No. _____

In the
Supreme Court of the United States

CITY OF MIDDLETOWN, THOMAS SEBOLD, JOSHUA WARD AND MICHAEL D'ARESTA,
Petitioners,

v.

WILLIAM MCKINNEY,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Police officers were attempting to transfer a detainee to a padded cell where he could be appropriately monitored after he repeatedly obstructed the view of his cell camera and was exhibiting erratic and self-injurious behavior. Despite several efforts to obtain the detainee's voluntary compliance with non-forceful efforts to secure and transfer him, he admittedly refused to comply, charged at the officers, and grabbed onto and physically struggled with an officer over control of a baton, resulting in the controlled deployment of a canine to engage the detainee's lower leg in an effort to overcome his resistance and protect fellow officers. The detainee, nevertheless, continued an active physical struggle with officers, resulting in the application of a baton to his thigh, buttocks and shoulder, each of which also failed to obtain his compliance. A single taser strike, via drive stun, was then applied to the detainee's shoulder, upon which the detainee finally ceased fighting and submitted to handcuffing. The questions presented are:

1. Did the Second Circuit Court of Appeals improperly find a constitutional violation in failing to consider the reasonableness of the use of force from the perspective of a reasonable officer on the scene and in direct contravention of precedent from this Court?

2. Did the Second Circuit Court of Appeals improperly deny qualified immunity to the officers given that the defense was raised, briefed and argued before the Court and where, as recognized by the panel, the facts and circumstances surrounding the plaintiff's

admittedly active resistance and corresponding use of force were largely undisputed?

3. Did the Second Circuit Court of Appeals improperly deny qualified immunity to the officers in failing to consider whether the claimed rights were clearly established given the particularized and largely undisputed facts and circumstances of this case?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Second Circuit, whose judgment is sought to be reviewed, are:

- William McKinney, plaintiff, was the appellant below and is the respondent here.
- City of Middletown Police Officers Thomas Sebold, Joshua Ward and Michael D'Aresta, defendants, were the appellees below and are the petitioners here.

The City of Middletown was a defendant in the underlying action and secured dismissal upon summary judgment pursuant to its defense of governmental immunity under Connecticut law. The Second Circuit affirmed the dismissal as the plaintiff did not challenge the same before the District Court and was, therefore, deemed to have forfeited this claim raised for the first time on appeal. Consequently, the City of Middletown is not a party to this petition.

No corporations are involved in this proceeding.

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Petitioners Thomas Sebold, Joshua Ward and Michael D'Aresta respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Summary Order of the Court of Appeals for the Second Circuit affirming in part, vacating in part, and remanding for further proceedings is available at *McKinney v. City of Middletown*, 712 Fed. App'x 97 (2d Cir. 2018), and is reproduced in the appendix to this petition at App. 1-5.

The Order of the Court of Appeals for the Second Circuit denying the petition for panel rehearing and rehearing *en banc*, has not been reported, and is reproduced in the appendix to this petition at App. 18-19.

The memorandum opinion of the U.S. District Court for the District of Connecticut granting summary judgment to Petitioners has not been reported, and is reproduced in the appendix to this petition at App. 6-17.

JURISDICTION

The Second Circuit Court of Appeals entered its judgment and summary order on February 27, 2018. On April 5, 2018, the Court denied the Petitioners timely filed a petition for panel rehearing and rehearing en banc. (App. 18-19.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent brought the underlying action pursuant to 42 U.S.C. § 1983, which states, in pertinent part:

> 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 . . . .

Respondent alleges that Petitioners violated his rights under the Fourth Amendment of the United States Constitution, which states:

> 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.

