Case No. 15-51077

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS,
Plaintiff-Appellant

v.

CHARLES KLEINERT,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

AMICI CURIAE BRIEF OF THE N.A.A.C.P. OF AUSTIN AND THE TEXAS STATE CONFERENCE OF N.A.A.C.P. BRANCHES IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF TEXAS

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CERTIFICATE OF INTERESTED PERSONS

State of Texas v. Charles Kleinert, No. 15-51077.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 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.

1. The State of Texas, Plaintiff-Appellant;
2. Charles Kleinert, Defendant-Appellee;
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4. Eric J.R. Nichols, Beck Redden LLP, attorney for Charles Kleinert;
5. William R. Peterson, Beck Redden, LLP, attorney for Charles Kleinert;
6. Scott Taliaferro, Assistant District Attorney, Travis County, Texas;
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9. Ian A. Mance, Staff Attorney, Southern Coalition for Social Justice, Counsel for Amici Curiae, Texas State Conference of NAACP Branches and the Austin NAACP;

10. Anita S. Earls, Executive Director, Southern Coalition for Social Justice, Counsel for Amici Curiae, Texas State Conference of NAACP Branches and the Austin NAACP;
11. Gary Bledsoe, President, Texas State Conference of NAACP Branches;
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/s/Gary Bledsoe
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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF AMICI CURIAE[1]

Amicus Texas State Conference of NAACP Branches is a non-profit, non-partisan membership organization, and an affiliate of the NAACP, the nation's oldest, largest and most widely recognized grassroots-based civil rights organization. Amicus Austin Branch NAACP is an affiliate of the Texas NAACP, located in the state's capital city. The NAACP has had an active presence in Texas for more than a century, having established its first chapter in El Paso in 1914.

The NAACP has consistently advocated for racial equity in all aspects of life in the United States. The organization was established in part as a response to extrajudicial killings of black people. Since its inception, the NAACP has focused on redressing an essentially unbroken line of violence against racial minorities. The organization has consistently opposed instances, such as this case, in which perpetrators of such violence avoid prosecution for their conduct.

[1] This brief has been filed with the consent of all parties involved. *See* FED. R. APP. PROC. 29(A). No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The federal district court erred in granting Officer Kleinert immunity under the Supremacy Clause related to his "reckless" shooting of Larry Jackson, Jr. It can never be "necessary" or "proper" to knowingly place the suspect of a non-violent crime at a "substantial and unjustifiable risk." Kleinert's act of bludgeoning a non-threatening person with a loaded weapon constituted "deadly force" and was objectively unreasonable; it thus did not provide the federal court with a legitimate basis to prohibit Texas from prosecuting the officer for manslaughter.

The court's opinion amounts to a blueprint for evading accountability for reckless conduct resulting in death and poses an acute danger in light of the recent proliferation of joint state-federal task forces. It disregards precedent regarding the appropriateness of considering an officer's training and is inconsistent with prevailing authorities governing situations in which an officer is the only surviving witness. Numerous recent cases caution against the wisdom of granting officers immunity on the basis of their own self-serving accounts. Here, Kleinert's testimony does not reasonably account for a gunshot to the back of the head at point blank range, one of many reasons that render the grant of immunity improper.

ARGUMENT

I. The Federal District Court Erred in Granting Officer Kleinert Supremacy Clause Immunity for His Reckless Conduct, Which Ended in the Death of an Unarmed and Non-Threatening Person.

A. It Can Never Be "Necessary" or "Proper" to Knowingly Place the Suspect of a Non-Violent Crime at a "Substantial and Unjustifiable Risk."

Officer Kleinert's enjoyment of immunity is a direct consequence of the court's determination that it was objectively reasonable for Kleinert to believe it was "necessary and proper" to repeatedly strike Jackson with his fist while holding a loaded firearm. *See* ROA.1098–99. Amici contend that the district court reached this conclusion in error and seek to highlight the irreconcilability of the court's "assum[ption] that Kleinert recklessly caused the death of Jackson by attempting to strike Jackson with a loaded firearm in the striking hand" with the court's ultimate conclusion that it was reasonable for Kleinert to believe this "reckless" course of conduct was a "necessary and proper" means of accomplishing his law enforcement objective. *Compare* ROA.1077 *with* ROA.1098–99. Put simply, Amici contend that it can never be "necessary" or "proper" to knowingly place the suspect of a non-violent crime at a "substantial and unjustifiable risk" of death when "the harm resulting from failing to apprehend him does not justify the use of deadly force[.]" Tennessee v. Garner, 471 U.S. 1, 11 (1985).

