No. 19-609

In the
Supreme Court of the United States

ERIN SHEPHERD AND TERRY REED,
Petitioners,

v.

ANGELA STUDDARD,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent attempts to convolute the issues presented to the Court by trying to create the existence of fact issues, some of which the District Court found not to even exist. But in doing so, Respondent fails to respond to the purely legal issues Reed and Shepherd ask this Court to consider. For instance, the question of whether a police officer's honest mistaken perception of fact entitles her to qualified immunity is a legal issue this Court should review; Respondent does not even address the question in her Response in Opposition.

Moreover, the Sixth Circuit's recent opinion in *Reich v. City of Elizabethtown, Kentucky*, No. 18-6296, 2019 WL 6907382 (6th Cir. Dec. 19, 2019), in which the Court reviewed nearly identical factual circumstances and found (2-to-1) that the officers ***were*** entitled to qualified immunity, shows that Reed and Shepherd's actions were not unconstitutional "beyond debate" in the Sixth Circuit.

1. The Sixth Circuit's Recent *Reich* Ruling Shows The Error Of The Sixth Circuit's Opinion in *Studdard*.

After Petitioners and Respondent submitted their Petition and Response to this Court, the Sixth Circuit issued its opinion in *Reich v. City of Elizabethtown, Kentucky*, No. 18-6296, 2019 WL 6907382 (6th Cir. Dec. 19, 2019), where it ruled that officers in a factual situation almost identical to the one here were entitled to qualified immunity. The *Reich* Court, in a 2-to-1 opinion, found that officers were entitled to qualified

immunity when they shot a suspect armed with a three-inch knife as far as ***thirty-six feet*** away, *id.* at *8, who may have been stepping ***away*** from the officers, *id.* at *7. The Court found that "[s]hooting [the suspect] from a distance of twenty-five to thirty-six feet would not have violated any clearly established right." *Id.* at *8.

Judge Moore, dissenting in *Reich*, observed that the *Reich* ruling casts doubt on the *Studdard* ruling: "If anything, Reich's testimony that Defendants essentially shot Blough in the back, as he turned to run away, makes the officers' actions even ***more*** unreasonable than the actions at issue in *Sova* and *Studdard*." *Id.* at *16 (Moore, J., dissenting) (emphasis in original). Thus, at least one Sixth Circuit judge has now suggested that, if the officers in *Reich* were entitled to qualified immunity, Reed and Shepherd are, too. And as this Court has recognized, if "judges [ ] disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999).

Here, even if the Court finds that Studdard was not walking forward and only swaying, he still presented more of a threat to Reed and Shepherd than the suspect in *Reich*. He was, at most, only thirty-four feet away, was yelling "shoot me, kill me,"[1] refused to drop his knife, was covered in blood, and most certainly was not facing away from or retreating from the deputies

[1] The suspect in *Reich* yelled "you're going to have to kill me mother****er." *Reich*, 2019 WL 6907382, at *2.

when shot. And unlike the officers in *Reich* who said only "put the knife down," *id.*, Shepherd more deliberately tried to deescalate the situation, saying "Stop it's okay. Don't do it. Let's not do this. Put the knife down." (Shepherd Declaration with attached BPSI Statement, RE 89-12, PageID# 822). At the very least, in light of *Reich* and Justice Moore's dissent, Reed and Shepherd's actions were not unconstitutional "beyond debate" in the Sixth Circuit.

2. Respondent Fails To Address The Legal Issues Petitioners Ask the Court to Consider.

Turning to the issues raised in Respondent's Brief in Opposition, Respondent fails to respond to the legal questions Petitioners ask the Court to take up. Can a police officer's mistaken perception of the distance between herself and a knife-wielding suspect constitute the kind of mistake of fact protected by qualified immunity? What level of specificity in Fourth Amendment case law is necessary to squarely govern a situation where officers face a knife-wielding suspect on open ground? And can a witness's lack of knowledge or insistence that he does not remember whether something happened create a material factual dispute over whether that thing happened? These are wide-reaching issues that impact more than just the parties to this lawsuit, but Respondent does not address them in her response. Pursuant to Supreme Court Rule 15.2, arguments not addressed at the opposition-to-certiorari stage may be deemed waived. *See D.C. v. Wesby*, 138 S. Ct. 577, 584 n.1 (2018). Because Respondent fails to articulate a response to these issues, Petitioners should prevail.

