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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This petition presents an important issue regarding the standard to be applied in deadly force shooting cases and presents the Court an opportunity to clarify that, in all excessive force cases, deadly or otherwise, "reasonableness" is the ultimate and only inquiry, and that a special jury instruction on the specific legal justifications for the use of deadly force is not required; an issue on which there is a square and growing conflict among the Courts of Appeal. Indeed, as recently as September of 2017, the Ninth Circuit Court of Appeals confirmed its view that, in the wake of *Scott v. Harris*, district courts are no longer required to give a separate deadly force instruction, a decision that is in direct conflict with the decision of the Second Circuit in the instant action. *See Hung Lam v. City of San Jose*, 869 .3d 1077, 1082 (9th Cir. 2017).

The Respondents do not dispute the existence of a conflict but attempt to minimize the significance of the circuit split by asserting that the contrary holdings of the other circuit courts present merely a semantic difference rather than one of substance. This is a claim that is belied by the plain language of the several decisions that are at odds with the Second Circuit. The distinction between a standard of "reasonableness" in one's belief that a use of force was necessary and the need for a finding that "probable cause" existed to employ force, can hardly be considered semantic.

Nor can the impact of the split in the circuit be reduced by claiming that the outcome of cases in other circuits would be the same in the Second Circuit, when the standard applied in the Second Circuit (probable cause) is more demanding than in circuits that apply the general reasonableness

standard announced in *Scott*. The proper focus is on the outcome of the appeal in this case had it occurred in the Third, Fourth, Ninth or Eleventh Circuit. An outcome which would, without a doubt, have been different in those jurisdictions.

The pressing need for this Court's review is apparent from the ever widening and continuing split in the circuits. As noted above, rather than a consensus emerging among the several Courts of Appeal, the split on this issue only continues to grow. This petition presents an appropriate vehicle for resolving the question, as there are no apparent obstacles to the Court's review and the case directly implicates the circuit split. Accordingly, it is respectfully requested that the petition for writ of certiorari be granted.

ARGUMENT

1. The Court Can Review the Arguments Raised in the Petition

As conceded by the Respondents, the Petitioner's failure to raise the present claims in the petition at the trial level does not preclude this Court's review of the case. The traditional rule in this Court "is that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.,* 513 U.S. 374, 379, 115 S. Ct. 961, 965, 130 L. Ed. 2d 902 (1995), *citing Yee v. Escondido,* 503 U.S. 519, 534, 112 S.Ct. 1522, 1532, 118 L.Ed.2d 153 (1992); *see also Dewey v. Des Moines,* 173 U.S. 193, 198, 19 S.Ct. 379, 380, 43 L.Ed. 665 (1899). The

arguments presented to the Court of Appeals in response to the Respondents' claim that the trial court's instructions to the jury were inadequate included the argument raised in the instant petition that the continuing application of the *Garner* standard was in doubt. The arguments presented in this petition support what has been the consistent position of the Petitioners, that the charge to the jury at trial was appropriate and conveyed the proper legal standard. Moreover, the Court of Appeals directly addressed the issue of whether *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) and subsequent decisions by this Court abrogated the need for a special jury instruction in deadly force cases. Since the issue was addressed by the court below, the Petitioner respectfully submits that this Court's practice "permit[s] review of an issue not pressed so long as it has been passed upon...." *Lebron v. Nat'l R.R. Passenger Corp.,* 513 U.S. 374, 379, 115 S. Ct. 961, 965, 130 L. Ed. 2d 902 (1995), *citing United States v. Williams,* 504 U.S. 36, 41, 112 S.Ct. 1735, 1738–1739, 118 L.Ed.2d 352 (1992). *See also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 322–23, 130 S. Ct. 876, 888, 175 L. Ed. 2d 753 (2010).

2. The Second Circuit's Determination Below is in Direct Conflict with Supreme Court Rulings That Have Re-affirmed Scott's Abrogation of the Use of a Special Standard in Deadly Force Case

Respondents claim that the Second Circuit's holding in the instant matter and its previous decisions regarding the requirement of a special jury instruction in deadly force shooting cases

consistent with *Tennessee v. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), is "in perfect harmony" with this Court's precedent. (Res. at 19). Respondents submit that the holdings in *Scott v. Harris* and *Plumhoff v. Rickard*, ___ U.S. ___, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014) do not abrogate the *Garner* "probable cause" standard because under the facts of those cases it was clear to the Court that probable cause existed to believe that the plaintiffs posed an imminent threat to the life and safety of the officers or others. Accordingly, under the Respondents' reasoning, because there was abundant evidence that established that the suspect's actions posed a significant risk of death to the officers, *Garner* would not apply to such facts. (Res. at 16). Respondents advance the same flawed reasoning with *Cty. of Los Angeles, Calif. v. Mendez*, ___ U.S. ___, 137 S. Ct. 1539, 198 L. Ed. 2d 52 (2017), asserting that *because* the officers had probable cause to believe a deadly threat was imminent, any use of deadly force would be reasonable and therefore *Garner's* prohibition on the use of deadly force without probable cause was inapposite. What respondents fail to recognize is that the Court in *Scott* (and later in *Plumhoff* and *Mendez*) focused its inquiry not solely on the actions of the suspect, but rather whether the use of force by the officers was reasonable in response to those actions. Rather than distinguishing among deadly force cases, *Scott* instructs that a single legal standard applies to *all* excessive force cases, deadly or otherwise. "Whether or not [an officer's] actions constitute [ ] application of 'deadly force,' all that matters is whether [his] actions were reasonable." *Scott* at 382.