In granting the defendant's motion to dismiss, the district court relied heavily on the decision in *In re* Neagle, 135 U.S. 1 (1890) and took an

unreasonably expansive view of that case's command that if an officer "is held in the state court to answer for an act he was authorized to do by the law of the United States, . . . and if in doing that act he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of [a] State[.]" *Neagle*, 135 U.S. at 75. The crux of the district court's decision regarding immunity turned on its view of the phrase "necessary and proper." ROA.1098–99. Early authorities interpreting the phrase described "the measure of necessary force [a]s that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary." Castle v. Lewis, 254 F. 917, 925 (8th Cir. 1918). To avail oneself of the right to immunity, the officer's "violation[] of state law for federal purposes *must . . . be clearly seen to be reasonable, necessary, and proper*. Otherwise, . . . the Supremacy Clause will not save them." Baucom v. Martin, 677 F.2d 1346, 1351 (11th Cir. 1982) (emphasis added).

A careful reading of the district court opinion reveals that the court placed too much weight on the *outcome* in *Neagle*—the Court granted Supremacy Clause immunity to the officer in question, who killed a man attempting to assassinate a Supreme Court justice—and paid too little attention to the Court's rationale. In fact, 16 years after *Neagle* was decided, the Court clarified its view that it regarded the circumstances of that case as "peculiar," "extraordinary," and decided on

"exceptional facts." *See* U.S. *ex rel.* Drury v. Lewis, 200 U.S. 1, 6–7 (1906) (discussing *Neagle*).

The federal district court in Kleinert's case likewise overlooked the opinion's discussion of the *Jenkins* case, from which the *Neagle* court quoted extensively. *See Neagle*, 135 U.S. at 75–76; id. at 94–95 (Lamar, J., dissenting) (discussing *Ex parte Jenkins*, 13 F. Cas. 445 (C.C.E.D. Pa. 1853)). *Jenkins*, dating to 1853, appears to be the first recorded opinion by a federal court involving a federal law enforcement officer tried on state charges for conduct engaged in while serving a federal function. Like many of the similar cases of record before the *Neagle* court in 1890, *Jenkins* considered "proceedings under the fugitive slave law"—cases in which federal marshals were arrested by state authorities related to their pursuits of fugitive slaves. *See Neagle*, 135 U.S. at 94–95 (Lamar, J., dissenting). At issue was whether marshals could be held on state charges of assault and battery with intent to kill, related to their capture of escaped slave William Thomas. The court found the marshals "sought to arrest [Thomas], but by great violence were prevented from doing so," "oblig[ing the marshals] to have a violent and bloody encounter with him," and granted a writ freeing the men. *Jenkins*, 13 F. Cas. at 445 & 448. Implicit in the court's decision was a judgment that the marshals' use of violence to accomplish the arrest was reasonable in light of the "great violence" Thomas used in trying to prevent his capture.

Even in the context of legalized slavery, federal courts explicitly recognized "rightful limits" to the authority of federal actors to enforce federal law while enjoying immunity from state prosecution. Id. at 452. *Jenkins* held that where officers "ignorantly violate[] the law, no considerations of policy . . . will . . . rescue them from punishment, by withholding them from the tribunal that demands their presence." Id. Though stated slightly differently today, this is the proper standard. "[T]he Supreme Court has held that the Supremacy Clause cloaks federal agents with immunity *if they act reasonably* in carrying out their responsibilities." Idaho v. Horiuchi, 253 F.3d 359, 362 (9th Cir.), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001) (citations omitted). However, "[w]hen federal officers violate the Constitution, either through malice or excessive zeal, they can be held accountable for violating the state's criminal laws." Id.

In short, *Jenkins*, and in turn *Neagle*, made clear the federal courts would offer no relief to officers who "ignorantly violate[] the law." *Jenkins*, 13 F. Cas. at 452; *see also*, *e.g.*, Puerto Rico v. Fitzpatrick, 140 F. Supp. 398, 400 (D.P.R. 1956) Tennessee v. Dodd, No. 1:08-CR-10100, 2009 WL 32886, at *7 (W.D. Tenn. Jan. 6, 2009). A century and a half later, *Horiuchi* articulated the same principle. *See*

Horiuchi, 253 F.3d at 362. Had the district court properly applied this principle in the instant case, it would not have granted the officer's motion to dismiss.[2]

Officer Kleinert made a conscious decision to pull out his firearm in pursuit of a suspect whom he had no objective reason to believe was armed or dangerous. He made a second conscious decision to then bludgeon Mr. Jackson with his gun, which he knew carried a "huge risk" due to the likelihood of an accidental discharge. *See* ROA.507. Kleinert was aware that "it has been clearly established . . . for [decades] that a criminal suspect 'ha[s] a right not to be shot *unless he [is] perceived to pose a threat* to the pursuing officers or others during flight.' " Sample v. Bailey, 409 F.3d 689, 699 (6th Cir. 2005) (internal citation omitted) (emphasis added); Tennessee v. Garner, 471 U.S. 1, 11 (1985). Moreover, Kleinert's training instructed him that "[f]irearms shall not be displayed . . . unless it is objectively reasonable to believe there is a substantial risk that the situation

