No. 19-1067

**IN THE**

# Supreme Court of the United States

NEAL N. BROWDER, CITY OF SAN DIEGO, AND SHELLEY ZIMMERMAN,

*Petitioners,*

**v.**

S.R. NEHAD, K.R. NEHAD, AND ESTATE OF FRIDOON RAWSHAN NEHAD,

*Respondents.*

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

## REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## I. INTRODUCTION

This case turns on whether precedent holds that an officer acting under similar circumstances as Officer Browder used excessive force. Plaintiffs argue certiorari should be denied because "*Deorle* is such a case." (Opp'n at 24). Plaintiffs, and the Ninth Circuit, have overlooked this Court's repeated warnings to not read *Deorle* beyond its facts. *Deorle* plainly does not apply: in *Deorle*, there were no bystanders, the suspect complied with multiple verbal commands, and the officers observed the suspect for 30-40 minutes. Here, there were multiple bystanders, the suspect had no history of complying with multiple verbal commands, and the officer had only 33 seconds to observe him. *Deorle* does not deal with similar circumstances and cannot be used as clearly established precedent to deny qualified immunity here.

Plaintiffs also argue certiorari should be denied because of issues of fact. But the Ninth Circuit erred by finding disputes where there was either no dispute or the fact was not material. Relying on a distorted version of the facts, the Ninth Circuit then concluded this Court's holding in *Garner* warned police officers that using deadly force against unarmed suspects is an "obvious violation" of the Fourth Amendment. (*Id.* at 13; 16.) This conclusion overlooks this Court's repeated warnings against over-generalizing *Garner* and the many factual differences between that case and this one.

This case is suitable for review because the Ninth Circuit again failed to implement this Court's

instruction to define the right at issue narrowly. No case squarely governs the facts at issue, so qualified immunity applies. This Court should grant certiorari and summarily reverse.

## II. THIS CASE DOES NOT PRESENT GENUINE ISSUES OF MATERIAL FACT, INCLUDING OFFICER BROWDER'S CONSULTATION WITH COUNSEL

Plaintiffs claim that only a jury can resolve issues like whether Officer Browder feared for his life. But Plaintiffs' framing distorts the standard on summary judgment. A court must view the facts in the light most favorable to the nonmoving party, but courts must not invent facts or adopt speculative arguments. The Court does not need to entertain arguments grounded in hindsight, speculating about what Officer Browder could have done or should have done. (Opp'n at 7.) Officer Browder decided whether to use force within seconds, under imminent threat, without backup, in an alley with innocent bystanders. (SEOR 149:6-9.)[1]

Plaintiffs assert innuendo into the center of the case. Plaintiffs argue there is a material issue of disputed fact as to whether Officer Browder believed there was a gun. (Opp'n at 14.) Officer Browder told

[1] Respondents argue the alley, shortly after midnight, was "well-lit." The video depicts a dark alley. Once the car turns the corner, the headlights appear to illuminate more of the alley than they do, because of the angle that the video was taken facing the headlights. From the angle that Officer Browder was looking, he faced a dark alley partially illuminated by headlights, but not one that could be considered "well-lit."

investigators that he had not seen any weapons, but that was only after he administered first aid to Nehad and searched him for weapons, learning he had none. (EOR 310:15-19; 319:1-21.) Plaintiffs imply a different question than the one asked, hoping that the Court would assume the question asked was if he believed Nehad had a weapon at the time he fired. Instead, when asked what he thought as Nehad walked toward him, Officer Browder testified, "I felt that he was walking—he was walking to stab me with the knife because that's what I saw. That's what I saw in his hand." (EOR 742:18-20.) Plaintiffs rely on innuendo to sidestep this testimony, arguing that he only made that statement after being "allowed to consult with his attorney and watch the video." (Opp'n at 5.) Officer Browder has a legal right under California law to consult with an attorney. *See Association for Los Angeles Deputy Sheriffs v. County of Los Angeles*, 166 Cal. App. 4th 1625 (2008). In doing so, Plaintiffs imply that Browder's attorney coached him into lying. But there is no evidence whatsoever that occurred, which means it is not a "justifiable inference" to be drawn in Plaintiffs' favor.[2] *Tolan v. Cotton*, 572 U.S. 650, 651 (2014). During the investigation, Officer Browder was asked two

[2] Respondents' argument raises troubling implications: the only way for Officer Browder to rebut the innuendo that he changed his story because he spoke to an attorney would be to reveal what he and his attorney spoke about, effectively causing him to waive attorney-client privilege. Respondents' argument would force an officer to choose between 1) waiving privilege and relinquishing his right to counsel; or 2) facing liability based on speculation about the attorney's advice. Without some factual basis supporting attorney misconduct, the insinuation should be rejected.

different questions and gave two different answers that were not inconsistent.

