledbetter, 780 F.2d at 1160-61.

Despite Harmon's efforts to claim that his role is more like that of the daughter in Ledbetter and not the wife, his assertion fails. Officer Tran is not accused of, nor does the video show that he indiscriminately fired shots at Terry's SUV – instead Tran directed his fire at Terry, not Harmon, and the shots struck only Terry. The District Court did not err by holding Harmon failed to establish a Fourth Amendment violation.

C. ARGUMENT FOR RESPONSE ISSUE NO. 3

Response Issue No. 3 – Tran has qualified immunity to Plaintiffs' claims because when Tran reasonably apprehended an immediate risk of serious harm from Terry, the driver of the SUV Harmon occupied as a passenger, and Tran then acted to stop the risk by firing at and striking only the driver, no controlling authority held that the Fourth Amendment prohibited Tran's actions. (*Germane to Appellants' Issue No. 1 and 2).*[13]

1. Harmon Does Not Challenge the Clearly Established Law Prong of Qualified Immunity

Plaintiffs' only express discussion of the second prong of qualified immunity – which requires Plaintiffs to show a violation of clearly established law – is limited to the claim asserted on behalf of decedent Terry's representative (Opening Brief

[13] Despite Plaintiffs adding a footnote that allegedly preserves the right to challenge the very existence of the qualified immunity doctrine in the Supreme Court (Opening Brief p. 37 n. 8), nowhere in the District Court proceedings did the Plaintiffs make such a challenge, and they therefore waive any such challenge for any appellate proceeding. AG Acceptance Corp., 564 F.3d at 700; Bailey v. Shell Western E & P, 609 F.3d 710, 722 (5th Cir 2010). The Amicus Brief is of no consequence, it makes arguments attacking immunity when Plaintiffs cannot do so, and which this Court cannot adopt as an intermediate court. See Cole v. Carson, 935 F.3d 444, 471 (5th Cir. 2019) (en banc) (Judge Willet dissenting). Officer Tran adopts by reference the City of Arlington's briefing opposing the Cato Institute's Amicus Brief (See Arlington's Brief § IV.E). Fed. R. App. P. 28(i).

pp. 28-37). Plaintiff/Appellant Harmon simply does not attack the clearly established law prong of qualified immunity applicable to his claim. Officer Tran squarely asserted that the requirements of the "clearly established law" prong of qualified immunity defeated Harmon's claim because there was no controlling authority holding that when Tran directed force at Terry, but not at Harmon, Harmon would later be able to assert a claim against Tran (ROA.294). Although the District Court did not address this prong (ROA.355), Officer Tran is entitled to argue this prong of qualified immunity as an alternate basis for affirming the District Court's holding in his favor. Ratliff v. Aransas County, 948 F.3d 281, 285 (5th Cir. 2020); Cuvillier v. Taylor, 503 F.3d 397, 401 (5th Cir. 2007). The Supreme Court noted that the Circuits disagree as to whether a passenger in Harmon's situation would even be able to assert a Fourth Amendment claim when the officer intended to use force only with the intent of stopping the driver. Plumhoff v. Rickard, 572 U.S. 765, 778 n. 4 (2014). Without Harmon citing any controlling precedent, and with disagreement in the Circuits, the law certainly **was not** clearly established to prohibit Officer Tran's actions. Brosseau v. Haugen, 543 U.S. 194, 199-200 (2004).

Harmon has not cited a case holding, under facts similar to this case, that an officer using deadly force directed only at a driver, while the officer is holding onto the outside of a fleeing vehicle, violated the rights of a passenger who was not even touched by the deadly force. Such a failure dooms Harmon's claim. Vann v. City of Southaven, 884 F.3d 309, 310 (5th Cir. 2018) (*per curium*). Harmon must overcome

both prongs of Officer Tran's qualified immunity. He cannot overcome this prong. Officer Tran's immunity is preserved. Morgan, 659 F.3d at 371.

2. Plaintiffs Fail to Show a Violation of Clearly Established Law

Clearly established law is determined by directly controlling authority either from the Supreme Court or this Court. McClendon v. City of Columbia, 305 F.3d 314, 329 (5th Cir. 2010) (en banc); Wilson v. Layne, 526 U.S. 603, 617 (1999). In the absence of directly controlling authority, the Court may look to a consensus of cases of persuasive authority. McClendon, 305 F.3d at 329, citing Wilson, 526 U.S. at 617. And finally, when determining if the law is clearly established, either by controlling authority or a consensus of persuasive authority, this Court must focus its review on cases finding a violation under facts closely similar to this case. Wesby, 138 S.Ct. at 590; Kisela, 138 S.Ct. at 1152. Specificity of the factual similarities between the cases is especially important in evaluating clearly established law applicable to this case because the Supreme Court has recognized it is sometimes difficult for an officer to determine how the relevant legal doctrine of excessive force will apply to the factual situation the officer confronts. Kisela, 138 S.Ct. at 1152; citing Mullenix, 136 S.Ct. at 308. Plaintiffs' argument that Officer Tran violated clearly established law fails for two reasons.

