No. 17-1476

In the Supreme Court of the United States

CITY OF FORT WORTH, TEXAS, W. F. SNOW, AND J. ROMERO,
Petitioners,

v.

ERIC C. DARDEN, as Administrator of the Estate of Jermaine Darden and on behalf of the statutory beneficiaries of the Estate of Jermaine Darden (which are Donneika Goodacre-Darden, surviving mother of Jermaine Darden, Charles H. Darden, surviving father of Jermaine Darden),
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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CONSTITUTION

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REPLY FOR PETITIONERS

As described in their petition, police officers W.F. Snow and J. Romero, while executing a felony narcotics warrant under dangerous circumstances, encountered a large suspect, who--as seen on undisputed video recordings--refused commands and forcefully resisted being restrained. Following the struggle, the suspect unfortunately suffered a fatal heart attack linked to his preexisting health problems and likely also related to the effects of a toxic synthetic cannabinoid. Despite clear video evidence of the struggle, respondent, nonetheless, tries to claim that the suspect, Jermaine Darden, offered no resistance. Respondent's brief ignores not only the video evidence, but also his own fact and expert witnesses. Even the court of appeals found that Darden indeed physically struggled against being restrained. Indeed Darden's own use of force expert states in his affidavit that even after a prolonged struggle, "Darden continued to resist officers by pushing himself up onto his knees while trying to stand up." ROA.1515.

Apparently recognizing that his arguments below and the reasoning of the court of appeals cannot withstand scrutiny and are insufficient to overcome the officers' qualified immunity, particularly in light of any clearly established law, respondent now tries to recast his case and direct attention to (sometimes non-existent) disputes of immaterial facts. The actual issues before the Court, however, remain whether the court of appeals erred by failing to view Darden's physical resistance through the eyes of a reasonable officer on the scene (finding instead a fact issue only as to *why* he was resisting) and the related question of

whether the relevant clearly established law must be more tailored to the facts than the global proposition that force cannot be used against non-resisting suspects, especially in light of this Court's recent and repeated mandates in this area. See *Kisela v. Hughes*, 138 S. Ct. 1148 (2018); *D.C. v. Wesby*, 138 S. Ct. 577 (2018); *White v. Pauly*, 137 S. Ct. 548, 552 (2017); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

Of significant note is that both the Fifth Circuit's error and the existence of a split of authority on this very issue is highlighted by another case currently pending before this Court, *Callwood v. Jones*. 727 F. App'x 552 (11th Cir. 2018), petition for cert. pending, No. 17-1569 (filed May 18, 2018). In *Callwood*, the Eleventh Circuit rejected the exact reasoning employed the Fifth Circuit in this case. Responding to the plaintiff's argument that the suspect in that case "continued to move not because he was resisting but because he was struggling to breathe," the Eleventh Circuit upheld the officers' immunity and correctly explained that "for qualified immunity purposes we must take the facts as a reasonable officer on the scene could have viewed them." *Id.*

For the reasons stated in their petition and herein, therefore, the Court should grant the petition and summarily reverse or vacate the judgment below, or, if the Court deems more appropriate, proceed to the merits stage.

I. DARDEN'S OWN WITNESSES, INCLUDING HIS OWN PROFFERED EXPERTS, AS WELL AS THE FIFTH CIRCUIT, ALL ACKNOWLEDGE THE UNDENIABLE FACT THAT DARDEN PHYSICALLY RESISTED