STATEMENT OF THE CASE

As found by both the District Court and the Court of Appeals, the facts and circumstances in this matter are largely undisputed:

On the evening of February 19, 2010, the plaintiff, William McKinney, was arrested by the Middletown Police Department on charges of robbery, breach of peace and larceny for the alleged armed robbery of a Subway fast food restaurant. (App. 7.) McKinney was processed and placed into Cell #1 in the department's cell block. (*Id.*)

Several hours later, at approximately 3:46 a.m., officers observed that McKinney had covered the cell camera with wet toilet paper, thereby completely obstructing the view of his holding cell. (*Id.*) Officer Thomas Sebold went down to McKinney's cell, spoke with him and asked him to remove the obstruction. (*Id.*) McKinney ultimately agreed and removed it. (*Id.*)

McKinney, thereafter, began behaving erratically and appeared to be trying to injure himself by punching his head and cutting his wrist with an unknown object. (App. 10.) McKinney then covered the cell camera a second time. (App. 7.) Officer Sebold and Officer Joshua Ward proceeded to McKinney's cell to once again have the material obstructing the view of the cell camera removed. (*Id.*) Officer Sebold opened the cell door and asked McKinney to remove the toilet paper from the camera. (*Id.*) McKinney twice refused to comply, was hostile and yelled and threatened Officer Sebold. (*Id.*) McKinney then stated, "Fuck you. If I'm going to jail, it won't be for something minor. Come in here and I will go to jail for fucking you cops up." (*Id.*) Officer Sebold informed McKinney that he was going to be moved to a cell for mentally disturbed persons. (*Id.*) McKinney did not want to be moved to the padded cell, and stated that he was not going to go to the cell. (App. 7-8.) Consequently, Officer Sebold remained

outside of the cell while Officer Ward retreated to get Officer Michael D'Aresta to assist them. (App. at 8.) During this time, McKinney continued to yell threats at Officer Sebold. (*Id.*)

Officer Ward returned with Officer D'Aresta, who was accompanied by his K-9, Hunter. (*Id.*) Officer Sebold then instructed McKinney to move back away from the door so that they could enter the cell. (*Id.*) McKinney refused to comply despite numerous requests, and then responded, "Come on in." (*Id.*) Officer Sebold cracked the cell door open so that McKinney would see the canine and be deterred from giving them any trouble. (*Id.*) McKinney, however, refused to leave the cell and told the officers that they would have to come in and get him. (*Id.*)

At that point, Officer D'Aresta gave Hunter a "watch him" command which caused Hunter to begin barking. (*Id.*) The cell door was still cracked open against Officer Sebold's foot. (*Id.*) In response, McKinney clenched his fists, looked Officer Sebold in the eye with clenched teeth and said, "Come on." (*Id.*) McKinney took the foam mattress pad, folded it in front of himself, and used it as a barricade between himself and the officers. (*Id.*) McKinney then pressed against the cell door. (*Id.*) Officer Sebold expanded his baton, pulled open the cell door and attempted to push McKinney against the back wall of the cell. (*Id.*) However, McKinney grabbed onto Officer Sebold's baton in an attempt to wrestle it out of his hand, upon which the two became engaged in a struggle for the baton. (*Id.*) Officer D'Aresta entered the cell, along with his canine, followed by Officer Ward. (*Id.*) McKinney became extremely combative and charged towards the officers. (*Id.*) Officer D'Aresta deployed the canine, directing him toward McKinney's lower

right leg. (App. 8-9.) Upon being bitten by the canine, McKinney dropped to the ground, falling partially on top of Officer D'Aresta. (App. 9.) Officer D'Aresta was able to get up and saw McKinney grabbing at the canine's collar. (*Id.*) Officer Sebold then struck McKinney a few times on the left thigh, yelling at him to stop resisting. (*Id.*) McKinney refused to submit and, as the struggle continued, Officer Sebold struck McKinney once in the left buttock and once on his left shoulder. (*Id.*)