Moreover, had the Court in *Scott* determined that the Garner standard was not applicable (or was already met) because of the clear evidence that the plaintiff posed an imminent threat to the life and safety of the officers, it would have simply stated such and found for the defendant officer on those grounds, further confirming the continuing validity of the *Garner* standard. Instead, as noted above, the Court fashioned a standard of general reasonableness in *all* excessive force claims. The Court ruled similarly in *Plumhoff*, and made no mention of the *Garner* standard at all. It is of significance that in the decision below, the Second Circuit distinguished *Plumhoff* by noting that it did not involve a claim of instructional error, and relied on *Scott*, but said nothing that approaches the rational advanced by the Respondents. *Callahan v. Wilson*, 863 F.3d 144, 149 (2d Cir. 2017).

Nor is Respondents' claim persuasive that there are no cases where the use of deadly force would be constitutionally permissible unless there was "probable cause" to believe the suspect posed an imminent threat to human life. Respondents need look no further than their own case, or the facts in *Rasanen v. Doe*, 723 F.3d 325 (2d Cir. 2013) for instances where an officers use of deadly force would be constitutionally permissible, *if* the standard applied is general reasonableness. Indeed in both cases, the Second Circuit found fault with the jury instructions because they provided the jury with the option that that "the shootings *seemed necessary" (i.e.* that Rasanen was *not* trying to turn the officer's gun against him, but the officer nonetheless acted *reasonably* under the circumstances), or (that Officer Wilson

acted *reasonably* under the circumstances, even if the jury concluded that Callahan did not pose the type of threat he perceived). *Rasanen v. Doe*, 723 F.3d 325, at 336 (2d Cir. 2013); *Callahan v. Wilson*, 863 F.3d 144, at 151–52 (2d Cir. 2017). In any jurisdiction where the standard to be applied in deadly force cases is one of general reasonableness, or based upon a "reasonable belief" that a suspect poses an imminent threat to life, the conduct of an officer will be constitutionally permissible if she has that reasonable belief. It is the very distinction between the more demanding standard of "probable cause" and the lesser requirement that an officer need only "reasonably believe" a threat exists that is at the heart of the arguments presented in this petition. The facts of a case in a jurisdiction that applies the *Garner* "probable cause" standard will be viewed far differently (whether by a court or a jury) in one that requires only a reasonable belief by an officer that uses deadly force.[1]

3. The Respondents Do Not Dispute the Circuit Split on this Issue, which is Real, Meaningful and Substantive and which Continues to Deepen

The Respondents do not dispute the existence of a conflict but attempt to minimize the significance of the circuit split by asserting that the contrary

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[1] Indeed, although in a criminal context, the Second Circuit has recognized that the 'reasonable belief' standard ... may require less justification than the more familiar probable cause test. See, *United States v. Bohannon*, 824 F.3d 242, 253–55 (2d Cir. 2016), cert. denied, 137 S. Ct. 628, 196 L. Ed. 2d 517 (2017)

holdings of the other circuit courts present merely a semantic difference rather than one of substance. This is a claim that is belied by the plain language of the several decisions that are odds with the Second Circuit which have concluded that the requirement of a "deadly force instruction" in addition to an instruction based upon the Fourth Amendment's reasonableness standard was "expressly contradicted" by and "clearly irreconcilable with" *Scott*. For example, in *Noel v. Artson*, 641 F.3d 580, (4th Cir. 2011), a case that involved the issue of a jury instruction in a deadly force shooting case, the Fourth Circuit stated:

> Following the pattern jury instructions, the district court submitted the case to the jury under the general rubric of reasonableness. The entire charge embodied this simple query: Did the officers act reasonably or did they not? This is indisputably the correct standard, for "all claims that law enforcement officers have used excessive force … should be analyzed under the Fourth Amendment and its 'reasonableness' standard." Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

Noel v. Artson, 641 F.3d 580, 587–88 (4th Cir. 2011)

Similarly, in *Acosta v. Hill*, 504 F.3d 1323 (9th Cir. 2007), another case in which the jury was given an excessive force instruction based on a reasonableness standard, the Ninth Circuit found that the instruction was appropriate. Citing *Scott*,

the Court rejected the plaintiff's argument that the jury should have been given a separate deadly force instruction, finding instead that "all that matters is whether [the police officer's] actions were *reasonable*....Under *Scott,* that is the end of the inquiry." *Acosta v. Hill*, 504 F.3d 1323, 1323–24 (9th Cir. 2007).