[2] In a sad irony, the district court cites *In re McShane* while observing that "there is no evidence that Kleinert acted with any other motive than doing his duty as he perceived it." ROA.1091. Amici are well acquainted with the case, which concerned the admittance of James Meredith to the University of Mississippi. *See* U.S. MARSHALS, *History: The U.S. Marshals and the Integration of the University of Mississippi* (2002) (observing that "the NAACP's backing was a key component in Meredith's eventual success"). Charles Kleinert is no James McShane. *McShane* involved the attempted state prosecution of a U.S. Marshal who ordered tear gas deployed at a racist mob that was seeking to stop, with "violent opposition," the integration of a state university. *See* 235 F. Supp. 262, 264–67 (N.D. Miss. 1964). Throughout the incident in question, McShane was acting pursuant to an order of the District Court for the Southern District of Mississippi. At the time he reluctantly gave the order to fire tear gas, he and his officers were being battered with metal pipes, dealing with fires set by demonstrators, and had a petrol bomb thrown in their direction. *See* id. at 266–67 nn. 5–6.

may escalate to the point where deadly force would be permitted." ROA.2142 (APD Policy on Firearms).

Kleinert's decision to pull his weapon and use it to bludgeon Jackson was not just objectively unreasonable; for purposes of resolving the question of immunity, the district court presumed it to be "reckless." ROA.1077. A finding of criminal recklessness is permitted when "a person disregards a risk of harm of which he is aware." Farmer v. Brennan, 511 U.S. 825, 836–37 (1994). Kleinert has conceded that he was aware there was "huge risk" in using his weapon in the manner he did. *See* ROA.507. His use of force constituted "deadly force" under the law. *See infra* Section II. This use of deadly force was objectively unreasonable and thus unlawful. Under these circumstances, it was error for the district court to find Kleinert's conduct "necessary and proper." *See* Brosseau v. Haugen, 543 U.S. 194, 197 (2004) ("[I]t is unreasonable for an officer to 'seize an unarmed, nondangerous suspect by shooting him dead.' " (quoting *Garner*, 471 U.S. at 11)).

The court's analysis of whether Kleinert intended to arrest Jackson for the state misdemeanor offense of Evading Arrest or for the federal felony offense of Bank Robbery is ultimately immaterial; in neither case was he permitted to employ deadly force to make the arrest. Under the circumstances, Mr. Jackson's right to be free of deadly force was "absolute" and was not dependent on the charge for

which he was being pursued. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971) ("[T]he Fourth Amendment . . . . guarantees to citizens of the United States the absolute right to be free from unreasonable . . . seizures carried out by virtue of federal authority."). The Supreme Court has made clear that it is *only* where "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," that he may employ deadly force. *Garner*, 471 U.S. at 11. By his own admission, Kleinert lacked the authority to even *search* Jackson prior to his fleeing. *See, e.g.*, ROA.534.

An unauthorized search is a decidedly less serious intrusion into the liberties guaranteed by the Fourth Amendment than a seizure accomplished by deadly force. Indeed, deadly force is the most serious seizure possible under the Fourth Amendment. Yet controlling authorities make clear that officers are not permitted to conduct a search simply because they might *subjectively* believe a suspect to be armed. Instead, various circumstances may give rise to an *objectively* reasonable suspicion that a suspect is armed and dangerous. *See, e.g.*, Adams v. Williams, 407 U.S. 143, 148 (1972) (protective search objectively reasonable where subject refused to step out of car and officer had been informed suspect had concealed weapon). These include circumstances in which an officer has reasonable suspicion that a suspect was involved in a *violent* crime, as well as circumstances

in which they "possess an articulable and objectively reasonable belief that [a] suspect is potentially dangerous." Michigan v. Long, 463 U.S. 1032, 1051 (1983). However, in a situation such as existed in this case, where "the suspect is not thought to be involved in violent criminal conduct and the officers have no prior indication that the suspect is armed, more is required to justify a protective search." State v. Thomas, 542 A.2d 912, 916 (N.J. 1988); *see also* ROA.512 (Q: "And he never threatened you in any way?" A: "No, sir."). It is difficult to conceive how *less* could be required of an officer who, with firearm drawn, decides to physically strike a non-threatening suspect.

Officer Kleinert conceded he did not have any "specific and articulable facts" that would have permitted him to search Jackson before he fled. *See* Peterson v. Fort Worth, 588 F.3d 838, 845 (5th Cir. 2009) ("The officer must be able to point to 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' " (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)). Thus, any possible lawful justification for pulling his firearm and using it to repeatedly strike Jackson must stem from events that transpired in the time between the moment Jackson fled on foot and the time Kleinert shot him through the back of the head. And yet, there is "no evidence in the case tending to show, even remotely, that the deceased was armed at the time he received the fatal shot, or that his actions were such as to induce a reasonable

man to believe that he was armed." Drake v. State, 5 Tex. App. 649, 663 (1879). Jackson is dead because Kleinert made an objectively unreasonable decision to employ a means of arresting him that presented an obvious and substantial risk of death or injury, not because Jackson did anything to present himself as a threat.