The best evidence in this case, of course, are the video recordings, which both courts below and all witnesses, fact and expert, plaintiff and defense, agree (or at least cannot deny) show Darden engaged in a significant and prolonged physical struggle with police. In an apparent attempt to shift the Court's focus, however, respondent makes a number of inapplicable, immaterial, or simply incorrect claims and arguments in his response. Respondent, for example, incorrectly claims that once Darden was on the ground, "Snow placed his body on Jermaine, choked him and held him down, face first." Br. in Opp. 3. Respondent cites page 1510 of the record to support the claim. Not only is that factual allegation not accurate, it is not supported by the referenced page (or any page) of the record. The reference is to the affidavit of Darden's own use of force expert, but nowhere in his affidavit does that witness ever claim Snow did those things, particularly that he ever choked Darden. What Darden's own expert does say, however, is that upon entering the residence officers ordered "everyone to get down on the floor." ROA.1510. He also admits Darden did not comply with those commands (contrary to respondent's current arguments, Br. Opp. 9) but claims it was because Darden had been asleep before officers entered. ROA.1510. (The claim about Darden having been asleep prior to the officers' entry now also appears to be untrue but totally immaterial as even respondent does

not claim officers could possibly have known what Darden was doing prior to their entry.)

Darden's expert goes on to explain that a struggle to get Darden handcuffed then ensued and that Snow eventually deployed his Taser device two times "in an attempt to get him handcuffed." ROA.15.14.[1] Respondent's proffered expert then opines that Darden was not "resisting arrest" but rather "trying to breathe." ROA.1515. Despite that statement, he immediately thereafter then states that "Darden ***continued to resist officers*** by pushing himself up onto his knees while trying to stand up." ROA.1515 (emphasis added). That paragraph, from Darden's own expert's affidavit, fully encapsulates Darden's arguments below and the court of appeals' opinion. On the one hand, there can be no dispute that Darden was in fact "resisting," but maybe, the argument goes, in Darden's mind, he was not "resisting arrest," because he was perhaps actually struggling to breathe because his extraordinary preexisting health infirmities made it difficult for him to breathe in almost any position.

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[1] Although also not material, respondent incorrectly claims that Snow was able to throw Darden on the ground in an instant, citing pages 705, 1503, and 1528 of the record. Br. in Opp. 3. None of the cited pages support the contention. The first reference is to the autopsy report, which states only that Darden "engaged in a physical struggle with police after failing to comply with instructions during search warrant" and that Darden continued to struggle even after being tased twice. App. 705. The other references are to the videos, which completely belie the claim, and to Darden's expert's affidavit, which does not support the claim.

As mentioned in the petition and ignored by respondent in his brief, Darden's own medical expert also describes the obvious struggle captured on video, stating, "Mr. Darden was involved in a struggle with multiple police officers as they attempted to place him in a prone position and apply wrist restraints. . . . . During the course of the struggle, one of the police officers fired 2 darts from their CED weapon and a second firing of 2 darts shortly thereafter. . . . After an approximate 2½ minute struggle," Darden was restrained and "placed in a sitting position." ROA.1535.

As described in the petition and below, Darden's own friends and family members admitted he physically resisted officers. See Pet. 14-6.

The court of appeals also explains that as officers were trying to restrain him, "Darden . . . appeared to push himself up on his hands. . . . As Officer Romero tried to pull Darden's left arm behind his back, Darden seemed to pull his arm away." App. 24-25. But the panel failed to evaluate the case from the perspective of a reasonable officer faced with physical resistance. Instead the panel improperly found a fact question to exist only as to whether "Darden was merely trying to get into a position where he could breathe and was not resisting arrest." App. 13-14.

II. RESPONDENT'S EFFORTS TO DISCOUNT HIS OWN WITNESSES' TESTIMONY ARE UNAVAILING

Undisputed video evidence shows Darden's *significant and prolonged* resistance and wholly belies any claim that officers, particularly including Snow and Romero (who did not join the struggle until close to

its completion, see pet. 7), ever used anything other than imminently reasonable, measured force in response. Witness accounts confirm what the video shows. In his response, Darden tries to argue that friends and family members of Darden's, who were inside the house and who testified under oath that Darden struggled against officers and plainly appeared to be resisting arrest should be ignored. Darden's own mother, Donna Randle, testified as follows:

> 12 Q. (BY MR. EAST) On the date of the incident in
> 13 question, is it your position that the police thought
> 14 Jermaine was fighting them, but really he was trying to
> 15 get into a better position, so he could breathe easier?
> 16 A. Yes.
> 17 Q. And that's what you told police, right?
> 18 A. Yes.

