No. 23-1257

IN THE

Supreme Court of the United States

SANTOS ARGUETA, *et al.*,
Petitioners,

v.

DEREK S. JARADI,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF FOR THE CATO INSITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Cato Institute submits this brief as *amicus curiae* in support of Petitioner.[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of our intention to file this brief at least ten days prior to its filing.

promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs in this Court and others around the country.

If left unreviewed, the Fifth Circuit's decision threatens to undermine both the jury's traditional role in checking government abuses and the Fourteenth Amendment's original purpose of extending the Second Amendment's right to bear arms to all Americans, including, but not limited to, recently freed slaves. Cato writes to urge this Court to review this case and to reaffirm these core constitutional principles.

SUMMARY OF THE ARGUMENT

I. The Seventh Amendment provides that "[i]n Suits in common law * * * the right of trial by jury shall be preserved." U.S. Const. amend. VII. This constitutional guarantee is deeply rooted in English tradition, which recognized juries as fundamental instruments of public justice. The Framers understood juries as essential for protecting individual liberty from government encroachment, acting to democratize judicial proceedings and serving as a check on government abuse and judicial partiality. The Seventh Amendment's protections ensure that private citizens have a fair opportunity to seek recourse for government wrongdoing. That is exactly what Petitioners seek here: to hold Respondent accountable for his violation of Argueta's Fourth Amendment rights. Pet. App. 25a.

Rather than let the case proceed to trial and allow the jury to determine the material facts, the Fifth Circuit instead granted summary judgment for

Respondent on the ground that Argueta made a "furtive gesture" that gave Respondent cause to believe his life was in danger, even though Argueta did little more than flee the police while armed. The court of appeals' premature grant of summary judgment is inconsistent with this Court's cases and usurps the jury's role as fact-finder and, ultimately, as a vital instrument of public justice.

II. Efforts to disarm Black people after the Civil War inspired, in part, the Fourteenth Amendment's adoption, which extended the Second Amendment to non-white people. This was understood as especially critical in the South where threats of physical violence against recently freed slaves loomed large. Congress particularly wanted to ensure that non-white citizens could protect themselves when the government would not, and defend themselves against oppressive local-government actors. The Fifth Circuit's holding undermines this original understanding. It effectively deprives people of fundamental constitutional rights once the police have deemed them a suspect and permits the use of deadly force without warning. This approach is contrary to the Fourteenth Amendment, which is a tool of self-defense and self-determination *against* the government.

Additionally, the Fifth Circuit's holding would, in effect, require non-white Americans in particular to choose between their Second Amendment rights and their lives. Non-white suspects are already perceived as more dangerous and are more likely to be subject to police violence. Under the Fifth Circuit's ruling, police violence is likely to be excused if the suspect had a gun. Yet this Court has stated that the Second Amendment's enumeration denies the government

the power to decide whether the right to bear arms is worth insisting upon. A constitutional guarantee that can only be exercised in some circumstances by certain people is no guarantee at all. Further, the Fourth Amendment requires officers using deadly force to have probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. Mere possession of a gun is not enough. Specific, explicit evidence that a suspect poses a significant threat is necessary. This Court should apply the principles of the Second and Fourth Amendments via the Fourteenth and hold that armed suspects fleeing the police cannot be shot without particularized evidence of dangerousness.

The petition should be granted.

ARGUMENT

I. BY FAILING TO VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO PETITIONERS, THE FIFTH CIRCUIT UNDERMINES THE JURY'S HISTORICAL ROLE IN SAFEGUARDING INDIVIDUAL LIBERTIES.

A. Juries have a long history of safeguarding civil liberties by checking judicial partiality and holding government officials accountable for misconduct.