Finally, it was unreasonable for the district court not to "consider[] any of the testimony or evidence regarding City of Austin police procedures, either lay or expert," and conclude that these "procedures [we]re simply not relevant to the immunity defense asserted by Kleinert." ROA.1086. Kleinert's ability to avail himself of an immunity defense is ultimately a function of the court's assessment regarding the reasonableness of his actions. As such, the training Kleinert received is a relevant consideration. This Court has held that "it may be difficult to conclude that [] officers acted reasonably if they performed an action . . . of whose dangers in the[] circumstances they had been warned." Gutierrez v. San Antonio, 139 F.3d 441, 449 (5th Cir. 1998). This position is consistent with numerous federal courts of appeal that have likewise concluded that the training an officer receives is a relevant consideration when evaluating the reasonableness of his use of force. *See, e.g.*, Martin v. Broadview Heights, 712 F.3d 951, 962 (6th Cir. 2013); Drummond *ex rel.* Drummond v. Anaheim, 343 F.3d 1052, 1061–62 (9th Cir. 2003); Weigel v. Broad, 544 F.3d 1143, 1155 (10th Cir. 2008).

B. By Definition, Officer Kleinert Used "Deadly Force" Even Before His Gun Fired, and This Use of Force was Objectively Unreasonable.

The federal district court ultimately credited Officer Kleinert's story that the firing of his gun was inadvertent, and it appears to have found this conclusion dispositive as to the question of immunity. The relevant case law, however, reveals that the proper analysis is not so straightforward. "In determining whether the evidence supports a finding of recklessness, a statement that a defendant did not intend to kill the victim 'cannot be plucked out of the record and examined in a vacuum.' " Gahagan v. State, 242 S.W.3d 80, 86–87 (Tex. App. 2007) (internal citation omitted). Texas law books are replete with examples of cases in which courts "upheld jury findings that a defendant consciously disregarded a substantial and unjustifiable risk in numerous situations involving an allegedly accidental discharge of a firearm." *See, e.g.*, *Gahagan*, 242 S.W.3d at 86–87 (collecting cases). When Kleinert made the conscious choice to place hands on and physically strike Jackson while still holding his weapon, Kleinert, by definition, *chose to employ deadly force*.

The Model Penal Code defines "deadly force" as, among other things, "force that the actor uses . . . that he knows to create a substantial risk of causing death or serious bodily injury." *See* MPC § 3.11(2). This Court has adopted the same definition. *See* Gutierrez v. San Antonio, 139 F.3d 441, 446 (5th Cir. 1998) ("deadly force" is force "carrying with it a substantial risk of causing death or

serious bodily harm"). The United States has argued in the course of prosecuting crimes committed *against* police officers that "striking" a person multiple times while "holding in his hand a firearm" is an act that "create[s] a very real and substantial risk of serious bodily injury." *See, e.g.*, Brief of Appellee, United States v. Cooper, 2004 WL 3764069 (4th Cir. 2004), at *9.

The MPC definition of "deadly force" also mirrors the language employed in the State of Texas' definition of "recklessness," which provides that "[a] person acts recklessly . . . when he is aware of but consciously disregards a substantial and unjustifiable risk[.]" TEX. PENAL CODE ANN. § 6.03(c). "Several circuit courts of appeal have seemingly followed the Model Penal Code definition of 'deadly force.' " Johnson v. Morris, 453 N.W.2d 31, 38 (Minn. 1990) (collecting cases). Prevailing authorities dictate "that for . . . Fourth Amendment analysis purposes, application of the Model Code definition is reasonable in the light of the fact that the Supreme Court has seemingly adopted, in a large part, the Code's rule as to permissible use of deadly force." Id. (citing Tennessee v. Garner, 471 U.S. 1, 6 n.7, 11–12 (1985); Pruitt v. Montgomery, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985)). Thus it is clear that Kleinert elected to use what was, by definition, deadly force even before the moment that his firearm discharged. This use of force was objectively unreasonable in light of the U.S. Supreme Court's bright-line rule that

"the harm resulting from failing to apprehend [a non-violent and non-threatening suspect] does not justify the use of deadly force[.]" *Garner*, 471 U.S. at 11.

C. The District Court's Decision is Inconsistent with the Prevailing Authorities on Situations in Which a Defendant Officer is the Only Surviving Witness; the Opinion, Left Undisturbed, Risks Making Accountability for Certain Crimes Committed by Those Deemed to be Acting Under Federal Authority an Impossibility.