ROA.1053.

> 25 Q. And it was your earlier testimony that the
> 1 officers believed he was fighting them, but in reality,
> 2 he was trying to get into a more comfortable position?
> 3 A. Right.

ROA.1057. Darden does not refute that no objection was ever made to this testimony. See Br. in Opp. 11-12. Instead, he now claims that "close examination" of the testimony reveals a different meaning. It does not. The admission, in any event, is not surprising or

controversial. Evan a brief review of the videos shows the struggle officers were in with Darden as he continuously and forcefully resisted efforts to secure him. Obviously he appeared to be resisting arrest.

Respondent's effort to discount the testimony of Clifton Crippen even undercuts his own, earlier claim that Snow instantly and easily threw Darden to the ground. See note 1, supra. Respondent acknowledges in this part of his response that after Snow tried to get Darden on the floor, Darden instead stood up as officers were commanding him to get on the floor. Br. in Opp. 11 (citing ROA.1596).

Finally, respondent's argument about the testimony of Orlando Cook and Donald Virden is confusing and also not persuasive. Br. in Opp. 12. Respondent appears to argue that when Virden testified that Darden was raising up against the officers' efforts to control him, that Virden was somehow not referring to the actual point when Darden was raising up, as plainly seen on the video. See Pet. 9 (screen capture). And although Cook confirmed that Darden continued to resist even after being tased, respondent seems to claim that fact is somehow favorable to him. Br. in Opp. 12. It is simply not clear what respondent is arguing with regard to the testimony of these witnesses, but their testimony confirms what is visible on the videos: Darden was continuously and vigorously resisting officers until he was finally handcuffed.

III. NO CLEARLY ESTABLISHED LAW EXISTS THAT WOULD MAKE THE OFFICERS' ACTIONS UNCONSTITUTIONAL

"This Court has repeatedly told courts . . . not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449 (2018) (internal quotations marks and citation omitted). "[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Id.* (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam)). "Thus, we have stressed the need to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018) (citing *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam)).

As stated in the petition, the court of appeals failed to identify any such case. Instead, the court of appeals declared only that if a jury were to find that Darden's subjective reasons for resisting were not to escape or harm officers and were instead related only him struggling to breathe, then his resistance would somehow not be considered actual resistance. See App. 12. That approach obviously fails to view the suspect's actions objectively and "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989); see also *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018). The Fifth Circuit then said that if jurors could so find a lack of resistance based on

their view of the suspect's subjective thoughts and motivations, then clearly established law need only be the high-level principle that officers cannot use force against completely compliant subjects. See App. 13-14.

Even today, with one exception, respondent has never attempted to identify any case suggesting under even remotely similar circumstances that these officers could have known that securing this resisting suspect somehow would violate his constitutional rights. That only exception is the single out of circuit holding initially cited, then abandoned, by the court of appeals, *Richman v. Sheahan*, 512 F.3d 876, 880 (7th Cir. 2008). As discussed in the petition, that case is not only not factually on point, a single out of circuit opinion cannot clearly establish the law. *Ashcroft v. al Kidd*, 563 U.S. 731, 742 (2011).

In his response, respondent no longer even mentions *Richman* but instead now claims that he has always cited other cases that clearly establish the law. Br. in Opp. 13. He remarkably does not cite any such cases in his response but instead quotes a passage from his earlier briefing that talks only of a rule that is even less applicable than what the court of appeals described, i.e., "once a suspect has been handcuffed and subdued, and is no longer resisting, an officer's subsequent use of force is excessive." Br. in Opp. 13. But there is no evidence in this case that any officer ever used force against Darden after he was handcuffed. Respondent's bald claim that clearly established law exists at any level of particularity sufficient to put these officers on notice that they did anything wrong is incorrect and not supported in his response.