Throughout the struggle, Officer Sebold was yelling for McKinney to stop resisting. (*Id.*) McKinney, however, continued to actively resist, at which time Officer Ward deployed his taser, once via drive stun, to McKinney's left shoulder, ordering McKinney to give up his hands so that they could be cuffed. (*Id.*) Following use of the taser, McKinney complied and released his left hand. (*Id.*) McKinney was then rolled onto his stomach, however, he refused to release his right hand to be handcuffed. (*Id.*) McKinney finally gave up fighting, released his right arm and yelled for the officers to get the canine off of him. (*Id.*) Officers Ward and D'Aresta were then able to handcuff McKinney, and Officer D'Aresta broke the canine off of his leg. (*Id.*)

Following the close of discovery, the Petitioners moved for summary judgment, arguing that their use of force was objectively reasonable and, thus, did not amount to a Fourth Amendment violation. Additionally, the Petitioners argued that, even if a constitutional violation was found, they were entitled to qualified immunity.

The District Court granted summary judgment, finding that Officers Sebold, Ward and D'Aresta's

actions were reasonable under the totality of the circumstances. (App. 14.) In so finding, the District Court undertook a detailed analysis of the undisputed facts and circumstances confronting the officers, the plaintiff's admitted active physical resistance, and the totality of the force utilized to overcome his resistance, and aptly noted that,

> [the] officers responded to McKinney's combative behavior and continually warned him to stop resisting. Each level of force used was in response to McKinney's resistant behaviors. The canine was only deployed upon McKinney's attempt to take the baton from Officer Sebold and his attempt to charge toward the defendants. The baton was only used upon McKinney's attempt to grab the canine's collar and his continued refusal to submit to the officers. The taser was then used as a last resort when McKinney continued to refuse to free his right arm to be handcuffed. McKinney does not dispute these behaviors and his continued resistance throughout the defendants' attempt to secure him.

(*Id.* at 14-15.) The District Court, therefore, held that "the undisputed facts establish that the defendant officers' use of force was reasonable under the circumstances and did not amount to excessive force in violation of the Fourth Amendment." (*Id.* at 15.) Having found that no constitutional violation occurred, the District Court did not reach the issue of qualified immunity.

On appeal, the Second Circuit reversed the decision of the District Court as to the excessive force

claims[1], and remanded the case for trial. (App. 4.) In so ruling, the Second Circuit did not undertake any analysis or discussion of the objective reasonableness of force in light of the facts and circumstances facing the officers as required by *Graham v. Connor*, 490 U.S. 386 (1989). The Court merely noted that even where, as here, most of the facts concerning the application of force are undisputed, summary judgment is not appropriate unless no reasonable factfinder could conclude that the conduct was objectively unreasonable. (App. 3-4.) The Court then held that,

> [b]ased on the unique circumstances of this case, we think a reasonable jury could conclude that the combination of baton strikes, the use of a taser, and, especially, the use of a police canine was excessive in the context of a confined detention cell, notwithstanding McKinney's resistance.

(*Id.*) The Second Circuit refused to address the issue of qualified immunity which had been raised, briefed and argued before the Court. Instead, the Court stated that, "We express no view on whether the Officers will ultimately be entitled to qualified or governmental immunity for the claims against them." (*Id.*)

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[1] The Court also vacated the judgment as to the corresponding claims for assault and battery under Connecticut State law for the same reasons.

REASONS FOR GRANTING THE PETITION

Petitioners respectfully request that certification be granted as the Second Circuit's decision is in direct contravention of the clear precedent of this Court, and undermines the very intent and purpose of the doctrine of qualified immunity, thus warranting the exercise of this Court's discretionary power.

I. THE SECOND CIRCUIT'S FINDING OF A CONSTITUTIONAL VIOLATION FAILS TO CONSIDER THE REASONABLENESS OF THE USE OF FORCE FROM THE PERSPECTIVE OF A REASONABLE OFFICER ON THE SCENE IN DIRECT CONTRAVENTION OF PRECEDENT FROM THIS COURT AS WELL AS THE CIRCUIT'S OWN PRECEDENT

The Fourth Amendment's reasonableness standard governs all claims that law enforcement officers have utilized excessive force in effectuating a seizure. *See Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014); *Graham v. Connor*, 490 U.S. 386, 395 (1989). A plaintiff seeking to prevail on a claim of excessive force is, thus, required to establish that the officer's use of force was objectively unreasonable. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). This determination "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interest at stake." *Graham*, 490 U.S. at 396. Factors which may bear on the reasonableness or unreasonableness of force used may include

> the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.