1. English tradition recognized juries as fundamental instruments of public justice. Since at least the 12th century, English juries had a critical fact-finding role in resolving community disputes. Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.J. 579, 583 (1993). But the jury's role extended beyond mere fact-finding; Blackstone characterized the jury not only as "the best investigator[] of truth," but also as the

"surest guardian[] of public justice." 3 William Blackstone, COMMENTARIES *380. Trial by jury acted as such a strong deterrent that "the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men." *Id.* The jury thus "preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens." *Id.*

The jury's role as an instrument of public justice was far from an abstract theory; English history is shot through with examples demonstrating juries' importance in promoting justice and protecting civil liberties. For example, in 1670, William Penn and William Mead were indicted for "tumultuous assembly" and conspiracy to incite unlawful behavior after they preached their Quaker beliefs to a large London crowd. John A. Phillips & Thomas C. Thompson, *Jurors v. Judges in Later Stuart England: The Penn/Mead Trial and Bushell's Case*, 4 Law & Ineq. 189, 200 (1986). On initial submissions, the jury found Penn guilty and Mead not guilty. *Id.* at 209. The court and prosecution found this unacceptable, attempting to coerce the jury to find both defendants guilty by repeatedly ordering it to further deliberate without food, drink, fire, and tobacco. *Id.* at 210-213. The jury nonetheless rebuffed these pressures, eventually delivering a not-guilty verdict for both men. *Id.* at 213. The *Penn/Mead* case marks the beginning of juries upholding individual freedoms in the face of a prosecution-sympathetic court.

The jury again famously asserted itself—this time in the civil context—in the 1760s. Member of Parliament John Wilkes was arrested and charged with libel for his criticism of the King, and, after the charges were dismissed, Wilkes sought damages for false arrest, trespass, and theft of personal papers. *Wilkes* v. *Wood*, 98 Eng. 489, 498-499 (C.P. 1763). The jury found for Wilkes and awarded him substantial punitive damages—regarded by some as the first explicit articulation of the legal principle of punitive damages. Jason Taliadoros, *The Roots of Punitive Damages at Common Law: A Longer History*, 64 Clev. St. L. Rev. 251, 254 (2016); *see also Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 15 (1991) (citing *Wilkes* as evidence that "[p]unitive damages have long been a part of traditional state tort law"). The jury ensured not only that a victim of government oppression was compensated for his injuries, but also that government officials were punished for their transgressions, thereby deterring future misconduct. As Lord Chief Justice Pratt noted, the jury's power to award punitive damages was "not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as proof of the detestation of the jury to the action itself." *Wilkes*, 98 Eng. at 498-499.

2. The American colonists drew directly from English tradition in recognizing their own rights. The First Continental Congress declared that "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage,

according to the course of that law," thus recognizing the jury's role in protecting civil liberties and restraining government misconduct. Declaration and Resolves of the First Continental Congress res. 5 (U.S. 1774). In the years leading up to the American Revolution, Parliament enacted laws that interfered with or outright denied colonists the right to a jury trial. Landsman, *supra*, at 595-96. The Second Continental Congress thus challenged Parliament's deprivation of "the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property." Declaration of the Causes and Necessity of Taking Up Arms para. 3 (U.S. 1775). These grievances culminated in the Declaration, declaring that the Crown "depriving [the colonists], in many cases, of the benefits of trial by jury" was one of the injustices justifying independence. The Declaration of Independence para. 20 (U.S. 1776).

The Framers at the 1787 Philadelphia convention understood that juries were indispensable protectors of civil liberties and democratic governance. Hamilton observed that if there was any difference between supporters and opponents of a constitutional provision codifying the civil jury-trial right, it was that "the former regard it as a valuable safeguard to liberty, [while] the latter represent it as the very palladium of free government." The Federalist No. 83 (Alexander Hamilton). The Framers nonetheless ultimately decided to omit a constitutional civil-jury right, reflecting their desire to respect state practices. Cong. Rsch. Serv., *Amdt. 7.2.1 Historical Background of Jury Trials in Civil Cases*, Constitution Annotated; *see also Colgrove* v. *Battin*, 413 U.S. 149, 153 (1973) (recognizing the difficulty the Framers had in fashioning a

constitutional provision that covered variations in state jury practices).

The Framers' failure to include a constitutional guarantee of jury trials for civil cases proved to be "an almost fatal blunder." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 661 (1973). The Antifederalists protested that the omission would interfere with citizens' ability to vindicate their rights when interfered with by the government and would leave litigants without protection against overbearing and oppressive judges. *Id*. at 671-672. The Antifederalists emphasized juries' critical role in democratizing judicial proceedings that would otherwise be dominated by judges, "a select body of men * * * [who] will have frequently an involuntary bias towards those of their own rank and dignity." Landsman, *supra*, at 599-600 (quoting Blackstone, *supra*, at *379). In response to mounting Antifederalist pressure, the First Congress proposed and the States ratified the Seventh Amendment's guarantee that "the right of trial by jury shall be preserved" for "Suits at common law" over $20. U.S. Const. amend. VII.