In immunizing Officer Kleinert, the district court in this case has created a blueprint for police officers who use excessive and unnecessary deadly force to evade accountability. The decision effectively empowers federal officials to recklessly kill Texas citizens without ever having their actions subjected to the scrutiny of state courts. If it should stand, it would appear a federal officer need only characterize their objectively reckless conduct as an "accident" that occurred in the course of a necessary and proper function, and the case will proceed no further. "[A]ll a murderer who shoots and kills his victim would need to do . . . is say the magic words[.]" Henry v. State, No. C14-92-01125-CR, 1993 WL 282768, at *3 (Tex. App. July 29, 1993).

Particularly where there are no independent witnesses to the shooting, a rule that operates to end the legal proceedings on the basis of an officer's self-serving characterization of his actions and those of his victim will inevitably result in injustice. "[T]he precise circumstances of a death very commonly surface only in the testimony of the survivor who, if he be governed by the forces of human

nature, will be wont to cast his testimony in a light most favorable to himself." Davis v. State, 757 S.W.2d 386, 388 (Tex. App. 1988). This is no less true when police officers are involved. "[I]n excessive force cases resulting in a death, the trial court must be 'wary of self-serving accounts by police officers when the only non-police eyewitness is dead.' " Long v. City and Cnty. of Honolulu, 511 F.3d 901, 906 (9th Cir. 2007). "Every circuit to have confronted this situation—where the police officer killed the only other witness to the incident—follows this approach." Flythe v. D.C., 791 F.3d 13, 19 (D.C. Cir. 2015). It appears that all of the U.S. Courts of Appeal, including this Court, have now considered this issue and are approaching unanimity that, in circumstances in which an officer is the only surviving eyewitness,

> the judge must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify. The judge must carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the plaintiff, to determine whether the officer's story is internally consistent and consistent with other known facts. In other words, the court may not simply accept what may be a self-serving account by the police officer.

Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994) (internal citations omitted); *see also, e.g.*, Flythe v. D.C., 791 F.3d 13, 19 (D.C. Cir. 2015); Hegarty v. Somerset Cnty., 53 F.3d 1367, 1376 n.6 (1st Cir. 1995); O'Bert *ex rel.* Estate of O'Bert v. Vargo, 331 F.3d 29, 37 (2d Cir. 2003); Abraham v. Raso, 183 F.3d 279, 294 (3d

Cir. 1999); Ingle *ex rel.* Estate of Ingle v. Yelton, 439 F.3d 191, 195 (4th Cir. 2006); Goodman v. Harris Cty., 239 F. App'x 869, 874 (5th Cir. 2007); Jefferson v. Lewis, 594 F.3d 454, 462 (6th Cir. 2010); Plakas v. Drinksi, 19 F.3d 1143, 1147 (7th Cir. 1994); Ludwig v. Anderson, 54 F.3d 465, 470 n.3 (8th Cir. 1995); *cf.* Blossom v. Yarborough, 429 F.3d 963, 969 (10th Cir. 2005) (Henry, J., concurring); Perez v. Suszczynski, 809 F.3d 1213, 1220 (11th Cir. 2016). Had the federal district court in the instant case properly engaged in this analysis, Kleinert would be standing trial in State court, given the fact that various "medical reports, contemporaneous statements by the officer and the available physical evidence" clearly contradict the narrative that ultimately secured him a grant of immunity. *Scott*, 39 F.3d at 915.

On more than one occasion, this Court has addressed this "narrow factual situation . . . in which *the sole surviving witness* to the central events is the defendant himself, an interested witness." Bazan *ex rel.* Bazan v. Hidalgo Cty., 246 F.3d 481, 493 (5th Cir. 2001) (italics in original). This Court has said that "[t]he award of summary judgment to the defense in deadly force cases may be made only with *particular care where the officer defendant is the only witness left alive to testify.*" Pasco v. Knoblauch, 223 F. App'x 319, 322 (5th Cir. 2007) (internal quotations and citations omitted). In *Bazan*, this Court dismissed an officer's appeal of a district court's denial of a motion for summary judgment on qualified

immunity grounds. Observing that the district court's denial of summary judgment was based on a genuine dispute of material facts, this Court noted: "No doubt, it reached that conclusion in large part because little evidence corroborating the Trooper's version exists." *Bazan*, 246 F.3d at 492. The Court specifically noted the absence of testimony "as to the teeth marks that probably would have been imprinted on his hand if Bazan were biting so hard the Trooper thought he would lose his fingers." Id. It also observed that "Bazan's autopsy reflects a gunshot wound to the right side of the base of the neck, [and] . . . *no* expert testimony links this with the Trooper's recitation of the facts or opines on the distance or angle from which the shot was fired." Id. at 492–93 (emphasis in original)

Precisely the same problems exist with respect to Officer Kleinert's explanation for Mr. Jackson's death in the instant case. As in *Bazan*, "little evidence corroborating the [officer]'s version exists." *See, e.g.*, ROA.1963–64 (state expert witness asserts the physical evidence does not fit Kleinert's account). No one other than Kleinert witnessed the shooting. As in *Bazan*, Kleinert's account of the altercation suggests that one might have expected to find wounds "that probably would have been imprinted" if Kleinert had actually struck Jackson in the lower part of his back, as opposed to the back of his head, where the fatal shot entered *at point blank range*. *Compare* ROA.484 ("I thought I could strike on

his back and try to knock him down to the ground and that's what I was attempting to do.") *with* ROA.2488–89 (autopsy reporting no visible injuries to lower back).

