No. 17-552

In the
Supreme Court of the United States

POLICE OFFICER THOMAS WILSON, #5675,

Petitioner,

– v. –

CHRISTOPHER CALLAHAN, individually and as administrator d.b.n. of the Estate of Kevin Callahan, PATRICIA CALLAHAN, individually,

Respondents.

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

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DONNA ALDEA
Counsel of Record
BARKET, MARION, EPSTEIN & KEARON, LLP
Attorneys for Respondents
666 Old Country Road, Suite 700
Garden City, New York 11530
(516) 745-1500
daldea@barketmarion.com

QUESTION PRESENTED

Whether certiorari should be denied where, under the specific facts of this case, the evidence reasonably supported a view that Officer Wilson shot Callahan, who was unarmed, in his home, without any probable cause to believe that Callahan posed a threat; and, thus, consistent with this Court's precedent, the Second Circuit properly held that Callahan was entitled to a jury charge on *Tennessee v. Garner*'s fundamental proposition that deadly force is "*unreasonable …unless* 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." 471 U.S. 1, 11 (1985).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U. S. Const. amend. IV.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. §1983

STATEMENT OF THE CASE[1]

Police are sent to "check out" what they are told is a likely made-up account of a man with a gun in the Callahan house.

In September 2011, Kevin Callahan was battling a drug problem serious enough that it had caused his relationship with his mother, Patricia, to fray. So when Kevin arrived back at his mother's house after a pill-induced hospitalization, Patricia chose to avoid further conflict with him, left her home, and checked into a hotel (JA 50, 55).

Near midday on September 20, 2011, Kevin's brother, Christopher, went to visit Patricia at the hotel. During this time, Patricia called home to check in on Kevin. During the call, she overheard someone yelling in the background, and then Kevin told her, "Mom, he's got a gun" (JA 55, 57). Although Kevin was prone to making up stories, and it seemed that this report might have been just an attempt to get attention, Christopher nevertheless called 911 from the hotel. Christopher relayed Kevin's history of drug problems to the 911 operator, stating "the kid ... has a history of drama.... I don't know if he's ... begging for, you know, Mom to come back because she left him. I ... didn't know ... what the correct move was. I, I thought ... just call you guys." "[I]t could be just a, a cry for help from this kid" (JA 50, 55).

Importantly, Christopher also made clear that neither he nor his mother Patricia were actually present in the home with Kevin. He told the 911

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[1] The citations herein are to the Joint Appendix (JA) and Confidential Appendix (CA) filed in the United States Court of Appeals.

operator "My mom is with me" (JA 55) and that he was calling "from my mother's cell phone in ... the hotel" (JA 55). He even expressed awkwardness about calling the police about a potentially made-up story from his brother altogether. "I mean was this the wrong move to call?" he asked. But the police assured him he had made the right decision. "Yeah, no. Not at all," the dispatcher responded (JA 55). "We're going to get somebody over to check it out" and it was "[n]o problem" (JA 55).

Defendant Officers Wilson and Furey arrive at the Callahan residence, where Kevin is alone, unarmed, hiding behind his bedroom door.

Defendant Officers Wilson and Furey received radio calls over the air to respond to the Callahan residence (JA 484-85). On those radio transmissions, Officer Furey indicated he already knew the Callahans and that Kevin Callahan was "not violent" (JA 342).

When Defendant Wilson arrived at the home, Furey was already there, as was a third officer, McVeigh (JA 259). Together, they entered the home. McVeigh went upstairs, Defendants Furey and Wilson went downstairs (JA 262), and at the bottom of the stairwell, Furey and Wilson ventured in different directions (JA 345).

Alone now, Defendant Wilson observed two doors and decided to first enter the room on the left, which he cleared (JA 265). Then he proceeded to the doorway on the right. As he began to walk through, he saw "somebody through the doorjamb and at that point ... [he] said 'police, I see you, police, I see you, don't move'" (JA 270). At the time, Defendant Wilson stood six feet tall, weighed about "240, 250" pounds (JA 268), and was armed with a loaded .9-millimeter

semiautomatic pistol, which he had drawn and was holding against his left thigh (JA 499). The person on the other side of the door -- Kevin Callahan -- was alone, and unarmed, wearing a white tee-shirt, blue shorts, and a pair of socks (JA 64, 412-13) (Q. And was there any weapon in the vicinity of where he was? A. I didn't see any, no. Q. And did you see any weapon at all anywhere in that room...? A. No, I did not"). He was also lighter than Defendant Wilson by about sixty pounds (JA 225).

Defendant Wilson panics, then shoots Kevin Callahan repeatedly, killing him.

While he stood in the doorway, Defendant Wilson later claimed, the door shut against his body, somehow pinning his left side in the room and his right side out of the room (JA 307). He found the situation "scary" (JA 275), panicked, urinated on himself (JA 280), then without seeing a weapon or identifying Kevin's size, height, race, or anything other than his gender -- he fired his pistol (JA 277) (Q. Could you tell the age? A. No. Q. Description? Size? Height? Race? Anything? A. No").

While Wilson had claimed to be "pinned in the door" (JA 274) with his hand "down" by his "left thigh" (JA 272), the first shot, ballistics later showed, was fired into the back of Kevin's shoulder-area from point-blank range (JA 501-02, 522), traveled downward -- not upward -- through Kevin's body, and was later recovered still inside Kevin's chest (JA 444, 522).