3. This Court has repeatedly affirmed the importance of juries in civil cases. The Court has explained that the jury-trial right "has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy." *Parsons* v. *Bedford, Breedlove & Robeson*, 28 U.S. 433, 446 (1830). The Court has observed that "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized

with the utmost care." *Dimick* v. *Schiedt*, 293 U.S. 474, 485-486 (1935). The Framers adopted the Seventh Amendment to "secur[e] [the civil jury-trial right] against the passing demands of expediency or convenience." *Securities & Exch. Comm'n* v. *Jarkesy*, 144 S. Ct. 2117, 2128 (2024) (quoting *Reid* v. *Covert*, 354 U.S. 1, 10 (1957) (plurality op.)) (internal quotation omitted). Or, as then-Justice Rehnquist put it, "[t]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting). But without this Court's continued vigilance, even well-meaning judges can usurp the jury's traditional and historical role as the community's conscience.

B. The Fifth Circuit usurped the jury's role by refusing to view the record in the light most favorable to Petitioners.

1. As the petition explains (at 33-35), the court of appeals' refusal to draw inferences in favor of Petitioners from the facts found to be undisputed by the District Court is contrary to this Court's bedrock requirement that "in ruling on a motion for summary judgment, [t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan* v. *Cotton*, 572 U.S. 650, 651 (2014) (per curiam) (internal quotation marks omitted). But the court of appeals' failure to properly apply the summary-judgment standard is more than a garden-variety legal error; it upsets the

Seventh Amendment's division of authority between judges and juries.

Properly construed and properly applied, the summary-judgment standard preserves the important role of the jury as fact-finder and, more broadly, as an instrument of public justice. When there are no issues of material fact and one party is entitled to judgment as a matter of law, the Seventh Amendment is not offended because there is nothing for the jury to do—no rational factfinder could find for the plaintiff on the facts and law. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?,* 79 N.Y.U. L. Rev. 982, 1019 (2003). Thus, as this Court explained in upholding the constitutionality of the summary-judgment mechanism, it "prevent[s] vexatious details in the maturing of a judgment of a judgment where there is no defense"; a party should not be allowed to impose on a jury's time when there is no possible case to be made. *Fidelity & Deposit Co. of Md.* v. *United States*, 187 U.S. 315, 320 (1902).

When there are genuine issues of material fact but summary judgment is nonetheless granted, the right to jury trial is violated because judges decide matters that the Constitution commits to the community. Craig M. Reiser, *The Unconstitutional Application of Summary Judgment in Factually Intensive Inquiries*, 12 J. of Const. L. 195, 197 (2009). And when juries are deprived of the opportunity to "assure a fair and equitable resolution of factual issues," *Colgrove*, 413 U.S. at 157, they cannot function in a manner the Framers envisioned—as a

check on government abuse and as a mechanism to ensure the equitable vindication of private interests against government actors, *see* Wolfram, *supra,* at 671-672.

The civil jury is needed the most in cases like this one, where a government actor is alleged to have used excessive force. In drafting the Seventh Amendment, the Framers were gravely concerned about government oppression and recognized the necessity of the civil jury as a constraint on governmental power. Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 Hastings Const. L. Q. 1013, 1022 (1994). And there are few situations more-emblematic of government oppression than the wrongful killing of a citizen by a state agent.

The court of appeals nonetheless denied Petitioners' their right to a civil jury by granting summary judgment to Respondent. Whether Respondent used excessive force in this case is a highly fact-specific inquiry that warranted resolution by a jury. The district court identified four disputes of material fact that precluded summary judgment. Pet. App. 31a. These were: (1) whether Respondent could see that Argueta held a weapon; (2) whether Argueta's flight posed any risk to the officers or the public; (3) whether Argueta raised the gun or otherwise made a threatening motion towards the officers; and (4) whether the officers warned Argueta before firing. *Id*. at 32a. The court of appeals categorized these disputes as immaterial by holding as a matter of law that Argueta had made a furtive gesture, thus warranting summary judgment for Respondent. In

doing so, the court of appeals short-circuited Petitioners' Seventh Amendment protections.

