No. 20-1362

IN THE
SUPREME COURT of the UNITED STATES

DAVDRIN GOFFIN,

Petitioner,

vs.

ROBBIE K. ASHCRAFT, INDIVIDUALLY AND OFFICIAL CAPACITY AS POLICE OFFICER WARREN, AR,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For purposes of qualified immunity, is it "beyond debate," under clearly established law, that one officer's brief pat down search of a felony suspect who is reported to be armed and dangerous and carrying concealed weapons, establishes per se that the suspect is no longer armed, for purposes of another officer's use of deadly force when the suspect breaks away from handcuffing and appears to reach into a pocket while fleeing towards bystanders?

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STATEMENT OF THE CASE

A. The Underlying Incident And District Court Decision.

In September 2012, petitioner Goffin's uncle, Tommy Reddick, reported to respondent Officer Ashcraft and Officer Aaron Hines that his home had been burgled—and he suspected Goffin was responsible for stealing two handguns, a box of bullets, and a bottle of painkillers. (Appendix To Petition, "Pet. App." 2a.) Reddick told them that earlier that day Goffin came to his house and asked for a gun, explaining that he lost his own pistol fleeing from the police. (*Id.*) Reddick refused and left the house. (*Id.*) When Reddick returned, he saw Goffin was still nearby, arguing with a man in a black pickup truck. (*Id.*) Inside his house, Reddick discovered that someone had snuck in through a back window, broken down a bedroom door, and stolen guns, ammunition, and pills. (*Id.*) Reddick warned respondent Ashcraft, "This dude is out of control!" and, "Y'all better be ready to fight when you find him." (*Id.*)

The officers started searching for Goffin, and respondent Ashcraft stopped a black truck that looked like the one Reddick had described. (*Id.* at 3a.) The driver, Dewayne Moore, told Ashcraft that earlier Goffin had asked him for a ride. (*Id.*) Moore had initially refused, but Goffin threatened him, saying "take me to the goddamn car wash" and then displayed two guns that matched the descriptions of Reddick's stolen pistols. (*Id.*) Understandably frightened, Moore gave Goffin a ride. (*Id.*) Moore, as had Reddick, warned respondent Ashcraft about Goffin, telling her that Goffin was drunk and that

Moore was scared he would rob him. (*Id.*) After the shooting, he recounted to police that Goffin looked like he "was going to do something stupid," like he didn't "give a damn . . . like, I'm going to take you out or whatever." (*Id.*)

After interviewing Moore, respondent Ashcraft received a call from Officer Hines advising her that Goffin was at a nearby body shop. (*Id.*) The officers arrived separately but then walked together toward a crowd of people in the parking lot. (*Id.*) Respondent Ashcraft asked where Goffin was and the owner of the body shop directed the officers toward the garage. (*Id.*) The officers found Goffin sitting in a car in front of the garage, talking on a Bluetooth headset. (*Id.*) The officers approached the vehicle with guns drawn, but before they got there, Officer Hines holstered his pistol and drew a taser. (*Id.*)

The officers demanded that Goffin exit with his hands raised, which he did. (*Id.*) They then escorted him to the back of the car and respondent Ashcraft saw something "bumping in [Goffin's] right front pocket," though Goffin denies anything was in that pocket. (*Id.*) According to Goffin, at the rear of the vehicle Officer Hines patted him down and "searched every part of [his] body," including feeling for items in his pockets and around his waist, though Goffin admits Officer Hines "didn't go into [his] pockets" and did not remove anything from his body. (*Id.*)

Officer Hines started to place Goffin in handcuffs, but before he could finish, Goffin pushed off the car and fled toward a group of seven or eight bystanders. (*Id.*) With his back to the officers, he raised his right shoulder, which respondent Ashcraft interpreted as a reach for

something in his pocket or his waistband, and as a result she shot him once in the back. (*Id*. at 3a-4a.)