At that point, the pressure on the doorway "let up" (JA 278, 310). But the gunfire did not. Instead, Defendant Wilson fired another three bullets -- two of them through the closed door -- into the room he admitted he could not see (JA 278, 451). He claimed

to have fired these additional bullets while falling backward, into a sitting position (JA 310), which would have logically caused his gun to fire upwards; but the first of these bullets hit Kevin in his shoulder, traveling at a sharp downward trajectory, and exiting out of Kevin's stomach (JA 442, 522).

The next two bullets were fired while Wilson had allegedly fallen into a sitting position in the hallway outside the room. Although the door was closed, and Kevin was in another room, Wilson fired two more bullets through the door -- one shot missed Kevin, and the other hit (JA 266, 327, 455). The bullet that hit Kevin entered from his front on the left side of his chest, and it travelled rightward and, again *downward* through his body (JA 453), before hitting an unknown "intervening object" and exiting out his left side (JA 502). Gunshot stippling on the door showed that one of these bullets was fired downward through the door with the muzzle of the gun no more than 3 to 6 inches away from the door's surface (JA454).

Although Kevin was unarmed, did not touch Wilson, and the only gunfire in the house was from Wilson's gun, Wilson inexplicably claimed that during the shooting he thought his own "hand was blown off" and was in a "catatonic state" (JA 311). In fact, Wilson suffered no injuries at all.

After the shooting, there was no more movement or noise from the bedroom. Although no officer had ever seen a weapon, no officer had been hurt or even touched by Kevin, and no shots had been fired except by Wilson, neither Officer Wilson nor Furey attempted to enter the room where Kevin sat on his knees behind the door, holding his chest, and bleeding

to death. Instead, Wilson ran away toward Furey (JA 311-12) and announced on a police radio broadcast that he had "a male behind the door," who "just shut the door" (JA 323). "He was hiding behind the door," Wilson reiterated, adding that Kevin had "displayed something" but that "I'm okay. Shots fired" (JA 323).

On the other side of the radio, Wilson's sergeant -- Sergeant Greene -- instructed him to not make reentry into the room where Kevin lay bleeding (JA 312). So Wilson and Furey "[j]ust waited" (JA 313). Approximately twenty minutes passed, with neither Wilson nor Furey administering CPR or any other rescue efforts, until Emergency Services arrived on scene and entered the room (JA 391). Upon entering, Officer James Bowen from Emergency Services found Kevin "behind the door ... on his knees," unresponsive and "covered in blood" (JA 391). He did not see "any weapon in the vicinity of where he was," but nevertheless, rather than administering aid or CPR, he "grabbed [Kevin's] left arm and [helped] ... place[] him in handcuffs" (A412). Meanwhile, the officers, who were not injured, were taken to the hospital (JA 369) (Q. ...[W]ere you diagnosed with any sort of injuries as a result of this incident? A. No. .... Q. Did you ever learn whether or not [Wilson] suffered any sort of medical injuries as a result of this incident? .... A. No, I'm not aware of any"). Wilson, for instance, had testified that he was "pinned" in a doorway (JA 274), and yet no evidence was introduced at trial of him having any bruising whatsoever. Kevin, however, died from his injuries.

In a police report, Defendant Wilson later attempted to justify his behavior by stating that he had concern about the "safety of the mother because no one answered the door" (JA 56; see also JA 61). Yet

"the mother," Patricia, was not home, which had been clearly reported to the 911 operator; indeed, the call had been made from a hotel room using the mother's own phone (JA 55). Moreover, Officer Wilson claimed that right before he fired, he feared that he had been shot, and feared for his own life (JA 61, 69, CA 23). This puzzling "fear," allegedly experienced by a police officer in a home where the only sound of gunfire was from his own gun that he repeatedly discharged at an unarmed man through a door, obviously proved incorrect as well.

The Trial and Jury Charge

In 2012, Kevin Callahan's family filed suit in the United States District Court for the Eastern District of New York against Suffolk County, Officer Wilson, and other Suffolk County police officers and employees, alleging, *inter alia*, that Wilson had used excessive force in contravention of Kevin Callahan's Fourth Amendment rights and 42 U.S.C. §1983. The excessive force claim proceeded to trial in July 2015.

On July 23, 2015, all testimony had concluded and the parties appeared before the trial court to address proposed jury instructions before the jury entered the room**.** During this conference, Callahan's counsel "[s]pecifically ... object[ed] to the excessive force charge," given that there were "no *Garner/O'Bert*[2] instructions given as to excessive force" (JA 564, 570-71).

In particular, counsel explained, *Garner*/*O'Bert* instructions provide that deadly force "is unreasonable unless" the officer had probable cause to

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[2] Referencing *Tennessee v. Garner*, 471 U.S. 1 (1985); and *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29 (2d Cir. 2003).

believe the suspect posed a significant threat of death or serious physical injury (JA 566). "[I]t's not just a matter of semantics," Callahan's counsel explained (JA 566). But the trial court responded shortly: "Counselor, you have your objection .... It's enough to go to the Second Circuit if you're unhappy" (JA 566-67).[3]

The court's jury charge then included the precise error to which Callahan had objected. In particular, the court told the jury that a "police officer *may use* deadly force against a person *if* a police officer has probable cause to believe that the person poses a significant threat of death or serious physical injury to the officer or others" (JA 605) (emphasis added). This was instead of the requested charge that deadly force is "unreasonable unless" such probable cause existed.

Less than four hours after the court's instructions ended, including the lunch hour, the jury had a verdict (JA 615, 619). Answering the question of whether Plaintiffs proved that "defendant Wilson used excessive force in the shooting of Kevin Callahan" -- the jury answered, "No" (JA 619).