Kingsley, 135 S. Ct. at 2473.

Additionally, the determination of "[t]he reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018), *quoting Graham*, 490 U.S. at 396. In evaluating claims of excessive force, the standard of reasonableness applies at the moment the force is utilized. *See, Graham*, 490 U.S. at 396. "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers . . . violates the Fourth Amendment." *Id.* (internal citations omitted). The determination of reasonableness "must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97; *Kisela*, 138 S. Ct. at 1152. Application of the reasonableness standard, therefore, requires careful attention to the specific facts and circumstances of each particular case. *Id.*

In the instant matter, as acknowledged by the Second Circuit itself, the facts and circumstances regarding the use of force, including what actually

occurred in the cell, are largely undisputed. Moreover, the facts are entirely undisputed as to McKinney's active physical resistance throughout the incident. Viewing the undisputed facts in a light most favorable to McKinney, and from the perspective of a reasonable officer at the scene as the Court was required to do, it is clear that the Second Circuit erred in finding a constitutional violation by viewing Officers Sebold, Ward and D'Aresta's decisions and actions in the circumstances confronting them through the lens of 20/20 vision of hindsight.

In concluding that a jury could find that the combination of force used, including that of a canine, was excessive, the Circuit made a point to note the context of where the force occurred, namely in a confined detention cell. However, the fact that McKinney and the officers were confined in a detention cell only underscores the reasonableness of the use of force. To be sure, there was no means of retreat for the officers engaged in a physical struggle with McKinney given the automatic locking mechanism of cell doors from the exterior. Officers Sebold, Ward and D'Aresta were, therefore, effectively trapped in the detention cell with McKinney who was actively resisting their efforts to secure him, including grabbing onto and wrestling for control over Officer Sebold's baton, a potentially deadly weapon.

Nor does the Petitioner's determination of what assets to utilize, or the order in which they are implemented, amount to a Fourth Amendment violation. The proper inquiry under the Fourth Amendment's reasonableness standard is whether the officers acted reasonably and not whether, given the benefit of 20/20 vision of hindsight, they made the

best and/or least intrusive choices of alternatives available to them. This Court "has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means, because the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002); *see also*, *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) ("The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means.").

In fact, this Court has recently evaluated somewhat similar circumstances in *Kingsley*, albeit in the context of an excessive force claim under the Fourteenth Amendment. In *Kingsley*, the plaintiff was detained in a county jail. *See*, *Kingsley*, 135 S. Ct. at 2470. Officers noticed a piece of paper covering the light fixture in the cell, and repeatedly directed Kingsley to remove it. *Id.* Kingsley refused, upon which officers notified him that he would be moved to another cell so that officers could remove the paper. *Id.* Kingsley was ordered to back up to the cell door with his hands behind his back so that he could be handcuffed for the transfer, however, Kingsley refused to comply, at which time he was forcibly removed from his cell. *Id.* The parties disputed whether Kingsley resisted efforts to remove his handcuffs, and whether officers slammed Kingsley's head into the concrete bunk. *Id.* Kingsley was then tased while still handcuffed. *Id.* In concluding that an objective standard governed the analysis as to the reasonableness of force, this Court noted that officers running detention facilities "must have substantial

discretion to devise reasonable solutions to problems they face" therein. *Id.* at 2474. This Court went on to note that officers facing such disturbances "are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving," and courts "must [therefore] judge reasonableness of the force used from the perspective and with the knowledge of the defendant officer." *Id.* at 2474.