3. Respondent Impermissibly Relies On Opinion Statements By Lane.

Respondent points to Lane's testimony that he felt "no imminent threat to himself or anyone else." (Br. In Opp. 6, 10). But such testimony is irrelevant. Conclusory opinions from officers on the scene do not affect the Court's objective reasonableness analysis. *See Graham v. Connor*, 490 U.S. 386, 397 (1989). Further, Respondent's characterization of Lane's testimony about danger to the other deputies is misleading:

> Respondent's Attorney: You told me [your life] wasn't being threatened.
>
> Lane: Well, I didn't – I said I didn't perceive it that way.
>
> Respondent's Attorney: That's right, and I don't want you to speculate what [the other deputies] felt or didn't feel.
>
> Lane: ***I can't say what they experienced***, but I do know this guy was not putting the knife down. (Lane Supp. Dep., RE 96-3, PageID # 1105) (emphasis added).

Any speculation by Lane about what Reed or Shepherd might have perceived does not affect the analysis.

4. The Fact That Studdard's Knife Had No Blade Is A Red Herring.

Respondent repeatedly asserts that Studdard's knife had no blade. (*See, e.g.*, Br. in Opp. 19). But it makes no material difference. The District Court and both parties' experts opined that it was reasonable to

believe Studdard possessed a bladed weapon capable of causing serious bodily injury or death. (*See* District Court Order, RE 153, PageID# 2552-53; Defendants' Expert Report, RE 89-10, PageID# 740, 742; Respondent's Expert Report, RE 89-11, PageID# 809). As Respondent's expert put it, "a reasonable police officer in these circumstances would have believed that Mr. Studdard possessed a bladed weapon that was capable of causing death or serious bodily injury." (Respondent's Expert Report, RE 89-11, PageID# 809). The District Court agreed, and the Sixth Circuit did not disturb that ruling.

5. Respondent's Additional Case Law Does Not Change The Outcome.

Seemingly aware that the *Sova* case the Sixth Circuit relied on is insufficient to meet her burden, the Respondent cites numerous cases that the Sixth Circuit did not rely on. Few are from the Sixth Circuit; of those, few are published. Respondent cited these cases at the Sixth Circuit briefing stage, and Petitioners responded in depth to each case, explaining why they were either distinguishable or not controlling for qualified immunity purposes (e.g. unpublished cases do not clearly establish Fourth Amendment law in the Sixth Circuit, *Hall v. Shipley*, 932 F.2d 1147, 1152 (6th Cir. 1991)). Suffice it to say that none of those cases squarely govern the situation Reed and Shepherd faced. And in any event, the case with the closest factual similarity is now *Reich*, which found in favor of the officers and which shows unequivocally that the law in the Sixth Circuit is not so clear that Reed and Shepherd's actions were unconstitutional "beyond

debate." *See City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1774, (2015); *see also Doe v. Tullis*, No. 01-2044, 2003 WL 25506473, at *9 (C.D. Ill. Nov. 25, 2003) ("If the law was not clearly established in 2003, then it was not clearly established in 2000 or 2001, at the time Defendants in this case acted.").