On October 9, 2015, following through on his objections to the jury charge, Callahan filed a post-verdict motion seeking, *inter alia*, to set aside the jury verdict on the grounds that the court issued an improper deadly-force-reasonableness instruction (CA30-43). The defense opposed, arguing that

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[3] Callahan's attorney pressed on with her objection to the charge, and, ultimately, the trial court acknowledged the record's clarity: "It's very clear that you object. You said it at least seven times" (A571).

"[w]hether the jury was instructed that conduct was 'unreasonable unless' or 'was reasonable if' still resulted in them receiving the correct legal standard" (JA 649). On January 25, 2016, the trial court denied Callahan's post-verdict motion without discussion or explanation (JA 13).

The Appeal

Callahan appealed to the United States Court of Appeals for the Second Circuit, arguing, *inter alia*, that under these facts -- where deadly force was clearly used by the officer, Kevin Callahan was actually unarmed and never tried to take the officer's weapon, the officer never saw a weapon of any kind, and a material question of fact existed as to whether he had probable cause under the totality of the circumstances to believe that Callahan posed a threat to his life -- the court was required to instruct the jury that deadly force was "*unreasonable unless"* the officer had "probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or others." Appellant's Brief, citing *Tennessee v. Garner*, 471 U.S. at 11; *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d at 29.

Holding that this instruction was, indeed, required to properly apprise the jury of the law and to ensure that the jury's verdict would not run afoul of *Garner*'s explicit prohibition of the use of deadly force in the absence of such probable cause, that the district court's failure to deliver the requested charge ran afoul of *Garner* and *O'Bert*, as well as the Court's recent precedent in *Rasanen v. Doe*, 723 F.3d 325 (2d Cir. 2013), and that the error could not be deemed harmless on the facts of this case, the Second Circuit

reversed and remanded for a new trial. *Callahan v. Wilson*, 863 F.3d 14 (2d Cir. 2017).

REASONS FOR DENYING CERTIORARI

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT, AND, IN ANY EVENT, PETITIONER DID NOT RAISE THIS ARGUMENT IN THE TRIAL COURT.

A. Petitioner's Present Arguments Were Not Raised in the Trial Court, and are Substantively Different from his Arguments on Appeal.

In the trial court, in response to Callahan's repeated objections about the jury charge and repeated requests for a specific charge articulating *Garner*'s standard,[4] petitioner failed to argue that more recent Supreme Court precedent cast doubt on the need for the *Garner/O'Bert* instruction,[5] or that there was a split on this issue in the circuit courts. Instead, petitioner argued only that the trial court's proposed charge complied with the *Garner* standard.

So, too, when this issue was briefed in Callahan's motion for judgment as a matter of law and a new trial pursuant to Federal Rules of Civil Procedure 50 and 59, petitioner again failed to articulate his present argument, or to even cite any of the cases upon which he now relies as abrogating the *Garner* rule. Instead, petitioner *conceded* that the instruction was mandated, and argued only that the trial court's

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[4] *Tennessee v. Garner*, 471 U.S. 1 (1985).

[5] *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29 (2d Cir. 2003).

charge, as given, was the "functional equivalent" of the required charge (JA 592-95).

Then, on appeal, petitioner principally relied on the arguments he had made at trial, and first raised the specter of his present claims as an alternative argument at the tail-end of his brief on this point. And even then -- contrary to his present argument -- petitioner *reconciled* this Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007), with the *Garner/O'Bert* requirement, and argued only that, pursuant to this Court's decision in *Plumhoff v. Rickard*, __ U.S. __, 134 S.Ct. 2012 (2014), "the continuing application of the *Garner* rule as distinct from a general reasonableness inquiry may be in doubt." (Resp. Br. at 19). Even in doing so, however, petitioner recognized that *Plumhoff* case was not a jury charge case, and, in any event, did not directly abrogate *Garner*, but merely "did not look to the question under *Garner* of whether the officers had probable cause to believe that the suspect was dangerous." (*Id.* at 20).

While petitioner's failure to raise his present claims below does not preclude this Court's review of the case, it nevertheless reveals an inconsistency in petitioner's position that should reflect on the merits of his petition.

B. Contrary to Petitioner's Claims, the Second Circuit's Decision is Consistent with this Court's Precedent.

Thirty-one years ago, this Court laid the measuring tape for determining when police officers' use of deadly force is reasonable. Confronted with a case involving a fleeing suspect, who posed no threat to the officer, it held that "such force may not be used unless … 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." *See Tennessee v. Garner*, 471 U.S. at 11. Today, *Garner*'s clear statement of this minimum threshold of reasonableness is, essentially, black-letter law, with the case cited in over 4,000 published decisions.[6] Indeed, *Garner*'s central proposition is so fundamentally engrained in our Fourth Amendment jurisprudence, that it would be difficult to conceive of even a hypothetical scenario where a police officer *would be* constitutionally permitted to use deadly force against a person *without having*, at least, probable cause to believe that person posed a threat of death or serious physical injury to the officer or others. Certainly, *no case* after *Garner* has ever found deadly force justified under such circumstances.[7]

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[6] A Westlaw search reveals 14,063 citing references, with 4,251 citing cases.

[7] In view of this fact, petitioner's argument that "the existence of 'probable cause' is the only situation in which an officers [sic] use of deadly force in shooting cases can be constitutionally permissible," and this is a higher or different standard than "one who engages in the identical conduct in another circuit" would face (Pet. at 22), is a hollow complaint. For there is no court in the nation that has ever held that deadly force is permissible in the absence of probable cause to believe the target poses a threat to human life or safety. Indeed, any such holding would be directly contrary to this Court's precedent and would warrant reversal as a matter of law. Unless petitioner can point to the existence of any such case – or even such hypothetical situation – his complaint here amounts to nothing more than a claim that he is entitled to the windfall of a vague jury instruction, in the hopes that the jury might thereby improperly find "reasonableness" in contravention of *Garner*'s rule. This is hardly a sound policy reason to grant certiorari. To the contrary, it is a very strong reason not to.