As recently as September of 2017, the Ninth Circuit reaffirmed its view that, in the wake of *Scott v. Harris*, district courts are no longer required to give a separate deadly force instruction to jury, further deepening the split between that Court and the Second Circuit. *See Hung Lam v. City of San Jose*, 869 F.3d 1077, 1082 (9th Cir. 2017).

Perhaps the strongest language issued by a circuit at odds with the Second Circuit comes from the Third Circuit in *Johnson v. City of Philadelphia*, 837 F.3d 343 (3d Cir. 2016). Prior to affirming the lower court's granting of summary judgment, the Court unequivocally declared that *Scott* abrogates the use of special standards in deadly-force cases.

> Before proceeding, it is necessary to clarify our Fourth Amendment standard in deadly-force cases. Following the Supreme Court's lead in *Tennessee v. Garner*, we have previously suggested that an officer's use of deadly force is justified under the Fourth Amendment only when (1) the officer has reason to believe that the suspect poses a "significant threat of death or serious physical injury to the officer or others," and (2) deadly force is necessary to

> prevent the suspect's escape or serious injury to others. In *Scott v. Harris*, however, the Supreme Court clarified that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' " Rather, *Garner* was "simply an application of the Fourth Amendment's 'reasonableness' test to the use of a particular type of force in a particular situation." *Scott* abrogates our use of special standards in deadly-force cases and reinstates "reasonableness" as the ultimate—and only—inquiry. "Whether or not [an officer's] actions constituted application of 'deadly force,' all that matters is whether [the officer's] actions were reasonable."

Johnson v. City of Philadelphia, 837 F.3d 343, 349–50 (3d Cir. 2016)

While the Court did go on to recognize that considerations enumerated in *Garner* could still be relevant, it noted that "such considerations are simply the means by which we approach the ultimate inquiry, not constitutional *requirements* in their own right." *Id.* (emphasis added). Again, the plaintiff attempts to diminish the impact of this clear language by stating that the outcome in *Johnson* would be the same in the Second Circuit, entirely missing the point that the verdict in the instant matter would be sustained had the trial been held within the jurisdiction of the Third Circuit.

All of the above Circuits have held that *Scott v. Harris* abrogates the use of special standards in

deadly force cases and reinstates "reasonableness" as the ultimate and only inquiry. In doing so, they set themselves apart from the standard applied in the Second Circuit which still continues to require that a jury be instructed that an officer must have "probable cause" to believe that a suspect poses a significant threat to the life and safety of the officer or others before his use of force can be deemed constitutional. The distinction between a standard of "reasonableness" in one's belief that a use of force was necessary, and the need for a finding that "probable cause" existed to employ force, can hardly be considered semantic. This is a real, meaningful and substantive conflict which this Court should resolve.

Nor can the impact of the split in the circuits be reduced by claiming that the outcome of cases in other circuits would be the same in the Second Circuit, when the standard applied in the Second Circuit (probable cause) is more demanding than in circuits that apply the general reasonableness standard announced in *Scott*. It is no great leap to suggest that an officer who has "probable cause" in a jurisdiction requiring only that he act reasonably under the circumstances, will face the same outcome in a trial in the Second Circuit. The true nature of the conflict arises when examining how a case in the Second Circuit, which applies a more demanding standard, would be resolved had it proceeded in one of the circuits applying the appropriate standard of general reasonableness. Had this case been tried in the Third, Fourth, Ninth or Eleventh Circuit, with the jury receiving the identical charge, a verdict in favor of Officer Wilson would undoubtedly be sustained on appeal.

Respondents also contend that Courts in the circuits that apply *Scott's* reasonableness standard only do so because those Courts misapplied *Garner* from the outset, and wrongly held that *Garner* established a special rule which required in any case in which police conduct created a substantial risk of death or serious bodily injury. (Res. at 21). Based on this initial misapplication, reasons the Respondents, the Courts then felt compelled to read *Scott* as abrogating *Garner*. However, prior to *Terranova v. New York*, 676 F.3d 305, 309 (2d Cir.2012), the Second Circuit itself read *Garner* as establishing a special rule in all deadly force cases. *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29, 36 (2d Cir. 2003). Moreover, the Ninth Circuit, which is one of the circuits in conflict with the Second Circuit, applied *Garner only* to police shooting cases, yet still recognized that *Scott* overruled that position. *See Hung Lam v. City of San Jose*, 869 F.3d 1077, 1082 (9th Cir. 2017).

4. The Circuit Split Prevents Law Enforcement Officers from Having Adequate Fair Notice of What Conduct is Constitutionally Permissible

The Respondents misapprehend the argument in the originating petition regarding qualified immunity, reading it as applying to the Petitioner alone. The argument is advanced, not as to the specific merits of this case, but rather as another reason why the continuing split among the circuits must be resolved. The deepening conflict fosters an uncertainty whereby law enforcement officials are prevented from receiving adequate fair notice as to what the clearly established Fourth

Amendment right is with respect to the use of deadly force in § 1983 police shooting cases.

CONCLUSION

For the foregoing reasons, as well as those contained in the Petition for Certiorari, the petition should be granted.

DATED: Hauppauge, New York
December 29, 2017

Respectfully submitted,

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