In the instant matter, Officers Sebold, Ward and D'Aresta are, likewise, entitled to similar discretion in devising reasonable, split-second solutions to the disturbance and threat created by McKinney's own conduct based upon the assets available to them. In this regard, McKinney was provided with numerous opportunities to comply with the officers' commands and lesser degrees of force. When it became apparent that McKinney would not voluntarily comply with Officer Sebold's numerous verbal commands, the Petitioners utilized the presence of a canine in the hallway outside of the cell in an effort to dissuade McKinney from resisting them. However, the canine's barking in the hallway did nothing to dissuade McKinney from resisting the Petitioners' effort to enter his cell and secure him for transfer. Instead, McKinney grabbed onto Officer Sebold's baton upon his entry into the cell and attempted to wrestle it from Officer Sebold. It was only after McKinney grabbed onto and began wrestling for the baton that Officer D'Aresta deployed the canine, in a controlled manner, to engage McKinney in an effort to subdue him. McKinney, nevertheless, continued to actively resist the Petitioners' efforts to secure him, ultimately resulting in the use of a baton by Officer Sebold and application of a taser, via drive stun, by

Officer Ward. It is undisputed that McKinney continued to actively fight and resist the officers up to the point in which he finally submitted to handcuffing.

Requiring officers to choose the best combination of assets in such circumstances as the Second Circuit seems to infer would only raise unsurmountable barriers to the conduct of officers in the performance of their duties. The reasonableness standard of the Fourth Amendment has never been interpreted to demand such superhuman judgment from officers, especially in a rapidly evolving struggle with an actively resisting individual.

Properly viewed from the perspective of a reasonable officer confronted with the particular facts and circumstances facing Officers Sebold, Ward and D'Aresta, the force utilized was limited and proportional to McKinney's active, physical resistance. The combination of force was, therefore, objectively reasonable and not violative of McKinney's constitutional rights. The Second Circuit erred in determining otherwise. Accordingly, the petition should be granted in order to review and to correct this clear error by the Second Circuit.

II. THE SECOND CIRCUIT'S OPINION UNDERMINES THE VERY INTENT AND PURPOSE OF THE DOCTRINE OF QUALIFIED IMMUNITY AND CONTRAVENES THE MANDATE OF THIS COURT

The Second Circuit's refusal to determine the issue of qualified immunity, which was squarely raised, fully briefed and argued before it, undermines the

very intent and purpose of the doctrine of qualified immunity and contravenes the mandate of this Court that qualified immunity should be resolved at the earliest possible stage of litigation so as to protect the defendant's immunity from suit as expressly articulated in *Wood v. Moss*, 134 S. Ct. 2056, 2065 n. 4 (2014), *Pearson v. Callahan*, 555 U.S. 223, 232 (2009), *Scott v. Harris*, 550 U.S. 372, 376 n. 2 (2007), and *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). The Petitioners, however, are being forced to proceed to trial without the benefit of the Second Circuit having examined whether they have violated clearly established law.

As acknowledged by the Court of Appeals, the facts underlying the excessive force claim, namely the plaintiff's admittedly active physical resistance and corresponding use of force, are largely undisputed. Consequently, the issue of qualified immunity turns on the purely legal question of whether the plaintiff has alleged the violation of a clearly established right. Where, as here, a claim of qualified immunity raises purely legal issues, the determination of the same "is a core responsibility of appellate courts, and requiring appellate courts to decide such issues does not create an undue burden for them." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2019, 188 L. Ed. 2d 1056 (2014). "Because of the importance of qualified immunity to society as a whole . . . [this] Court often corrects lower courts when they wrongly subject individual officers to liability." *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n. 3 (2015). Accordingly, this Court has remained steadfast in affirming that "qualified immunity is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously

permitted to go to trial." *Scott*, 550 U.S. at 376 n. 2, *quoting Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Pearson*, 555 U.S. at 231. In keeping with this exceptionally important principle, this Court has "repeatedly … stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Scott*, 550 U.S. at 376 n. 2, *quoting Hunter*, 502 U.S. at 227; *Pearson*, 555 U.S. at 232; *Wood*, 134 S. Ct. at 2065 n. 4.