Finally, just as in ***Bazan***, the "autopsy reflects a gunshot wound . . . [at] the base of the neck." ***Bazan***, 246 F.3d at 492–93; ROA.2485–92 (Medical Examiner Report, Larry Eugene Jackson, Jr.) (reporting "a contact-type gunshot wound of the posterior neck" with "muzzle imprint and gunpowder soot deposition" and the severing of the spinal cord). Kleinert has put forth "*no* expert testimony link[ing] this with [his] recitation of the facts" or "opin[ing] on the distance or angle from which the shot was fired." Id. Instead, his accounts of how the bullet was fired have evolved over time. *Compare* ROA.498 (describing Jackson's movements just before fatal shot without any reference to force) *with* Affidavit in Support of Motion to Dismiss Indictment, p 7 at 12. (asserting that between second and third strikes with handgun, Jackson rose from embankment and "turned his body with force into mine").

None of Kleinert's statements reasonably explain how he shot Jackson at point blank range in the back of the head. That the district court would grant immunity on the basis of Kleinert's self-serving characterization of the shooting, without so much as addressing the seemingly impossible mechanics of the shooting as described, is contrary to circuit precedent and deeply disturbing to the undersigned Amici and their respective memberships. The Travis County grand

jury exercised sound judgment when it decided to bring charges against Officer Kleinert. The district court's subsequent decision to deny Texas courts an opportunity to properly scrutinize the circumstances of this homicide, particularly on grounds that the federal government regards this officer's reckless conduct as "necessary and proper," is an affront to justice. It is also in direct contravention of this Court's clear instruction that courts pay "particular care where the officer defendant is the only witness left alive to testify." *Pasco*, 223 F. App'x at 322.

Here, it is only by virtue of defendant's position as a police officer on a federal task force—and his capacity to assert his actions were "necessary and proper"—that he is shielded from criminal liability. As a police officer with firearm training, Kleinert was well aware of the significant risks of going hands on with a firearm drawn. He admitted as much in his grand jury testimony. *See* ROA.507 ("[I]f you are not holding the weapon in a manner that you feel is safe . . . and I'm hitting somebody, there's a huge risk in that."). Kleinert's decision to disregard this known risk amounted to criminal recklessness. *See* Farmer v. Brennan, 511 U.S. 825, 836–37 (1994) (finding of criminal recklessness is permitted when "a person disregards a risk of harm of which he is aware"). "[E]vidence that a defendant is familiar with guns and their potential for injury and that the defendant pointed the gun at the victim 'indicates a person who is aware of a risk created by that conduct and disregards the risk.' " *Gahagan*, 242 S.W.3d at

87. Kleinert's attempts to qualify his decision to engage this known risk ("if you are not holding the weapon in a manner that you feel is safe") are unpersuasive, particularly in light of his prior suggestion that he was already borderline inept when it came to handling his gun. *See* ROA.503 ("I'm lucky to be able to use the gun that I have.").

II. It is Not Uncommon for Police Officers to Misrepresent the Circumstances in Which They Kill Unarmed Civilians, and Public Policy Cautions Against Any Rule That Would Immunize an Officer on the Basis of His Own Self-Serving Statement.

"[W]ith the proliferation of video cameras in cell phones . . . capturing an event on video has never been easier." State v. Lockhart, 4 A.3d 1176, 1217 (Conn. 2010) (Palmer, J., concurring). Today, it is not uncommon for courts to be confronted with video evidence of conduct giving rise to an allegation of excessive force. *See, e.g.*, Glik v. Cunniffe, 655 F.3d 78, 79–80 (1st Cir. 2011). Twenty-five years ago, it was a very different reality. In 1991, the country was introduced to Rodney King, whose beating by four LAPD officers was labeled by commentators at the time as the most egregious excessive force ever captured on tape. The acquittal of the officers filmed beating King led to riots among the worst the nation has ever seen. Today, however, the King video would struggle to capture anything approaching the level of attention it received in the 1990s. Rodney King survived his encounter with the LAPD. By contrast, in 2015, America found itself confronted on a near monthly basis with videos documenting police shooting

deaths of unarmed suspects. One month into 2016, the trend shows no sign of abating.