Plaintiffs cite to five Section 1983 cases in which appellate courts have questioned the officers' credibility: 1) *Newmaker v. City of Fortuna*, 842 F.3d 1108, 1116 (9th Cir. 2016); 2) *Fogarty v. Gallegos*, 523 F.3d 1147, 1166 (10th Cir. 2008); 3) *Tarver v. City of Edna*, 410 F.3d 745, 753 (5th Cir. 2005); 4) *Wilson v. City of Des Moines, Iowa*, 293 F.3d 447, 454 (8th Cir. 2002); and 5) *Weyant v. Okst*, 101 F.3d 845, 858 (2d Cir. 1996). These are not cases in which the officers' engagement of counsel cast doubts about credibility. Rather, there were material disputes of fact regarding the officers' credibility in those cases because their statements conflicted with statements by others. The conflicts are as follows: two different officers (*Newmaker*); arrestee vs. officers (*Fogarty* and *Tarver*); contradictions within one of the officer's testimony and some contradictions between the two officers' testimony (*Wilson*); and arrestees vs. officers (*Weyant*). There is no similar basis to question Officer Browder's credibility.

In practice, no case presents a perfect alignment between all witnesses and evidence as to what happened, and that is not what summary judgment requires. But here, the encounter was video recorded, and undisputed evidence establishes the critical facts. Officer Browder responded to an emergency call informing officers that a man was threatening people with a knife. (EOR 110; 750:18-22; SEOR 208.) He pulled into an alley shortly after midnight and saw a man matching the suspect's description walking towards him and holding a

metallic and shiny object in a pointed fashion. (SEOR 208; EOR 297:9-298:2; 738:3-10.) With Nehad able to reach him in only 1.35 to 1.91 seconds, Officer Browder acted, believing that Nehad was "walking to stab [him] with the knife." (SEOR 149:6-9; EOR 742:18-20.) On those facts, there is no case placing Officer Browder on notice that this action was unconstitutional. The Court should grant certiorari and reverse.

## III. THIS COURT HAS REPEATEDLY REJECTED PLAINTIFFS' ARGUMENT THAT *GARNER* AND *DEORLE* SHOULD BE LIBERALLY APPLIED TO DENY QUALIFIED IMMUNITY

Plaintiffs argue two cases put Officer Browder on notice that his conduct was unconstitutional: *Tennessee v. Garner* and the Ninth Circuit's decision in *Deorle v. Rutherford*. (Opp'n at 12.) Both cases are plainly distinguishable from the conduct at issue here.

### A. *Garner* Does Not Squarely Govern the Facts at Issue

This Court has repeatedly warned against attempts to extend the facts from *Garner* to every instance where an officer uses deadly force. In the *Garner* opinion, this Court noted that the holding was not applicable to all situations because there would be plenty of different factual contexts where deadly force would be justified. *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985). Contrary to Plaintiffs' characterization of the case, this Court has held that *Garner* "did not

establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force'." *Scott v. Harris*, 550 U.S. 372, 382 (2007). Rather, the case applied the Fourth Amendment reasonableness test to "the use of a particular type of force in a particular situation" and cannot be used as a bright line rule to circumvent "the factbound morass of 'reasonableness'." *Id.* at 383. Based on that exact reasoning, this Court has repeatedly denied attempts to apply *Garner* to facts that are not sufficiently similar. *See, e.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (holding *Garner* did not put the officer on notice because it is "cast at a high level of generality"); *Scott,* 550 U.S. at 382-384 (holding *Garner* did not put the officer on notice because it dealt with dissimilar facts); *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (noting *Garner* sets forth a "general rule" that does not by itself "create clearly established law outside an 'obvious case'"). Unless the facts in *Garner* are sufficiently similar to put an officer on notice, the case simply has no application to the qualified immunity analysis.