The dangers of the court of appeals' ruling are substantial. It chips away at litigants' ability to vindicate their rights when they are encroached upon by government officials. It also denies litigants the ability to have factual issues resolved by members of the community who can contribute their varied perspectives and experiences, instead vesting that power in judges who may exhibit "an involuntary bias towards those of their own rank and dignity." Blackstone, *supra*, at *379. Despite judges' best efforts to decide cases impartially, research demonstrates that "judges harbor many of the same implicit associations as most adults." Jeffrey Rachlinski et al., *Getting Explicit About Implicit Bias*, Judicature (2020), https://perma.cc/N8MG-7HFP. Studies further suggest that implicit associations may—although not always—play a role when judges decide cases. *Id*. Combine this with the fact that a disproportionate number of federal judges come from prosecutorial and other government-advocacy backgrounds, *see* Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, Cato Institute (May 27, 2021), https://perma.cc/HRL3-S7YA, and there is a genuine danger that judges will not reflect the views of the communities involved in litigation before them.

II. THE FIFTH CIRCUIT'S DECISION RISKS JEOPARDIZING THE RIGHT TO BEAR ARMS FOR NON-WHITE AMERICANS IN PARTICULAR.

Allowing police to shoot suspects exercising their Second Amendment right to bear arms who flee may disproportionately affect non-white people. Given the

nature of police-citizen interactions in this country, despite appearing facially neutral, the Fifth Circuit's furtive-gestures rule may disproportionately harm non-white Americans, whose Second Amendment rights were of particular concern to those who wrote and ratified the Fourteenth Amendment.

A. The Fourteenth Amendment was prompted in part by concern for the continued tyrannizing and oppression of non-white Americans following emancipation.

The Fourteenth Amendment's history confirms that one of its primary goals was to secure the right to bear arms for non-white Americans—newly freed slaves who continued to be tyrannized and oppressed despite their formal emancipation. Guns were considered critical for self-defense against racist public officials, including the police and state actors. In that context, the Fifth Circuit's holding equating the mere presence of a gun with "an immediate threat" is contrary to the Fourteenth Amendment's original meaning and purpose. Pet. App. 17a-18a. This Court should respect the original intent of the Fourteenth Amendment by reaffirming that arms are "essential for self-defense," *McDonald* v. *City of Chicago*, 561 U.S. 742, 787 (2010), and their carrying should not be viewed, standing alone, as a threat to police.

1. The American legal tradition has been shaped to some extent by fear of non-white people carrying guns. *See* Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 Harv. L. Rev. F. 537, 547 (2022). Chief Justice Taney argued that Black people could not be citizens because that would entitle them "to keep and carry arms wherever they went." *Dred Scott* v. *Sandford*, 60 U.S. 393, 417 (1857). Before

Emancipation, both free and enslaved Black people were not allowed to own guns, *see* Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 Kan. J.L. & Pub. Pol'y, 17, 18 (1995), and state laws authorized whites to seize weapons from Blacks, *see* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 344 (1991).

After the Civil War, Black former soldiers with guns alarmed many defeated Confederates, resulting in "systematic efforts * * * to disarm them." *McDonald*, 561 U.S. at 771. Southern governments passed "Black Codes," restricting every aspect of freedmens' lives. *See* Nicholas Johnson, *The Arming and Disarming of Black America*, Slate (Feb. 10, 2018), https://perma.cc/H4SL-J4FA. Gun prohibition was especially common. *Id.*; *see* Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866–1876* 2 (1998) (describing a Mississippi law); H.R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236 (1866) (describing a Kentucky law); E. McPherson, *The Political History of the United States of America During the Period of Reconstruction* 40 (1871) (describing a Florida law); *id.*, at 33 (describing an Alabama law). Black disarmament was a goal shared by local police, state militias, and—most troublingly—white supremacist groups. *See* Steven Hahn, *A Nation under Our Feet: Black Political Struggles in the Rural South From Slavery to the Great Migration* 267 (2003).