Among the most notable things about these videos—a number of which were shot surreptitiously by bystanders—is that they often emerge only after the officer has committed himself to a particular narrative about the events which led to a suspect's death. These narratives are sometimes directly contradicted by the video. There are many examples of this phenomenon, but one need only look to very recent history for evidence:

- In January 2016, video emerged of the January 2013 shooting of Shaun Mouzon by Baltimore police officers. According to *The Baltimore Sun*, an officer wrote in charging documents that officers shot Mouzon in self-defense "because Mouzon had driven his car at them." However, video of the incident, obtained by the newspaper, showed Mouzon's car stuck in traffic and no officers standing in front of it as it begins slowly pulling away and officers open fire. *See* Justin Fenton, *Attorney Says Video Disputes Police Account of Shooting*, THE BALTIMORE SUN, Jan. 14, 2016.

- In December 2015, attorneys for the family of Noel Aguilar released video footage of the 23-year-old's May 2014 death at the hands of Los Angeles County sheriff's deputies. The deputies were initially exonerated of any wrongdoing after telling supervisors that they shot Aguilar after he shot one of them at point blank

range with a concealed firearm. Video of the incident instead shows one officer inadvertently shooting his partner and then blaming Aguilar. The footage captures Aguilar pleading for his life moments before both officers open fire on him. The officer who accidentally shot his partner appears to try to accelerate Aguilar's demise by smothering him as he bleeds to death. *See* Cindy Chang, *Video Prompts Calls for D.A. to Reopen Case of Fatal Shooting by L.A. Sheriff's Deputies*, L.A. TIMES, Dec. 23, 2015.

- In November 2015, video emerged of the October 2014 shooting of 17-year old Laquan McDonald by Chicago police officer Jason Van Dyke, who was subsequently charged with first-degree murder. Prior to the video's release, Van Dyke told investigators that shortly before shooting McDonald 16 times, the teenager had been "swinging [a] knife in an aggressive, exaggerated manner" at the officer. According to the Associated Press, "[m]ultiple officers reported that even after McDonald was down, he kept trying to get up with the knife in his hand." Each of these allegations was later shown to be false. Video evidence of the shooting, now widely available online, shows "McDonald veering away from officers on a four-lane street when Van Dyke opened fire from close range and continued shooting after the teen had crumpled to the ground and was barely moving." Associated Press, *Chicago Cops' Versions of Laquan McDonald Shooting at Odds with Video*, HERALD-NEWS (Chi.), Dec. 5 2015.

Amici could recite many other examples. The point is that police officers are human like anyone else. When they use bad judgment and take a life, on purpose or inadvertently, they are not immune from succumbing to the instinct of self-preservation or above telling a lie to conceal a truth that might end their career or put them in prison. The State of Texas decided that the evidence in this case warranted charging Kleinert with manslaughter. The federal courts should respect that decision and not accord Kleinert's self-serving version of events such extraordinary deference simply because he is a police officer. To date, Kleinert has put forth no explanation as to how Jackson was shot in the *back* of the head at *point blank range*. The federal district court committed error in not accounting for the significant inconsistencies in his story before granting him immunity from prosecution.

III. Because of the Recent Proliferation of Joint State-Federal Task Forces, and the Thousands of Officers Who Participate, Public Policy Concerns Caution Against Taking An Expansive View of Supremacy Clause Immunity.

Public policy cautions against resting Officer Kleinert's grant of immunity for his reckless conduct on Supremacy Clause grounds. The significant increase in the number of joint state-federal law enforcement initiatives in the 126 years since *Neagle* was decided suggests that courts should proceed with caution before expanding immunized categories of conduct to include that which is reckless and causes death. In 1889, the Attorney General of California argued that an

improvident grant of Supremacy Clause immunity would result in "*vast body of officers*, . . . *constantly increasingly* . . . [and] possessed of special privileges[.]" Baucom v. Martin, 677 F.2d 1346, 1348 (11th Cir. 1982) (emphasis added)). Given the relative size of the federal government in 2016 and the ubiquity of joint-state MOUs conferring federal authority on state officials such as Kleinert, the Attorney General's concern is more apt today than ever. For that reason, courts should be especially careful not to expand the traditionally understood contours of immunity to protect an entirely new class of conduct.

The Court would do "well to heed the general admonition of Judge Friendly [that] . . . 'agents naturally tend to assign great weight to the societal interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights of citizens to be free from government-induced criminality.' " *Baucom*, 677 F.2d at 1349–50 (quoting United States v. Archer, 486 F.2d 670, 677 (2d Cir. 1973)). The warning is particularly instructive here, where that the district court effectively concluded the government's interest in apprehending Jackson outweighed Jackson's interest in not being subjected to reckless and deadly force.

The *way* the district court arrived at its conclusion is particularly frightening. It found the absence of FBI "rules or prohibitions" regarding the manner and mode a federal officer may use to arrest or detain a suspect "dispositive" as to the question of immunity. ROA.1098. Put simply, according to the district court,

because the manner and mode of seizure is left by the FBI to "discretion of the federal officer," it cannot be said this particular mode of arrest was objectively unreasonable, despite an abundance of authority to the contrary. *See supra*, Part I.