While this Court has never addressed *Garner*'s applicability in the context of a jury charge, it has recognized that "the very purpose of a jury charge is to flag the jurors' attention to concepts that must not be misunderstood…." *Lakeside v. Oregon*, 435 U.S. 333, 340 (1978). And it is universally recognized that "a party is entitled to an instruction on its theory of the case so long as it is legally correct and there is factual evidence to support it." *Thornton v. First Bank of Joplin*, 4 F.3d 650, 652 (8th Cir. 1993). Thus, applying these principles, many circuit courts, including the Second Circuit, have required -- in addition to the general charge on reasonableness applicable to all excessive-force cases -- a *Garner* charge, explaining that deadly force is *unreasonable unless* the officer had probable cause to fear serious physical injury or death, in cases where the evidence supports a reasonable view *both* that (1) the police used "force that was 'highly likely' to result in the suspect's death"; *and*, (2) the suspect did not pose a risk of death or serious injury to the officer or others. *See, e.g., Rasanen v. Doe*, 723 F.3d 325, 334 (2d Cir. 2013) (requiring instruction where officer shot unarmed man, and the evidence supported a view that there was no probable cause to believe the man posed a threat); *Cf. Terranova v. New York*, 676 F.3d 305, 309 (2d Cir. 2012) (providing that the "usual instructions regarding the use of excessive force are adequate" as long as the case does not involve force "highly likely to have deadly effects, as in *Garner*").

Here, it was undisputed that the Officer Wilson used deadly physical force in shooting Callahan three times. It was similarly undisputed that Callahan was not actually armed, and never grabbed for the officer's gun. And there was certainly a reasonable view of the evidence, on the facts of this case, that under the

totality of the circumstances, Wilson lacked probable cause to believe that Callahan posed any threat to his life when he responded to the family's call of a likely-made-up complaint, he knew Callahan was in the house and non-violent, he did not see any weapon, and yet he fired-blind at Callahan through a closed door. Thus, to ensure that the jury's verdict complied with *Garner*'s basic rule, and to prevent it from being misapplied or "misunderstood" (*Lakeside v. Oregon, supra*), the Second Circuit properly held that the failure of the trial court to give the requested instruction on the facts of this case was error, and, as this may have been outcome determinative in this close trial, required reversal. *Callahan v. Wilson*, 863 F.3d 154.

Nevertheless, petitioner now argues -- as he did for the first time before the Circuit Court -- that this Court's more recent precedent casts doubt on the continued vitality of *Garner* 's rule -- that "[deadly] force may not be used unless … 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. at 1) -- and, thus, undermines the Second Circuit's holding that this instruction must be given to juries in cases factually similar to *Garner*. *See* Def. Br., at 19, *citing County of Los Angeles v. Mendez*, __ U.S. __, 137 S.Ct. 1539 (2017); *Mullenix v. Luna*, __ U.S. __, 136 S.Ct. 305 (2015); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Scott v. Harris*, 550 U.S. 372 (2007). Petitioner is wrong.

As a threshold matter, none of this Court's cases on this subject involved review of jury instructions, and, thus, none are directly applicable to the case at bar –

or, stated another way – contrary to it. Thus, this simple fact alone dispels petitioner's argument.

But, even substantively, and contrary to petitioner's understanding, this Court has never abrogated *Garner*'s absolute prohibition of a police officer's use of deadly force in the absence of probable cause to believe that the target poses an imminent threat to the life and safety of the officer or others. To the contrary, in each of the cases cited by petitioner, this Court has repeatedly *affirmed* that such conduct -- *if supported by the facts of the case* -- would be necessarily unreasonable under the Fourth Amendment, and thus, constitutionally prohibited by *Garner*. What the Court *has* underscored, however, is that the contrapositive of *Garner*'s rule is also, necessarily, true: if the evidence *conclusively establishes* that a target *does* pose an imminent threat to life, then deadly force is not, *per se*, unreasonable, and the totality of the circumstances must control the reasonableness inquiry. *See, e.g., Scott v. Harris,* 550 U.S. at 384; *Plumhoff v. Rickard*, 134 S. Ct. at 2021-22. Likewise, if deadly force is *not used* by police, then there is no rigid requirement of imminent threat to life, and, again, courts must "slosh … through the factbound morass of 'reasonableness'" to determine if the degree of force used was commensurate with the threat-level. *Scott v. Harris*, 550 U.S. at 382; *Graham v. Connor*, 90 U.S. 386, 395-96 (1989). Stated another way, *Garner*'s applicability is – like all case law – limited to cases on all fours with it.

Thus, in *Scott v. Harris*, 550 U.S. 372 (2007), this Court reversed the Eleventh Circuit's denial of summary judgment to a police officer, Scott, who ended a dangerous high-speed chase by ramming Harris's car from behind, thereby causing the car to

crash and rendering Harris a quadriplegic. In rejecting Harris's argument that the case should be evaluated under the *Garner* standard simply because "deadly force was used," this Court explained that "Garner did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force,'" but was, rather, "simply an application of the Fourth Amendment's 'reasonableness' test to the use of *a particular type of force"* (*i.e.*, deadly force) "in a *particular situation*" (*i.e.*, where police lacked probable cause to believe the suspect was an actual and imminent threat). *Id.* at 383 (internal quotations omitted, emphasis added). Reasoning that in *Scott* – unlike in *Garner* – it was so "clear from [a] videotape that respondent posed an actual and imminent threat to the lives of any pedestrians …, other civilian motorists, and to the officers involved in the chase," such that "no reasonable jury could have believed [otherwise]," the Court held that the deadly force used by Scott was, as a matter of law, reasonable. Far from abrogating or limiting *Garner*, as petitioner now contends, *Scott* was completely consistent with it: the type of force was the same (deadly force),[8] but the particular situation was "vastly different," as the evidence in *Garner* reasonably supported the view that the running suspect posed no actual or imminent threat to anyone, while the evidence in Scott *conclusively* established that the speeding motorist *did* pose such threat, eliminating any question of fact on this issue.