The House began debating the Fourteenth Amendment against this backdrop. *See McDonald*, 561 U.S. at 773, 774 n.23 ("[T]he 39th Congress concluded that legislative action was necessary," evidenced by both

§ 14 of the Freedmen's Bureau Act of 1866, which "explicitly guaranteed that 'all the citizens,' black and white, would have 'the constitutional right to bear arms' " and the Civil Rights Act of 1866 which was "meant to end the disarmament of African-Americans in the South") (citations omitted). Senator Jacob Howard of Michigan introduced the amendment, explaining that its goal was to "restrain the power of the States and compel them" to respect the rights "[s]ecured by the first eight amendments of the Constitution * * * [including] the right to keep and to bear arms." *Cong. Globe*, 39th Cong., 1st Sess. 2764–2766 (1866). Later, Representative Sidney Clarke opposed readmittance of Mississippi to the Union because its constitutional provision disarming Blacks violated the Second Amendment. *Cong. Globe*, 39th Cong., 1st Sess. 1838-39 (1866). At the same time, Congress passed legislation abolishing Southern state militias, which had been used to disarm the freedmen. *Cong. Globe*, 39th Cong., 2nd Sess. 1848 (1868). By 1868, the Fourteenth Amendment and its expansion of rights to non-whites, including the right to keep and bear arms, was the law.

2. Firearms were critical for Black Americans to protect themselves against ex-Confederate police, militias, and terrorist organizations, which the "Reconstruction-era Congress clearly understood." Akhil Reed Amar, *Putting the Second Amendment Second*, Slate (Mar. 17, 2008), https://perma.cc/9QEC-4HLY. The distinction among these groups was often thin, if it existed at all. For instance, Colonel Roger Moore, commander of the New Hanover County, North Carolina militia also headed the Wilmington, North Carolina Ku Klux Klan. Johnson, *supra*. Throughout the South, "armed parties, often consisting of ex-

Confederate soldiers serving in the state militias," targeted newly freed slaves. *McDonald*, 561 U.S. at 772. Blacks could not rely on the State for their personal safety. They instead had to rely on the Fourteenth Amendment and its incorporation of the Second Amendment's right to bear arms for protection.

Fear of non-white people bearing arms fueled facially neutral, yet discriminatorily applied, gun-control efforts during the Southern Civil Rights movement. Martin Luther King Jr. applied for a concealed carry permit after his house was bombed in 1956 but was denied. *The Past and Present of Black Gun Ownership in the US*, Giffords (Feb. 23, 2021), https://perma.cc/EG55-8HS8. The Black Panther Party advocated for Black Americans to openly bear arms to protect Black communities from police misconduct. *Id.* California passed the 1967 Mulford Act in response, which prohibited carrying loaded weapons in public spaces without a permit. Alana Wise, *Black Gun Owners Have Mixed Feelings About the Supreme Court's Concealed-Carry Ruling*, NPR (Jul. 13, 2022), https://perma.cc/UA7W-F4R8. And racial violence following King's assassination prompted passage of the 1968 Gun Control Act, the first major federal gun-control law in 30 years. Lakeidra Chavis, *Black And Up In Arms*, NPR (Dec. 16, 2020), https://perma.cc/9TXN-AXAS.

In sum, one of the Fourteenth Amendment's core purposes was to extend the right to bear arms to all Americans. *See McDonald*, 561 U.S. at 778. It aimed to ensure that Black Americans in particular could protect themselves against white violence, including and especially that perpetrated by those who wore police badges by day and white hoods at night. Yet that

goal has been undermined at various times by those who fear gun ownership by non-whites. The Fifth Circuit's holding that an officer is entitled to qualified immunity after shooting a fleeing suspect exercising his constitutional right to bear arms is yet another affront to the original understanding of the Fourteenth Amendment's expansion of the right of armed self-defense. It effectively deprives presumptively innocent suspects of their constitutional rights by permitting the use of deadly force against armed persons without warning. If a person's Second Amendment right is forfeited the moment an officer deems him a suspect, the Fourteenth Amendment's history as a tool for self-defense and a check against abuses of power is compromised.

B. The Fifth Circuit's rule risks forcing non-white gunowners in particular to choose between their Second Amendment rights and their lives.