IV. THIS CASE IS IMPORTANT, AND THE COURT OF APPEALS' OPINION CONFLICTS WITH HOLDINGS FROM THIS AND OTHER COURTS

The Fifth Circuit's opinion in this case sends a message to police officers who risk their lives serving warrants in dangerous environments that they can no longer take the swift and decisive action long-approved by this Court and necessary for the protection of everyone involved. See *Muehler v. Mena*, 544 U.S. 93, 99 (2005) (recognizing that "the risk of harm to officers and occupants is minimized if the officers routinely exercise unquestioned command of the situation."). Instead they must now apparently somehow assess suspects for potential latent health infirmities that may cause them to resist apprehension for reasons other than to escape, hide evidence, or harm officers. The implied rule is unworkable and dangerous. It is, of course, unfortunate that Mr. Darden suffered a heart attack, but his undeniable resistance reasonably appeared to officers on the scene to be the resistance it was and no clearly established law dictated that officers should not have treated him as any other resisting suspect in dangerous circumstances. Moreover, the holding in this case has quite remarkably come to stand for the proposition in the Fifth Circuit that force cannot be used against a completely compliant suspect, a rule that has no relationship to the actual facts of this case. *See, e.g.*, *Sam v. Richard*, No. 17-30593, 2018 WL 1751566, at *3 (5th Cir. Apr. 12, 2018); *Pena v. City of Rio Grande City*, 879 F.3d 613, 619 (5th Cir. 2018).

Finally, for the reasons discussed in the petition, the Fifth Circuit's opinion violates the repeated mandates of this Court that, especially in the Fourth Amendment context, officers' qualified immunity must be preserved unless they can be shown to have violated clearly established law stated at a sufficiently factually-applicable level.

The case of *Callwood v. Jones*, currently pending before this Court and set to be considered at the same conference as this case demonstrates both the Fifth Circuit's error and the split of authority on the very issue presented by this case. 727 F. App'x 552 (11th Cir. 2018), petition for cert. pending, No. 17-1569 (filed May 18, 2018). In *Callwood*, officers used significant force against a resisting suspect, including two applications of a Taser device. *Id.* at 555. In that case, the suspect continued to resist even after he was handcuffed, and officers ended up using additional force, including ultimately hogtying him. *Id.* at 556. Here, of course, officers used no force against Darden after he was handcuffed. Nonetheless, in *Callwood*, as here, the suspect became unresponsive and died.

In *Callwood*, as here, the plaintiff argued (using almost the exact language found in the Fifth Circuit's opinion) "that a jury could reasonably infer that [the suspect] continued to move not because he was resisting but because he was struggling to breathe." *Id.* at 560. But unlike the Fifth Circuit, the Eleventh Circuit answered the question in a manner consistent with this Court's repeated mandates, stating:

> Tragically that may be so, but for qualified immunity purposes we must take the facts as a reasonable officer on the scene could have

> viewed them. Throughout the incident, Illidge resisted all of the officers' attempts to subdue him and ignored their repeated requests to calm down. A reasonable officer could have believed that Illidge continued to resist arrest and that he posed a danger to the officers and himself by resisting. For that reason, we cannot say that the officers' use of force was so utterly disproportionate that any reasonable officer would have recognized that his actions were unlawful.

Id. at 560-61.

Darden struggled vigorously and continuously against the officers' efforts to restrain him under tense and dangerous circumstances. The Fifth Circuit erred by denying the officers qualified immunity.

Particularly in light of *Kisela v. Hughes* and *D.C. v. Wesby,* therefore, the Court should grant the petition and summarily reverse or vacate the opinion below (or proceed to merits briefing) to ensure uniform application of qualified immunity principles and to protect both police officers and the public.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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