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[8] Although, as the Court pointed out, while Scott's actions in bumping Harris's car during a high speed chase "posed a high likelihood of serious injury or death," they did not pose "the near *certainty* of death posed, by, say, shooting a fleeing felon in the back of the head." *Id.* at 384, comparing *Garner*, *supra*, at 4.

Similarly, this Court's decision in *Plumhoff v. Rickard*, __ U.S. __, 134 S.Ct. 2012 (2014) -- though heralded by petitioner as a game-changer because it involved a police shooting -- is actually materially indistinguishable from *Scott* on the Fourth Amendment question, as this Court itself explicitly recognized. *Id*. at 2021-22. Like *Scott*, *Plumhoff* involved a dangerous high speed chase of a motorist, who was driving at speeds in excess of 100 miles per hour, and, when ultimately blocked in a parking lot, rammed into police cruisers, accelerated, and threw his car into reverse to attempt escape. Concluding, as it had in *Scott*, that it was "beyond serious dispute that Rickard's flight posed a grave public safety risk," the Court likewise held that "as in *Scott*, the police acted reasonably in using deadly force to end that risk." *Id*. at 2022. The fact that the police in *Plumhoff* used deadly force in the form of gunfire, rather than deadly force of another kind, is, thus, wholly immaterial. The reason that summary judgment was appropriate -- and the reason that *Garner* would not apply to such facts -- was because there was no question of fact regarding the suspect's posing an imminent risk of death or serious injury to the officer or others; accordingly, the use of deadly force -- whatever its nature -- was reasonable as a matter of law. Thus, far from abrogating *Garner*, or casting doubt on its application to cases, like the one at bar, involving deadly force against an unarmed suspect posing no danger to the officer or others, *Plumhoff* is, actually, perfectly consistent with *Garner's* continued vitality, and with the Second Circuit's continued reliance upon it in appropriate cases.

Mullenix v. Luna, __ U.S. __, 136 S.Ct. 305 (2015), similarly makes no attempt whatsoever to abrogate *Garner*, and, thus, casts no doubt on the Second

Circuit's decision here. In that case, this Court did not even address the question of whether there was a Fourth Amendment violation, limiting its analysis to the existence of qualified immunity based on "whether it was *clearly established* that the Fourth Amendment prohibited the officer's conduct in the situation she confronted" (*id.* at 309, emphasis added) -- a determination which hinged, in turn, on the existence of any case with similar facts that "*squarely governs* the case here." *Id.* (emphasis in original). Reasoning that no prior case, including *Garner* and *Scott*, specifically prohibited the officer's conduct -- attempting to end a high-speed chase on an *empty* road, involving an intoxicated driver who had threatened to shoot police officers, by shooting at the engine block of the car just prior to the vehicle's arriving at a "spike strip" manned by police -- the Court held that the officer's actions should be protected by qualified immunity. *Id.* at 310. While it is unknown how the "factbound morass" would have ultimately been resolved to determine reasonableness (*Scott*, *supra*, at 382), there is no question that *Mullenix* was not on all fours with *Garner*, as this Court clearly explained. *Id.* at 309. Thus, it could not abrogate the case, as it simply found it factually inapposite.

And, finally, *County of Los Angeles v. Mendez*, __ U.S. __, 137 S.Ct. 1539 (2017), this Court's most recent case on the issue, did nothing whatsoever to abrogate *Garner*'s fundamental and central holding, forming the crux of the Second Circuit's required jury instruction in this case, that deadly force "may not be used unless … 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." *Garner*, *supra*, at 11. First, *Mendez* did not involve the

propriety of a jury charge, and *Garner* was cited numerous times in the *Mendez* decision, which is wholly inconsistent with petitioner's view that its central holding was abrogated. But, more to the point, *Garner* was, again, *clearly* factually inapposite -- and its prohibition clearly inapplicable -- as it was beyond cavil in *Mendez* that police had probable cause to believe that the suspect posed a significant threat of death to them, as he pointed a gun at the police when they entered his room. Indeed, while petitioner finds it so significant that *Mendez* "said nothing of *Garner*'s 'probable cause' requirement in deadly force cases," that he boldly declares that the decision "effectively overruled *Rasanen*" (Pet. at 18), in actuality, the Court's failure to mention *Garner*'s inapplicable and inapposite rule prohibiting the use of deadly force *where probable cause is lacking*, in this case *where probable cause is a foregone conclusion*, is simply not significant at all.[9]

To come full circle, Petitioner's gross misapprehension of *Mendez*'s significance stems from his fundamental misunderstanding of *Scott*'s holding, from which the Second Circuit's holdings in *Rasanen*, *Terranova*, and *Callahan* naturally -- and consistently -- flowed.[10] *Scott* did not abrogate *Garner*, nor deem it inapposite on the grounds that the deadly force was inflicted by a car rather than a gun; and the Second Circuit majority never interpreted the case that way

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[9] Indeed, *Mendez*'s central holding focused on the validity of the Ninth Circuit's "provocation rule" (*Mendez*, *supra*, at 1546-48) -- it did not discuss, and was not concerned, with the issue raised here at all.