1. Just as newly freed Blacks were targeted for oppression in the wake of the Civil War, non-white people today are disproportionately impacted by police violence. The Fifth Circuit's holding risks exacerbating that problem. The Second Amendment protects *all* Americans' rights to keep and bear arms for the purpose of self-defense. *See District of Columbia* v. *Heller*, 554 U.S. 570, 628 (2008). In practice, however, that right has not been applied equally to all gun owners, and police violence against non-white people in particular is often rationalized if the victim is armed.

Police are more likely to use physical force, including deadly force, against non-white Americans. *In Pursuit of Peace, Building Police-Community Trust to Break the Cycle of Violence*, Giffords (Sep. 9, 2021),

https://perma.cc/G4KC-SRD7. Although officers employ force in less than 2% of all civilian interactions, they are 3.6 times more likely to use force against non-white suspects, even though white suspects are more likely to resist arrest. Timothy Williams, *Study Supports Suspicion That Police Are More Likely to Use Force on Blacks*, N.Y. Times (July 7, 2016), https://perma.cc/D5AP-FTFN. Police shoot unarmed white suspects at particularly low rates and tend to be "more discerning of armed/unarmed status before shooting a white suspect" than a non-white suspect. Cody T. Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011–2014*, PLoS One, 10, no. 11 (2015), https://perma.cc/RJ3F-KFE6. A 2012 study similarly found evidence that officers "were quicker to shoot an armed black person, and slower to refrain from shooting an unarmed black person." Danyelle Solomon, *The Intersection of Policing and Race*, Center for American Progress (September 1, 2016), https://perma.cc/P2YJ-XUXB. Black Americans account for roughly fourteen percent of the U.S. population but are killed by police at twice the rate of white Americans. *Police Shootings Database*, Wash. Post (June 28, 2024), https://perma.cc/PS5U-Y639. Since 2015, 27% of victims in police shootings were Black Americans. *Id.* Twenty-two percent of those victims were armed. *Id.*

Many white people tend to perceive non-white individuals as dangerous, especially when they are armed. In 2016, Philando Castile, a Black man, was pulled over for a broken tail light. Wise, *supra*. Consistent with NRA guidelines, he alerted the officer that he was licensed to carry a firearm and that he had his gun with him. *Id.*; *see* Jim Wilson, *Traffic*

Stops: What CCW Citizens Need to Know, NRA Family (Mar. 7, 2018), https://perma.cc/GMP9-DJG5. The officer asked to see identification. Wise, *supra*. Castile reached for his wallet, and the police shot and killed him. *Id.* But Castile's example is emblematic of a larger problem: non-white Americans exercising their right to bear arms are often considered more dangerous than white Americans doing the exact same thing.

2. Statistics like these can contribute to the idea that someone's status as non-white is "a sort of body of evidence for probable cause, reasonable suspicion[,] and excessive force." T. Anansi Wilson, *Furtive Blackness: On Blackness and Being*, 48 Hastings Const. L. Q. 141, 147 (2020). If an individual is already preconceived as naturally furtive, or dangerous, by police and the law at large, it "might then 'reasonably' be assumed [by police officers] that some furtive movement * * * is afoot." *Id.* at 161. Yet, this creates a positive feedback loop: some police officers may fear for their lives around non-white gunowners, which becomes evidence justifying future violence. The problem, however, is that the fear, at its core, is not based on any actual signs of dangerousness. Instead, it is based on a more-generalized fear of non-white people carrying weapons. Although the right to keep and bear arms has public-safety implications, including for police, all "constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category," *McDonald*, 561 U.S. at 783. Notably, this Court has "expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." *Id*. at 785. "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-

by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634. Fleeing while armed is not, by itself, evidence of "dangerousness." Specific evidence that a suspect poses a significant threat of death or serious physical injury to the officer or others is necessary to justify the officer's use of deadly force.

This Court's cases add up to exactly that. This Court has held that deadly force "may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee* v. *Garner*, 471 U.S. 1, 3 (1985). Later, in *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, this Court held that an individual has the right to carry a handgun for self-defense outside of the home. 597 U.S. 1, 10 (2022). So carrying a gun, by itself, cannot provide the probable cause necessary to justify the use of deadly force, as a gun is not an indicator that a person poses an unlawful threat. Rather, specific, explicit evidence that a suspect poses a significant threat of death or serious physical injury to the officer or others—*other* than the fact the suspect has a gun—is necessary.