The Second Circuit has itself recognized that "[r]esolving the qualified immunity defense at an early stage furthers the rule that qualified immunity insulates a defendant officer from suit as well as shielding him from liability." *Brown v. City of New York*, 862 F.3d 182, 189 (2017); *see also*, *Lynch v. Ackley*, 811 F.3d 569, 576 (2d Cir. 2016) (holding that, "because qualified immunity is not only a defense to liability, but also provides immunity from suit, an important part of its benefit is effectively lost if a case is erroneously permitted to go to trial; thus, the defendant's entitlement to qualified immunity should be resolved 'at the earliest possible stage in litigation.'"). Consistent with the foregoing, the Second Circuit has held that,

> [a]lthough we generally decline to consider arguments that were not passed on by the district court, this principle is prudential, not jurisdictional. *See Fabrikant v. French*, 691 F.3d 193, 212 (2d Cir. 2012). We retain discretion to consider such arguments based on factors such as "the interests of judicial economy" and "whether the unaddressed issues present pure questions of law." *Bacolistas v. 86th & 3rd Owner, LLC*, 702 F.3d 673, 681 (2d Cir. 2012). The issue of qualified immunity

> was presented in the district court, has been fully briefed on appeal, and turns on the purely legal question of whether [the plaintiff] alleged a violation of a clearly established right. *See Fabrikant*, 691 F.3d at 212 ("The matter of whether a right was clearly established at the pertinent time is a question of law." (quoting *Dean v. Blumenthal*, 577 F.3d 60, 67 n. 6 (2d Cir. 2009))). It is therefore appropriate for us to consider the defense of qualified immunity on appeal.

McGowan v. United States, 825 F.3d 118, 123-24 (2d Cir. 2016). The Second Circuit has, therefore, approved the practice of resolving qualified immunity even where the District Court does not address the defense. *See e.g.*, *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 595-96 (2d Cir. 1990) (noting that, consistent with past precedent, interlocutory review of qualified immunity is appropriate even when a district court does not address a proffered qualified immunity defense); *Musso v. Hourigan*, 836 F.2d 736, 741 (2d Cir. 1988). In fact, the Circuit has recognized that the same policy considerations which militate in favor of immediate review when a district court rules that a defendant is not protected by qualified immunity is equally applicable when a district court fails to address a proffered qualified immunity defense because, "[if] we were to deny review under these circumstances, [the defendant] would stand to lose whatever entitlement he might otherwise have not to stand trial." *Musso*, 836 F.2d at 741.

This matter presents the very type of case upon which these exceptionally important principles are applicable. Yet, despite its own foregoing precedent, the Second Circuit refused to determine the issue of

qualified immunity notwithstanding that it was premised upon the purely legal determination of whether the defendant's conduct violated clearly established law. This was manifest error, especially in light of the Second Circuit's own characterization that this matter presented "unique circumstances."

The Second Circuit's failure to consider and resolve the qualified immunity issue squarely before them, thus, contravenes the very purpose of the qualified immunity doctrine, as well as this Court's mandate that issues of qualified immunity are to be resolved at the earliest possible stage of the litigation. The petition should, thus, be granted to review this clear error by the Second Circuit.

III. THE SECOND CIRCUIT IMPROPERLY DENIED QUALIFIED IMMUNITY AS IT WAS NOT CLEARLY ESTABLISHED THAT THE FOURTH AMENDMENT PROHIBITED OFFICERS FROM THE INCREMENTAL USE OF FORCE IN THE FACE OF ACTIVE RESISTANCE SO AS TO PROTECT THEMSELVES AND FELLOW OFFICERS

Even if a jury concluded that the force utilized by the Petitioners amounted to excessive force as posited by the Circuit, the Petitioners are, nevertheless, entitled to the protections of qualified immunity. More specifically, "[i]f the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

The Second Circuit's failure to determine that the Petitioners' conduct did not violate clearly established law is especially troubling given their own express acknowledgment that this case presented "unique circumstances." In fact, a review of the "unique circumstances" of this matter in light of the precedent existing at the time of the Petitioners conduct quickly dispels the notion that their conduct violated clearly established law.