[10] *Rasanen v. Doe*, 723 F.3d 325 (2d Cir. 2013); *Terranova v. New York*, 676 F.3d 305 (2d Cir. 2012); *Callahan v. Wilson*, 863 F.3d 144 (2d Cir. 2017).

-- contrary to Petitioner's attempts to so characterize its decisions.[11] *See* Pet. at 8 (erroneously claiming that the Second Circuit's case law requires the *Garner* instruction in all "deadly force shooting cases"); Pet. at 13 (erroneously claiming that "[b]y requiring a *Garner* 'probable cause' instruction in cases where the agent of deadly force is a firearm, but not where the deadly force is administered by a motor vehicle or some other fashion, the majority in *Rasanen* attempted to cabin *Scott* to its facts"). Rather, as discussed above, *Scott* deemed *Garner's* prohibition inapposite because -- just as in *Mendez* -- it was beyond cavil that the officers *had probable cause* to believe the suspect posed an imminent threat to human life; so, as a result, deadly force -- of any kind, be it car, gun, knife, fist -- was reasonable. In requiring *Garner*'s instruction *only* in cases that are on all fours with the facts of that case -- *i.e.*, where the evidence reasonably supports a view *both* that deadly force was used, *and* that probable cause of a threat was lacking -- the Second Circuit's case law is in perfect harmony with all of this Court's precedent.

C. There is no Genuine Split Among the Circuit Courts that Requires Certiorari

Similarly exaggerated is petitioner's claim of a deep divide among the circuit courts that requires this Court's intervention. While, admittedly, there are divergences in the language and reasoning applied by different circuit courts in determining the reasonableness of an officer's use of deadly force -- and charging the jury on the relevant criteria -- these variations do not provide a rift that this Court needs

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[11] This was, however, suggested by Judge Raggi's dissent in *Rasanen* and *Callahan*, and the reason she was wrong.

to bridge, because the differences are semantic rather than substantive. In other words, as discussed below, every single case that petitioner relies upon to establish his "circuit split" would, actually, have the same outcome if analyzed under the Second Circuit's precedent. Thus, the underlying concern militating in favor of certiorari where a circuit split results in inconsistent results for similarly situated parties from one circuit to another (*see* Pet. at 22), is simply not implicated here. And, as a result, certiorari is not warranted on this basis.[12]

Initially, to fully understand the nature of the differences among the circuit courts, it is necessary to track the development of the case law. Following *Garner*, some circuit courts (wrongly) held that "the

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[12] Petitioner's related claim that certiorari is warranted because "the standard to be applied against §1983 defendants is more demanding in [the Second Circuit] than in other circuits" (Pet. at 22) is hardly a persuasive basis to grant the writ. First, there is fact-based variation from case to case on jury charges, which can be fashioned by individual judges in individual cases, and each circuit has its own set of model instructions. Thus, in the context of jury charges, discrepancies are not as concerning. Second, this Court has, in the past, denied certiorari where circuit courts' jury charges resulted in far more significant differences in the burdens on §1983 defendants. For example, the circuits have long been split on the placement of the burden of persuasion in a §1983 Fourth Amendment challenge to a warrantless search, with some circuits holding that it rests with the plaintiff (*see Bogan v. City of Chicago*, 644 F.3d 563 [7th Cir. 2011]; *Der v. Connolley*, 666 F.3d 1120 [8th Cir. 2012]), and others holding it rests with the defendant (*Armijo v. Peterson*, 601 F.3d 1065, 1070 [10th Cir. 2010]). While this difference in burdens is far more significant, and has even broader applicability, and while the divide has existed for years, this Court had repeatedly denied certiorari to resolve the dispute. *See, e.g., Bogan v. City of Chicago*, 132 S.Ct. 1538 (2011).

Supreme Court … established a special rule concerning deadly force," which required a separate jury instruction *in any case in which police conduct created a substantial risk of death or serious bodily injury*. *See, e.g., Abraham v. Raso*, 183 F.3d 279, 290 (3d Cir. 1999); *Vera Cruz v. City of Escondido*, 139 F.3d 659, 661, 663 (9th Cir. 1997); *Adams v. St. Lucie Cnty. Sheriff's Dep't.*, 962 F.2d 1563, 1570-71 (11th Cir. 1992). Thus, in these circuits, *Scott* represented a sea-change in the law, for it rejected this proposition in cases where, although deadly force was used, the police clearly had probable cause to believe the suspect posed an imminent threat to the lives of the officers or others. In those cases, *Scott* explained, *Garner* would not apply, for the use of deadly force would not be precluded, and, based on the totality of the surrounding circumstances, might be reasonable as a matter of law. Thus, as a result of *Scott*, circuits that had misinterpreted *Garner* began to reverse their precedent. The Ninth Circuit did so in *Acosta v. Hill*, 504 F.3d 1323, 1324 (9th Cir. 2007); the 11th Circuit did so in *Penley v. Eslinger*, 605 F.3d 843, 850 (11th Cir. 2010); and the 3rd Circuit followed suit in *Johnson v. City of Philadelphia*, 837 F.3d 343, 349 (3rd Cir. 2016).