Other circuits have held as much. The Eighth Circuit, for instance, explains that "[g]enerally, an individual's mere possession of a firearm is not enough for an officer to have probable cause to believe that individual poses an immediate threat of death or serious bodily injury; the suspect must also point the firearm at another individual or take similar 'menacing action.' " *Cole* v. *Hutchins*, 959 F.3d 1127, 1132 (8th Cir. 2020); *see also Craighead* v. *Lee*, 399 F.3d 954, 961 (8th Cir. 2005) (holding use of deadly force was

objectively unreasonable when the suspect shot by police was holding his "gun overhead, pointed upwards"). The Ninth Circuit has similarly held that where a suspect "did not reach for his waistband or make a similar furtive or threatening movement," the suspect's "mere possession of a gun did not justify the use of deadly force." *Calonge* v. *City of San Jose*, No. 22-16495, 2024 U.S. App. LEXIS 13912, at *12-13 (9th Cir. 2024). And the Fourth Circuit has held that "a police officer used unconstitutionally excessive force in shooting a man holding a firearm on his own property who has neither pointing the weapon at the officer nor giving some indicator of an immediate intent to harm." *Knibbs* v. *Momphard*, 30 F.4th 200, 217 (4th Cir. 2022). In short, in all of these circuits, an armed suspect—without more—is not justification for the use of deadly force.

In the Fifth Circuit, however, the rule is different. Argueta—while armed with a weapon that Respondent may or may not have even seen—was fleeing from the police toward an empty lot while clutching his right arm to his side. Pet. App. 9a. The Fifth Circuit panel likened Argueta clutching his side to a "furtive gesture" like in two Fifth Circuit cases where the use of deadly force was held to be reasonable following a suspect's reach for what an officer could have reasonably perceived as a weapon. Pet. App. 12a-13a (discussing *Salazar-Limon* v. *City of Houston*, 826 F.3d 272, 279 (5th Cir, 2016) (suspect suddenly reached towards his waistband which was covered by an untucked shirt) and *Batyukova* v. *Doege*, 994 F.3d 717, 723 (5th Cir. 2021) (suspect reached in her waistband behind her back)). Critically, however, Argueta never *reached* for his gun. Pet. App. 8a-9a. He was running away from police and towards an empty lot with no

bystanders present, and he never pointed the gun at the officers. Pet. App. 8a-9a.

Furthermore, the court of appeals' definition of "furtive gesture" as essentially anything akin to a suspect reaching for a waistband is problematic. In observing the increasing frequency of incidents in which officers shoot unarmed men supposedly reaching for empty waistbands, some commentators have "observed the increasing frequency of incidents in which unarmed men allegedly reach for empty waistbands." *Salazar-Limon* v. *City of Houston*, 581 U.S. 946, 953 n.2 (2017) (Sotomayor, J., dissenting from denial of certiorari) (quoting Robert Faturechi, *Half of L.A. County Deputies' 'Waistband Shootings' Involve Unarmed People*, L.A. Times (Sept. 23, 2011), https://perma.cc/X69R-7423). But Argueta did not reach for his waistband. In fact, his movements were consistent with running. Pet. App. 8a. And in other circuits, Argueta's actions would not constitute a threat to Respondent or others, and accordingly would not justify the use of deadly force. Sup. Ct. R. 10(a).

In the end, this Court should not allow the Fifth Circuit to weaken the Second Amendment by applying a rule that endangers the lives of non-white Americans in particular who seek to exercise their right to bear arms by defining threat or furtive movement so broadly. As this Court has cautioned, "[a] constitutional guarantee subject" to others' "assessments of its usefulness is no constitutional guarantee at all." *Heller*, 554 U.S. at 634. If the Second and Fourteenth Amendment are truly meant to protect "the rights of minorities and other residents of high-crime areas"—which they surely are—then white and non-white gun owners alike must feel secure in their ability to carry

without that fact alone being used to justify police violence against them. *McDonald*, 561 U.S. at 790. The Court should reverse the Fifth Circuit's decision and affirm that a fleeing suspect being armed—by itself—is not evidence of a threat that would warrant an officer's use of deadly force.

CONCLUSION

For these reasons, as well as those in the petition, the petition should be granted.

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