This Court has repeatedly clarified the heightened specificity required to satisfy the "clearly established" standard for qualified immunity. *See*, *Dist. of Columbia v. Wesby*, 138 S. Ct. 577 (2018); *Kisela*, 138 S. Ct. 1148. In *Wesby*, this Court reaffirmed that "clearly established means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful . . . . In other words, existing law must have placed the constitutionality of the officer's conduct beyond debate." *Wesby*, 138 S. Ct. at 589, *quoting Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011). This Court emphasized that, "[t]his demanding standard protects all but the plainly incompetent or those who knowingly violate the law." *Id.*, *quoting Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In order to be clearly established,

> a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be settled law . . . which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority . . . . It is not enough that the rule is suggested by then-existing precedent. The precedent must

> be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. . . . Otherwise, the rule is not one that every reasonable official would know. . . .
>
> The clearly established standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted. . . . This requires a high degree of specificity. . . .

Id. at 589-90 (internal quotations and citations omitted; alteration in original); *see also Hunter*, 502 U.S. at 228; *al-Kidd*, 563 U.S. at 741-42; *Reichle v. Howards*, 566 U.S. 658, 666 (2012); *Mullenix v. Luna*, 136 S. Ct. 309 (2015); *Plumhoff*, 134 S. Ct. at 2023.

Moreover, this Court has stressed that

> the specificity of the rule is especially important in the Fourth Amendment context. . . . 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*. . . . While there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular arrest beyond debate.

Wesby, 138 S. Ct. at 590 (internal quotations and citations omitted; emphasis added). Claims of excessive force "is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified

immunity unless existing precedent squarely governs the specific facts at issue." *Kisela*, 138 S. Ct. at 1153.

In the instant matter, the Second Circuit opined, without more, that a jury could find that the "combination of baton strikes, the use of a taser, and, especially the use of a police canine was excessive in the context of a confined detention cell, notwithstanding McKinney's resistance." Precedent from the Second Circuit, however, demonstrates that reasonable officers could conclude that the combination of force utilized here was constitutionally permissible.

For example, in *Crowell v. Kirkpatrick*, 400 Fed. App'x 592, 595 (2d Cir. 2010), the Second Circuit found that the law was not clearly established that the use of a taser upon an actively resisting individual amounted to a constitutional violation. In *Crowell*, the plaintiffs had been arrested for relatively minor offenses and were not threating the safety of any other persons with their behavior as they had chained themselves to several hundred pound barrels and refused to free themselves. *Id.* They were deemed to be actively resisting arrest in chaining themselves to the barrels and in refusing to release themselves despite several warnings that they would be tased if they did not comply. *Id.* In concluding that the officers' conduct in tasing the plaintiffs via drive stun mode was objectively reasonable, the Court noted that, given the totality of the circumstances, the officers had first attempted other means to effectuate the seizure, none of which proved feasible, such that their conduct could not be deemed to be anything other than reasonable. *Id.*

Similarly, in *Tracy v. Freshwater*, 623 F.3d 90 (2d Cir. 2010), the Second Circuit found that an officer's use of a combination of force was objectively reasonable. In *Tracy*, the plaintiff had been pulled over by a lone officer who, during the course of the traffic stop believed that the plaintiff was a fugitive. *Id.* at 97. The plaintiff made a quick and sudden movement when the officer attempted to effectuate an arrest, causing the officer to strike the plaintiff several times with a flashlight. *Id.* The Court concluded that the officer's use of a flashlight to strike the plaintiff several times to protect himself and to subdue the plaintiff whom he perceived to be actively resisting was objectively reasonable. *Id.* The Court further found that the officer's subsequent jumping upon the plaintiff to pin him down was also objectively reasonable in the face of the plaintiff's active resistance. *Id.* at 97-98.