Meanwhile, other circuit courts simply articulated and applied the *Scott* standard, explaining, either in the context of summary judgment motions or jury charges, that *Garner*'s "unreasonable unless" standard does not apply unless *both* its factual underpinnings are met: use of deadly force, *and* lack of probable cause to believe the suspect was an imminent threat. *See, e.g.*, *Godawa v. Byrd*, 798 F.3d 457 (6th Cir. 2015); *Harris v. Pittman*, 2016 WL 4547220 (4th Cir. 2016); *Noel v. Artson*, 641 F.3d 580 (4th Cir. 2011); *Pasco ex rel. Pasco v. Knoblauch*, 566

F.3d 572, 579-580 (5th Cir. 2009); *Tolliver v. City of Chicago*, 820 F.3d 237, 245 (7th Cir. 2016); *Thompson v. Murray*, 800 F.3d 979, 983 (8th Cir. 2015). The Second Circuit was one of these courts. Unlike the Ninth, Eleventh, and Third Circuits, it had never misapplied *Garner*, so there was no precedent to overrule. So, its decisions, instead, focused on correctly reconciling *Scott* and *Garner*.

In *Terranova v. New York*, 676 F.3d 305 (2012), for example, which involved a traffic stop of a group of motorcyclists on a highway, during which one man's bike accidentally hit another biker in the chest, killing him, the court reasoned that *Garner*'s first factual precondition was not met: the police conduct was simply not reasonably likely to cause death. Thus, because of these "vastly different facts," *Garner* had "scant applicability to this case," so the court held that the *Garner* jury charge was simply not appropriate. *Id.* at 309, *quoting Scott at* 383.

However, in cases that *are* factually similar to *Garner*, "involving the fatal shooting of an unarmed suspect," where there is a reasonable view of the evidence that police used deadly physical force *and* that the officers lacked probable cause to believe the suspect posed an imminent threat of death, the Second Circuit has -- correctly and consistently with both *Garner* and *Scott* -- required the *Garner* instruction. *See Rasanen v. Doe*, 723 F.3d 325, 334 (2013) (requiring Garner charge where police shot unarmed man, who was naked from waist up, in his bedroom; heavily-armored officer said he feared for his life when Rasanen charged at him, while eyewitness said she did not see Rasanen charge). And this is precisely what it held in this case.

With this background in place, a review of each of the cases cited in the petition reveals that there is no deep divide among the circuits; for the outcome would be exactly the same under the Second Circuit's precedent. Therefore, to the extent there exists a difference in the *rationale* underpinning the decisions, that difference is semantic rather than substantive, and simply does not create the type of "circuit split" that would warrant certiorari.

Initially, again, the majority of the circuit cases cited by petitioner involve summary judgment issues – not jury instructions. Thus, they are not directly on point to the issue before this Court. Nevertheless, their outcome would not be different in the Second Circuit.

Penley v. Eslinger, 605 F.3d 843 (11th Cir. 2010), for example, is not contrary to *Callahan*. In that case, Penley, a 15-year old student went to school armed with a realistic-looking toy firearm, pretended it was real, held students hostage, and threatened to kill himself with it. During the police standoff and negotiation that followed, Penley pointed the gun at police, and was shot and killed. Only afterwards did police discover that the gun was fake. Penley's parents brought a 1983 claim, alleging police used excessive force in violation of their son's Fourth Amendment rights; however, it was clear from the evidence that police believed the gun was real, that Penley had pointed the gun at officers, and that officers believed other students were potentially at risk. The District Court granted the officers' motions for summary judgment, and Penley appealed, arguing that issues of fact precluded summary judgment. Consistent with *Garner*, the Eleventh Circuit recognized that the relevant inquiry hinged on whether the officers "had

probable cause to believe that [Penley] posed a threat of serious physical harm." While this point was contested by the parties, relying on *Scott*, the Eleventh Circuit reasoned that although factual inferences must be made in Penley's favor, this rule applies only "*to the extent supportable by the record*" 853, *quoting Scott* 550 U.S. at 381 n. 8. And because it concluded that there was no reasonable view of the record under which probable cause did not exist, it affirmed the district court's order. While the Eleventh Circuit did cite *Scott*'s language cautioning that *Garner* was not a "magical on/off switch," and interpreted it as broadly establishing that "none of [*Garner*'s] conditions are prerequisites to the lawful application of deadly force by an officer seizing a suspect" (850), *Penley*'s holding is not inconsistent with *Callahan*, and would not necessitate a different result in the Second Circuit. Not only did the case not speak to jury instructions at all, but, more significantly, it recognized, consistent with *Callahan*, that the relevant inquiry was probable cause to believe that the suspect posed a threat of serious physical harm, and that, if this standard is clearly met, then deadly force is clearly authorized -- thus, authorizing summary judgment in *Penley*, just as it would negate the need for a *Garner* jury instruction under Second Circuit precedent.

Likewise, *Johnson v. City of Philadelphia*, 837 F.3d 343 (3rd Cir. 2016) – another summary judgment case -- uses broader language, but is not contrary in result to Second Circuit case law. In *Johnson*, a young man high on PCP was standing in the street, naked, yelling, and flailing his arms. A police officer ordered the man to approach. The man attacked the officer, slamming him into cars, and attempting to take his handgun. During the struggle, the officer shot and

killed him. *Id.* at 345-48. Drawing all inferences in the decedent's favor, the court found the above facts undisputed, and granted summary judgment on the grounds that once the decedent tried to take the officer's gun, the officer was justified in using deadly force to defend himself. *Id.* at 351. This holding -- so uncontroversial that it scarcely needs discussion -- would issue in *any* Circuit on these facts, under any statement of the law.[13] Thus, while in *Johnson*, the Third Circuit highlighted that it had initially applied *Garner* too broadly, and clarified that, in its view, *Scott* "abrogates our use of special standards in deadly-force cases and reinstates 'reasonableness' as the ultimate -- and only -- inquiry" (*id.* at 349), any disagreement among the circuits about the breadth of that statement, and its particular application, would have no impact whatsoever on its resolution of the *Johnson* case.