The facts in *Garner* are starkly different than the facts here. In *Garner*, two officers responded to a burglary call, which is "a 'property crime' rather than a 'violent crime'" and "only rarely involve[s] physical violence." *Id.* at 21. Nothing in the call suggested the suspect was armed. *Id.* at 4. The officers could see the suspect's face and hands, "saw no sign of a weapon," and were "reasonably sure" the suspect was unarmed. *Id.* The suspect ran away from the officers, climbing over a fence, before one officer shot him "in the back of the head." *Id.*

In contrast, Officer Browder responded to a 911 call for a "417 with a knife," meaning someone has used a knife in a threatening manner. (EOR 110; 750:18-22; SEOR 208.) Officer Browder was alone. The 911 call meant the suspect was armed. The crime is a violent crime that involves threatened physical violence. Officer Browder did not believe the suspect was unarmed, rather he saw the suspect was holding a metallic and shiny object in a pointed fashion. (SEOR 208; EOR 297:9-298:2; 738:3-10.) The suspect here walked towards Officer Browder instead of fleeing, facing Officer Browder at the time of the shot. The facts in *Garner* are starkly different from the facts here and do not squarely govern this case.

### B. *Deorle* Does Not Squarely Govern the Facts at Issue

*Deorle* does not fare any better, for the reasons discussed in Defendants' Petition at pages 17-20. Plaintiffs' reliance on *Deorle* also begins on shaky footing. This Court has specifically cautioned the Ninth Circuit about applying *Deorle* too generally. *City and County of San Francisco v. Sheehan*, 125 S. Ct. 1765, 1776 (2015) ("Whatever the merits of the decision in *Deorle*, the differences between that case and the case before us leap from the page"); and *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018) ("As for *Deorle*, this Court has already instructed the Court of Appeals not to read its decision in that case too broadly in deciding whether a new set of facts is governed by clearly established law.")

Plaintiffs attempt to reconcile the differences noted in Defendants' Petition by arguing that 1) the

bystanders were not under threat of immediate bodily harm; 2) Nehad complied with instructions in the split second before the shot was fired; and 3) although Officer Browder acted quickly, Plaintiffs' police practices expert believes Officer Browder could have "tactically repositioned," or retreated, from the scene. (Opp'n at 18-20.) All three arguments miss the point.

First, the mere presence of bystanders is a distinguishing fact. Plaintiffs argue that the bystanders were not under threat of immediate harm. But this misses the mark—there were no bystanders at all in *Deorle* because the officers had cordoned off the scene, erected roadblocks, and escorted all bystanders over a block away. *Deorle v. Rutherford*, 272 F.3d 1272, 1276 (9th Cir. 2001). So, whether the bystanders here were under threat of immediate harm or not, their mere presence is distinguishing. This is not a distinction without a difference. Officer Browder did not believe the bystanders were under threat of immediate harm, but their presence alters the options available. If he attempted to reduce the threat of immediate harm to himself by retreating, as Plaintiffs suggest, then the situation could become volatile and the bystanders could have been threatened. Put simply, in deciding whether to use force, Officer Browder had to consider bystanders but the officer in *Deorle* did not.

Second, Plaintiffs argue that Officer Browder either did not give instructions or that Nehad complied with an instruction at the last second. Both again miss the mark. In *Deorle*, the suspect repeatedly did what the officers asked him to do for the 30-40 minutes he was under observation. When

asked, he dropped a wooden board, dropped a hatchet, and dropped an unloaded crossbow. *Deorle*, 272 F.3d at 1277. The Ninth Circuit found these facts significant because they provided a basis for the officer to believe Deorle might stop walking if asked to stop walking. *Id.* at 1284. Here, Officer Browder had only seconds to observe Nehad—there was no pattern of following orders before force was used. Because there was no rapport between the officer and suspect, and no facts to suggest compliance, Officer Browder again had to decide whether to use force based upon a different set of facts than those available to the officer in *Deorle*.