In light of the foregoing precedent in the Second Circuit at the time of the subject incident, the law was not clearly established that the utilization of a baton, taser and canine in the face of an actively resisting individual who had continually failed and refused to comply with efforts to secure him was violative of the Fourth Amendment. As in both *Crowell* and *Tracy*, McKinney was actively resisting the officers' efforts to secure him despite various alternative which failed to gain his compliance. Additionally, as in *Tracy*, McKinney posed a real and imminent risk to officer safety. Had McKinney gained possession and control of Officer Sebold's baton, he would have posed an immediate danger both to himself and to the other officers in the cell. In fact, a reasonable officer could have concluded that McKinney, in attempting to wrestle the baton away from Officer Sebold, posed an

immediate threat of death or serious bodily injury to the officers in the cell warranting the use of the canine in response to the perceived threat. Moreover, reasonable officers could have interpreted McKinney's noncompliance as an indication that he would continue to resist the officers and he, in fact, did so necessitating the use of a baton and taser, via drive stun mode, to subdue him. The fact that McKinney admittedly continued to be combative and actively fight the defendants notwithstanding the fact that he had been engaged by the canine underscores the fact that reasonable officers could have concluded that McKinney would continue to actively fight and resist officers until such time as he was secured in handcuffs. Certainly, the existing law in the Second Circuit was not such that it placed the constitutionality of the Petitioners' conduct beyond debate.

In fact, both the Second Circuit and this Court have recently found that the law was not clearly established that incremental uses of force in the face of continued active resistance was violative of the Fourth Amendment. In this regard, this Court's decision in *Sheehan* presented a factually similar scenario wherein officers were faced with an emotionally disturbed individual who actively resisted the officers' efforts to secure her. Specifically, officers entered the room in which the plaintiff had closeted herself in order to secure her, upon which she began yelling for them to leave while holding a knife. *See Sheehan*, 135 S. Ct. at 1771. The officers repeatedly pepper sprayed her, and ultimately fired multiple shots at her when she failed to drop the knife. *Id.* This Court concluded that qualified immunity applied because the officers had sufficient

reason to believe that the force utilized was justified under the circumstances presented. *Id.* at 1775-78.

Similarly, in *Brown*, the Second Circuit found that the law was not clearly established as to the incremental uses of force in the face of continued resistance. In *Brown*, officers were faced with an individual who repeatedly refused to follow the instructions of police officers attempting to put her in handcuffs. *See Brown*, 862 F.3d at 190. In attempting to secure the plaintiff therein, officers repeatedly used pepper spray, kicked the plaintiff's legs out from under her to bring her to the ground, and pushed the plaintiff's face onto the pavement. *Id.* In evaluating the issue of qualified immunity, the Circuit noted that the issue presented was whether, under clearly established law, every reasonable officer would have concluded that the foregoing actions violated the plaintiff's Fourth Amendment rights in the particular circumstance presented. *Id.* The Court concluded that the officers were entitled to qualified immunity as "[n]o precedential decision of the Supreme Court or this Court 'clearly establishe[d]' that the actions of [the defendants], viewed in the circumstances in which they were taken, were in violation of the Fourth Amendment." *Id.*

If the law was not clearly established as of the decisions in *Sheehan* and *Brown*, it cannot be said that it would have been clear to a reasonable officer that the combined use of force by the Petitioners herein was unlawful under the circumstances presented, namely in the face of the McKinney's continued active resistance to their efforts to secure him. Accordingly, the Second Circuit erred in failing to find that the Petitioners were entitled to qualified immunity as the law was not clearly established that

their combined use of force, in what the Second Circuit itself considered unique circumstances, was violative of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the Court grant this petition.

Respectfully Submitted,

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