Beyond the four corners of this case, there is real danger that future state actors will invoke some nexus to federal jurisdiction to seek refuge from the consequences of their reckless conduct. This is no small concern. Most states and mid- to large- sized cities in 2016 participate in a variety of federal law enforcement initiatives. *See, e.g.*, Thompson v. Memphis, 86 F. App'x 96, 97 (6th Cir. 2004) ("The City of Memphis is a participant in a number of joint federal-state task forces, including the Safe Streets Task Force, the Trigger Lock Task Force, and the Auto/Cargo Theft Task Force."). The FBI's violent gang task force includes "over 1,500 state and local law enforcement personnel." The DEA task force has "over 2,556." The FBI's Joint Terrorism Task Force has 104 regional offices, 71 of which were established in the last 15 years. The U.S. Marshal's Fugitive Task Force has at least one office in every state and works closely and cooperatively with state and local officials. In 2014, they made more than 100,000 arrests and cleared more than 125,000 warrants. *See* U.S. MARSHALS, *Fugitive Task Forces*, www.usmarshals.gov, accessed February 8, 2016. These are but a few examples.

To be clear, it is appropriate for courts to grant officers immunity when they employ *reasonable* force in neutralizing a threat to the safety of themselves or others. This includes, in some cases, Supremacy Clause immunity. However, in the instant case, "the public policy underlying official immunity for federal officials is not implicated[.]" Houston Cmty. Hosp. v. Blue Cross & Blue Shield of Texas, Inc., 481 F.3d 265, 276 (5th Cir. 2007). This is because the district court's opinion assumed that Kleinert acted *recklessly* and disregarded a substantial risk when he bludgeoned Jackson with his firearm. ROA.1077.

Critically, "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." Forrester v. White, 484 U.S. 219, 227 (1988). This Court has been very clear: "absolute immunity should only attach to the extent functional necessity absolutely demands that it must attach." Johnson v. Kegans, 870 F.2d 992, 1001 (5th Cir. 1989). The posture of this case is unusual in that it concerns Supremacy Clause—as opposed to traditional qualified—immunity, granted to a state employee tried in state court, who purports to have been acting under federal authority at the time of the incident in question. Nevertheless, the test for evaluating the appropriateness of a grant of Supremacy Clause immunity is not unlike that used to determine traditional qualified immunity, *see, e.g.*, State v. White, 988 N.E.2d 595, 621 (Ohio 2013) (describing Supremacy Clause immunity as "resembling qualified immunity"), and this

Court's precedents on qualified immunity indicate that officers may not use it to shield themselves from accountability for their "reckless" acts.

Specifically, in the context of § 1983 litigation, this Court has observed that "[t]urning a blind eye to such obvious danger provides ample support for [a] finding of the requisite recklessness" sufficient to "deny[] qualified immunity." *See* Brown v. Bolin, 500 F. App'x 309, 321 n.6 (5th Cir. 2012) (internal citations and quotations omitted); *see also, e.g.*, Winfrey v. San Jacinto Cty., 481 F. App'x 969, 980 (5th Cir. 2012); Hampton v. Oktibbeha Cty. Sheriff Dep't, 480 F.3d 358, 364 (5th Cir. 2007); Hart v. O'Brien, 127 F.3d 424, 445 (5th Cir. 1997).

In the opinion below, the district court appears to have taken the view that Supremacy Clause immunity insulates officials for "reckless" conduct that qualified immunity would not protect. Yet there is no "functional necessity [that] absolutely demands" federal officials be permitted to recklessly kill unarmed suspects. Johnson v. Kegans, 870 F.2d 992, 1001 (5th Cir. 1989). No credible argument has been advanced that denying Kleinert immunity for his reckless conduct would create any reasonable "danger" that other officers would feel stifled in "execut[ing their] office with the decisiveness and judgment required by the public good." Houston Cmty. Hosp. v. Blue Cross & Blue Shield of Texas, Inc., 481 F.3d 265, 276 (5th Cir. 2007). As the Supreme Court has observed, "Absolute immunity is strong medicine, justified only when the danger of officials' being

deflected from the effective performance of their duties is *very great*." Forrester v. White, 484 U.S. 219, 230 (1988) (internal quotations, alterations, and citations omitted) (emphasis added). This case does not present such a circumstance. "Supremacy Clause immunity is not absolute and . . . presupposes that federal agents can be prosecuted for violating state law." Idaho v. Horiuchi, 253 F.2d 359, 376 (9th Cir.), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001). One of those circumstances is when they recklessly kill unarmed people. Average citizens are not allowed to commit such an act without consequence. There is no compelling reason the rule should be different for public servants.

CONCLUSION

For the foregoing reasons, the order of the federal district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 23, 2016, I filed the foregoing brief with this Court by causing a true digital copy to be electronically uploaded to the Court's CM/ECF system. I further certify that this brief has been served on the parties and attorneys below via electronic mail.

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