Third, Plaintiffs argue that Officer Browder acted in seconds but should have tactically repositioned to earn more time. This argument is misdirected. Whether Officer Browder acted reasonably by acting in seconds instead of tactically repositioning goes to reasonableness, reasonableness is not the subject of this Petition. Instead, the only issue is the second element, whether the right was clearly established.[3] And once again, the differences between *Deorle* and this case are stark. In *Deorle*, the officer using force was on the scene, able to observe the suspect, and interact with him for 30-40 minutes. *Deorle*, 272 F.3d at 1276. Here, Officer Browder was on the scene for only 33 seconds. (EOR 694:1-3.) Plaintiffs can dispute the reasonableness of that fact, but there can be no dispute that Officer Browder decided to use force based upon different facts than those facing the officer in *Deorle*.

[3] For that reason, it would be possible for the Court to hold that the conduct at issue here violates the Fourth Amendment but hold that no case squarely governs the conduct at issue.

Plaintiffs argue the Ninth Circuit followed this Court's precedent by carefully examining the facts and identifying *Deorle* as applicable precedent. But *Deorle* cannot squarely govern the facts of this case because it involved a fundamentally different set of circumstances. In sum, as the District Court found, there is no case that squarely governs the facts of this case to put Officer Browder on notice that his conduct was unconstitutional. The Court should reverse.

## IV. THIS CASE IS A SUITABLE VEHICLE FOR REVIEW BECAUSE IT WOULD RESOLVE CONFLICTS WITH THIS COURT'S PRECEDENT AND A CIRCUIT SPLIT

Plaintiffs argue that there is no conflict with the Court's precedent and no circuit split, but the argument misses the point on the former and is wrong on the latter.

### A. The Opinion Conflicts with the Court's Precedent

Plaintiffs attempt to reconcile inconsistencies between this case and the Court's prior holdings by arguing they deal with different facts. (*See* Opp'n at 21-24.) This argument misses the point entirely. Of course, this Court's precedents dealt with different facts—no case in the Ninth Circuit or in this Court's precedents squarely governs the facts of this case. The conflict arises not because these cases looked at the same set of facts and reached different results, the conflict arises because the Ninth Circuit's opinion

legally conflicts with this Court's repeated mandate to not over-generalize in qualified immunity cases. In applying precedent, the Ninth Circuit leapt over inconsistencies, over-generalizing *Deorle* to facts that were substantially different. The Ninth Circuit said it followed this Court's precedent but resting its decision upon *Deorle* demonstrates otherwise.

### B. The Opinion Creates a Circuit Split with the Sixth Circuit

Plaintiffs note that the Petition does not argue the decision below conflicts with out-of-circuit precedent. (Opp'n at 25.) Nonetheless, Plaintiffs argue that the Ninth Circuit's decision does not create a circuit split. (Opp'n at 24-26.) To the contrary, the decision conflicts with the Sixth Circuit's opinion in *Mitchell v. Schlabach*, 864 F.3d 416 (6th Cir. 2017). The Sixth Circuit rejected the reasoning adopted by the Ninth Circuit, that *Garner* should be read broadly to deny qualified immunity when an unarmed suspect is shot.

In *Mitchell*, police responded to a report that a suspect had an altercation and was now driving drunk. *Id.* at 421. The suspect fled, speeding, while an officer pursued. *Id.* The suspect stopped and got out of his car, moving towards the officer "with speed, purpose, and confidence" despite the gun trained on him. *Id.* The suspect moved close enough that the officer would not have enough time to react without a violent confrontation. *Id.* The police officer conceded he did not believe the suspect was armed when he fired. *Id.*

Plaintiff relied upon this Court's decision in *Tennessee v. Garner* and several Sixth Circuit decisions to argue the officer's actions violated clearly established law. The Sixth Circuit rejected this argument, holding that relying on *Garner* would require defining the rights at issue at too generally. *Id.* at 425 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). Although an officer may not shoot an unarmed defendant posing no risk of danger, the officer had "probable cause to believe that [the suspect] posed an immediate threat to his safety." *Id.* at 426. Therefore, the Ninth Circuit's decision broadly applying *Garner* conflicts with *Mitchell*.

## V. CONCLUSION

No case squarely governs the undisputed facts at issue. Officer Browder, by himself, answered a 911 call describing a suspect using a knife in a threatening manner and found the suspect in an alley shortly after midnight. With the suspect walking towards him and bystanders behind him, Officer Browder defended himself within the few seconds he had. No clearly established precedent would put an officer on notice that his conduct was unconstitutional, including *Garner* and *Deorle*. This Court should therefore grant certiorari.

Respectfully submitted,

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