First, none of the cases Plaintiffs cite involve a situation in which a police officer was holding onto, or being dragged by a moving vehicle when the officer fired shots at the driver. (See cases cited at Opening Brief pp. 28-37 and this Brief

at p. 18 footnote 9.) The only authority from this Court, which Plaintiffs try to rely on, is Lytle. The Lytle case has glaring factual differences compared to the situation confronting Officer Tran.

In Lytle, the Court assumed the fleeing suspect had already driven past the officer, and was a substantial distance from the officer, and was not creating an immediate danger to anyone when the officer fired shots at the back of the fleeing car. Lytle, 560 F.3d at 409. Such facts are remote from the danger Officer Tran immediately faced while he clung to the fleeing SUV (Tran Bodycam 29:47-29:56). Tran immediately fired when the SUV took off with him holding on. (Tran Bodycam 29:57-59). In Lytle, the Court pointed out that instead of waiting until the danger had passed, if the officer had fired immediately when the vehicle backed towards the officer, he probably would have been entitled to qualified immunity. 560 F.3d at 412. Because Lytle from this Court and the persuasive authority Plaintiffs cite from other jurisdictions all deal with dramatically different facts, those cases could not have given Officer Tran notice that by firing at Terry he violated clearly established law.

Second, Plaintiffs' arguments about clearly established law ignore available cases involving facts that are indistinguishable from the present case. Unpublished persuasive decisions in this jurisdiction, uniformly recognize that an officer does not violate Fourth Amendment reasonableness standards if the officer uses deadly force to stop a driver, who flees in a vehicle while the officer is holding onto the outside

of the vehicle. Woolery, 2005 WL 755762 *6; Davis, 600 Fed. Appx. at 927-28; Mazoch, 733 Fed. Appx. at 180-81; Owens, 259 Fed. Appx. at 622.

The Ninth Circuit's recent unpublished case granting qualified immunity to an officer also involved the officer firing shots while he was riding partially on and inside the suspect's vehicle. Adame, 819 Fed. Appx. at 529. In a published case the Sixth Circuit likewise held that the officer did not use excessive force when he fired shots at a fleeing car immediately after he lost his grasp on the car that had briefly dragged him. Williams, 496 F.3d at 486-87.

No case of controlling authority or even persuasive authority forbid Officer Tran's conduct under facts either similar to the facts in any of these six cases, or similar to the facts confronting Officer Tran. The persuasive authority Plaintiffs cite involves dissimilar circumstances. The authority Plaintiffs cite from this jurisdiction – Lytle – is so dissimilar that it does not control on the specific facts facing Tran.

The only cases that considered threats similar to the threat faced by Officer Tran uniformly hold that there was no Fourth Amendment violation when officers used deadly force to stop such threats. Persuasive authority from this Court, the Sixth Circuit and Ninth Circuit approved of conduct like Tran's under similar circumstances. When the authorities were divided, the Supreme Court held the officer did not violate clearly established law. Brosseau, 543 U.S. at 199-200.

With authorities under similar facts supporting Officer Tran's actions, this Court cannot find this is an "obvious case" where the broad general rules of Garner

and Graham are the clearly established law. The Supreme Court states such "obvious cases" are rare. Wesby, 138 S.Ct. at 590. Plaintiffs' failure to cite a case that is on point dooms their challenge to the clearly established prong of qualified immunity. Vann, 884 F.3d at 309. The District Court did not err and must be affirmed.

VII. CONCLUSION & PRAYER

The record shows that Officer Tran did not violate the Fourth Amendment. No clearly established law prohibited Officer Tran's actions. For these reasons, the District Court correctly recognized that Tran was entitled to qualified immunity, and the District Court must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all parties and counsel of record this the 5th day of February, 2021 by electronic service to all counsel of record.

/s/*James T. Jeffrey, Jr.*
JAMES T. JEFFREY, JR.

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and .3, the undersigned certifies this brief complies with the type-volume limitations of FED. R. APP. P. 32(A)(7).

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__/s/*James T. Jeffrey, Jr.*___
JAMES T. JEFFREY, JR.