6. Respondent Incorrectly Characterizes Lane's Statements Regarding Whether Studdard Was Walking.

Deputy Lane's statements as to whether Studdard was walking do not create a triable issue of fact. Respondent asserts that "Lane testified that Eddie Studdard **never walked towards anybody** . . . ." (Br. in Opp. 10 (emphasis in original) (citing Lane Supp. Dep., RE 96-3, PageID# 1110)). This is not what Lane testified to. Instead, Lane said only that he did not ***see*** Studdard walking, does not ***know*** whether he was walking because Lane was focused on Studdard's upper-body and the knife, and that Studdard ***may have been*** walking and was definitely moving. (Lane Declaration with attached BPSI Statement, RE 89-13, PageID# 830) (. . . I don't know if he was walking . . . ."); (Lane Dep., RE 89-5, PageID# 564) ("Like he started – looked like he was starting to pace, look around, see what his next option was going to be."); (Lane Dep., RE 89-5, PageID# 565) ("Respondent's Attorney: Would it be a correct statement to say he wasn't walking, he was swaying?" Lane: I can't say for sure."). Most on point are these two exchanges Lane had with Respondent's counsel:

> Respondent's Attorney: You didn't see him walking, did you?

> Lane: No, sir. ***I didn't see him not walking either.*** I was too busy focused on that knife that he had in his hand. I saw he was moving. ***I can't say for sure if he was walking or if he was swaying. He was moving.*** (Lane Dep., RE 89-5, PageID# 565) (emphasis added).
>
> * * *
>
> Lane: I can't speak for them. At the time the shots were fired, there was – the situation was starting to become heightened, and he was moving. ***I can't – I don't remember if he was walking, or if he was swaying. I just – he was moving. That's all I can say.***
>
> Respondent's Attorney: You're changing your testimony from –
>
> Lane: ***No, sir. That's how it is, is he was moving.*** (Lane Dep., RE 89-5, PageID# 586) (emphasis added).

None of Lane's testimony is inconsistent with Pair, Shepherd, and Reed's unequivocal testimony that Studdard was walking. (*See* Pair Dep., RE 89-6, PageID# 617; Shepherd Dep., RE 89-3, PageID# 493; Reed Dep., RE 89-4, PageID# 532, 538).[2]

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[2] Respondent similarly incorrectly characterizes Shepherd's testimony regarding whether Studdard said anything. As Respondent puts it, Shepherd "testified that Eddie Studdard **never said anything throughout the whole ordeal**." (Br. in Opp. 8-9) (emphasis in original). In reality, Shepherd said she did not ***hear*** Studdard say anything. (Shepherd Dep., RE 106, PageID# 1466; Shepherd Statement, RE 132-1, PageID# 2098).

Moreover, Lane's testimony as to where Studdard started and where he ended up shows that Studdard was walking. As Respondent concedes, when the other deputies first arrived, Studdard "backed up and had his back to the fence." (Br. in Opp. 7). But when Studdard fell, Lane testified that he was not close to the fence; "[h]e was closer to the street." (Lane Dep., RE 89-5, PageID# 572). There is no evidence in the record contradicting this testimony, or suggesting Studdard was still up against the fence when the shots were fired.

7. Studdard Posed A Serious Threat To The Deputies Even At A Distance.

Finally, Respondent repeatedly describes Studdard as being "pinned in" or "boxed in" and suggests that as a result he "wasn't going anywhere . . . ." (Br. in Opp. 7, 10, 23). This ignores the fact that the deputies are made of flesh and bone. Studdard was not trapped in a room or behind barricades. Instead, the only barriers between him and the general public were the deputies' bodies, which are not impervious to knives or other stabbing weapons. From Shepherd and Reed's perspective, Studdard could have gone anywhere he wanted by going ***through them.*** To suggest otherwise is to try to add a sanitizing gloss to the hectic and life-threatening situation that the deputies faced. "There is no rule that officers must wait until a suspect is literally within striking range, risking their own and others' lives, before resorting to deadly force." *Reich v. City of Elizabethtown, Kentucky*, No. 18-6296, 2019 WL 6907382, at *9 (6th Cir. Dec. 19, 2019). Shepherd and Reed made a split-second decision in the face of

uncertain, dangerous conditions. Qualified immunity protects just such decisions. Shepherd and Reed are entitled to qualified immunity.

CONCLUSION

Based on the foregoing, Reed and Shepherd request that the Court grant their Petition for Writ of Certiorari or, in the alternative, summarily reverse the ruling of the Sixth Circuit.

Respectfully submitted,

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