The shooting occurred in a "split second" with Goffin asserting he took no more than two steps and respondent Ashcraft acknowledging that Goffin had traveled only "a very short distance" before she fired. (*Id*. at 4a.) After he was shot, officers discovered that although Goffin did not have a weapon on him, the patdown had missed a loaded 9mm pistol magazine and several loose bullets. (*Id*.) The stolen guns were later discovered within reach of where Goffin had been sitting in the car. (*Id*.)

Goffin subsequently brought a 1983 action against respondent Ashcraft, the city, and several other municipal employees, claiming that Ashcraft used excessive force against him and that the other defendants had failed to properly train and supervise her. (*Id*.) The district court granted summary judgment to the defendants, finding that respondent Ashcraft was entitled to qualified immunity because her actions were objectively reasonable as a matter of law. As the district court noted:

> Ashcraft had been told that Goffin had stolen two guns and ammunition from Reddick's house. Ashcraft knew Goffin had an outstanding warrant for aggravated robbery and had been told that Goffin was running from the police. Moore told Ashcraft that Goffin had two guns in his pockets and had brandished the two guns as he demanded a ride to the car wash. Ashcraft had reason to believe that Goffin was armed and that a gun could be in his pocket. She could not see Goffin's hands as he attempted to flee and raised his right shoulder, and, thus, her belief that Goffin posed a threat to her safety was objectively reasonable. Further, a reasonable officer could believe that Goffin posed a threat to nearby bystanders as

> he began to run towards a group of seven or eight people. Goffin admitted that, if he would have continued running, he would have run right into the bystanders.

(Pet. App. 35a.)

With respect to the brief search of petitioner just before he attempted to flee, the court observed:

> Nothing was seized from Goffin's pockets as a result of the pat down, and Goffin had a loaded magazine and bullets in his pockets. The fact that Ashcraft knew that a pat down occurred when nothing had yet been seized from Goffin's pockets does not necessarily support a finding that Ashcraft knew Goffin was unarmed or that her conduct was objectively unreasonable.

(*Id.* at 34a.)

Because the underlying excessive force claim failed, so did Goffin's claims against the other defendants. (*Id.* at 37a.) After dismissing all federal claims, the district court declined to exercise supplemental jurisdiction over the remaining state-law claims. (*Id.* at 38a-39a.) Goffin timely appealed.

B. The Eighth Circuit Affirms The District Court, Finding That Respondent Is Entitled To Qualified Immunity.

Following briefing and oral argument, the Eighth Circuit issued its initial opinion affirming the judgment and finding that respondent was entitled to qualified immunity based on the absence of clearly established law indicating that his use of force would violate the Fourth Amendment. (Pet. App. 16a-22a.) Following petitioner's petition for rehearing, the court withdrew the prior opinion and issued

a 2-1 decision again affirming summary judgment for respondent based on qualified immunity. (Pet. App. 1a-7a.) The court noted that no clearly established law would have put respondent on notice that she was required to assume that the search of petitioner by a fellow officer was so thorough as to render unreasonable as a matter of law any belief that respondent potentially had a weapon that could render him a danger to the public as he fled officers toward a group of bystanders:

> Officer Ashcraft is entitled to summary judgment because it is not clearly established that after observing a pat down that removes nothing from a suspect who an officer reasonably believed to be armed and dangerous, an officer cannot use lethal force against that suspect when he flees and moves as though he is reaching for a weapon. Nor do we think this is the "rare obvious case" in which "the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quotation omitted).

(Pet. App. 7a.)

REASONS FOR DENYING THE PETITION

REVIEW IS UNWARRANTED BECAUSE THE EIGHTH CIRCUIT CORRECTLY APPLIED SETTLED LAW FROM THIS COURT HOLDING THAT OFFICERS ARE GENERALLY ENTITLED TO QUALIFIED IMMUNITY IN FOURTH AMENDMENT CASES IN THE ABSENCE OF EXISTING PRECEDENT THAT SQUARELY GOVERNS THE SPECIFIC FACTS AT ISSUE.