One of the sole jury-instruction cases cited by petitioner is *Acosta v. Hill*, 504 F.3d 1323 (9th Cir. 2007). That case involved an excessive-force claim by a woman who was forcibly removed from a bar. *Acosta* was uncooperative, refused to leave, and kicked a security guard and Police Officer Hill. As a result, Hill placed her in a carotid restraint hold, and handcuffed her. Acosta was temporarily subdued, but remained

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[13] *Johnson* did have a more controversial wrinkle – the officer initially engaged the suspect without waiting for backup, in contravention of police protocol. The question of whether this unauthorized act by the officer was unreasonable and foreseeably caused the fight that led to the suspect's death, or whether the suspect's actions in attacking the officer and trying to take his gun were a superseding cause, is more difficult and divisive (*see Id.*, at 354-56, Roth, J., dissenting), but it is not relevant to the narrow issue on which *Johnson* is cited here.

conscious and began kicking again. The police officer slammed her to the ground, tied her legs together, and then removed her from the bar. After a trial, where the jury found for the officer, Acosta appealed, arguing that the court should have given a separate deadly force instruction. The Ninth Circuit's rejection of this claim is not inconsistent with the law in the Second Circuit, as the force used was not deadly, and there did not appear to be a reasonable view of the evidence where it was not commensurate with the threat posed by Acosta. While the court's reasoning in the short, one-page, decision swept broadly, declaring that "*Scott* held there is no special Fourth Amendment standard for unconstitutional deadly force," and overruling prior case law requiring the instruction across-the-board in every case where deadly force was alleged (*id.* at 1324, *overruling Monroe v. City of Phoenix*, 248 F.3d 851, 859 [9th Cir, 2001]), that is still not contrary to *Callahan*; for the Second Circuit also recognizes that deadly force, standing alone, is insufficient to require the *Garner* charge.

In *Noel v. Artson*, 641 F.3d 580 (4th Cir. 2011), the police officer entered the Noel home while executing a warrant, and Noel pointed a gun at him. The officer shot Noel twice, non-fatally, and she dropped her gun. According to the officer, Noel then reached for the gun once more, and he shot and killed her. According to Noel's husband, she was not reaching for the gun when the officer shot her. While the jury instruction given by the district court did not include *Garner*'s language -- that deadly force was unreasonable unless the officer had probable cause to believe the suspect was dangerous -- and while the circumstances in Noel would have mandated such instruction under *Callahan*'s reasoning, the case nevertheless is not

inconsistent with *Callahan* because there was *no claim raised on appeal that the charge was erroneous for this reason*. Instead, Noel challenged the charge on the grounds that (1) the court refused to specifically instruct the jury to focus on the third shot and determine whether the initial threat had abated at that time (*Id.* at 587); (2) the court failed to instruct the jury to consider if the execution of the search warrant was proper (*id.* at 589); (3) the court refused to instruct the jury that Noel had a right to possess the gun in her home (*id.* at 589); and (4) the court failed to instruct the jury that a police officer must give a warning before using deadly force (*id.* at 590). Thus, *Noel* cannot be relied upon to establish a "circuit split" on the salient issue, because that issue was not raised by the parties, considered by the court, or ruled upon in the decision.

II. PETITIONER'S QUALIFIED IMMUNITY CLAIM IS NOT PROPERLY BEFORE THIS COURT

As a secondary ground, petitioner argues that this Court should grant certiorari to resolve "an uncertainty preventing law enforcement officers from having adequate fair notice of what conduct is proscribed or constitutionally permissible." (Pet. 24). However, as discussed above (*see supra* n. 6). There is no possible view of the law -- nor any jurisdiction in America -- where an officer is permitted to shoot and kill an unarmed suspect without, at minimum, probable cause to believe the suspect poses an imminent danger to his life or another's. *Id.* Indeed, whatever its impact on the required jury charge, there is no doubt that this Court's decision in *Garner* firmly prohibits this under the Fourth Amendment. So, this

case has absolutely nothing to do with "notice" about constitutionally permissible conduct.

Moreover, to the extent petitioner now asserts a qualified immunity claim, that issue was not raised on appeal, and is not properly before this Court. See *Callahan v. Wilson*, 863 F.3d at 148, n.4 ("Defendants raised a qualified immunity defense … as part of their oral Rule 50 motion, which the district court denied in its entirety. Qualified immunity was not otherwise litigated at trial, and defendants have not raised it on appeal").

In an event, the district court was absolutely correct in rejecting petitioner's qualified immunity claim, here – and this result is consistent with all of this Court's precedent and that of every other circuit court in the nation – because, in this case, there was clearly a factual question about whether the deadly force used in shooting an unarmed man through a closed door was "reasonable;" and, if unreasonable, then the officer would have "fair notice" that he was acting unconstitutionally. As Petitioner notes, qualified immunity is meant to ensure that "'insubstantial claims' against government officials will be resolved prior to discovery" (Pet. at 25, *citing Anderson v. Creighton*, 483 U.S. 635, 640, n.2 [1987]). The claim here -- that Officer Wilson shot and killed an unarmed man through a closed door in violation of his Fourth Amendment rights -- can hardly be deemed "insubstantial."

Thus, this secondary claim likewise furnishes no basis to grant the writ.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

DONNA ALDEA
Counsel of Record
BARKET, MARION, EPSTEIN
& KEARON, LLP
Attorneys for Respondents
666 Old Country Road, Suite 700
Garden City, New York 11530
(516) 745-1500
daldea@barketmarion.com