A. This Court Has Repeatedly Recognized The Importance Of Qualified Immunity To Assure That Officers Are Not Subjected To The Burden Of Litigation And Threat Of Liability When Making Split-Second Decisions Under Tense, Rapidly Evolving Circumstances In The Course Of Protecting The Public.

An officer is entitled to qualified immunity when his or her conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam). While this Court's case law "'do[es] not require a case directly on point'" for a right to be clearly established, "'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Id.* at 12. In short, immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Id.*

This Court has recognized that qualified immunity is important to society as a whole. *City and County of San Francisco v. Sheehan*,

575 U.S. 600, 611 n.3 (2015); *White v. Pauly*, __ U.S. __, 137 S. Ct. 548, 551 (2017) (per curiam). It assures that officers, when confronted with uncertain circumstances, may freely exercise their judgment in the public interest, without undue fear of entanglement in litigation and the threat of potential liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[W]here an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'").

As the Court observed in *Harlow*, failure to apply qualified immunity inflicts "social costs," which "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," as well as "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" 457 U.S. at 814. Those concerns are magnified in the context of use of deadly force, where by definition, an officer is confronted by the imminent threat of serious harm to himself, or to others, and where hesitation could have deadly consequences.

Indeed, this Court has repeatedly issued per curiam reversals of lower court denials of qualified immunity in deadly force cases. In doing so, the Court emphasized that such cases, which are necessarily highly fact-dependent and concern tense, hectic circumstances, require courts to closely analyze existing case law to determine whether the

law was clearly established within the particular circumstances confronted by the officers in question.

In *White v. Pauly*, the Court held that an officer who arrived belatedly to the scene of an evolving firefight could reasonably rely on the actions of other officers in determining it was necessary to shoot a suspect who fired at the officers. 137 S. Ct. at 550-51. The Court observed that the highly unusual circumstances of the case should have alerted the lower court to the fact that the law governing such situations was not clearly established, and the officer was, indeed, entitled to qualified immunity. *Id.* at 552.

In *Kisela v. Hughes*, __ U.S. __, 138 S. Ct. 1148 (2018) (per curiam), the Court summarily reversed the Ninth Circuit's denial of qualified immunity to a police officer who received a 911 call reporting a woman hacking a tree with a kitchen knife and acting erratically. *Id.* at 1151. Shortly after arriving at the scene, the officer saw a woman standing in a driveway. *Id.* The woman, separated from the street and the officer by a chain-link fence, was soon approached by another woman, who was carrying a kitchen knife and matched the description that had been related to the officer via the 911 caller. *Id.* With the knife-wielding woman only six feet away from what appeared to be her potential victim, and separated by the chain-link fence, which impaired the potential victim's ability to flee and the officer's ability to physically intervene, when the woman refused commands to drop the knife, the officer fired and wounded her. *Id.*

In reversing the Ninth Circuit, the Court underscored the importance of applying qualified immunity to use of force cases, again

emphasizing the highly fact-specific nature of such claims, and the relevance of the exceedingly narrow window of time in which officers usually have to make such life or death decisions. *Id*. at 1153 (observing that "Kisela had mere seconds to assess the potential danger to Chadwick"). As the Court noted:

> Use 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. Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful.

Id. at 1153 (citing *Mullenix*, 577 U.S. at 13, 18).

In *City of Escondido v. Emmons*, __U.S. __, 139 S. Ct. 500 (2019) (per curiam), the Court again reversed the denial of qualified immunity to an officer where the Circuit court had defined the right at issue at too high a level of generality, and had failed to identify any case involving similar facts that would put an officer on notice that his or her conduct could give rise to liability. In *Emmons*, an officer sought entry into a residence to conduct a welfare check for reported domestic abuse. *Id*. at 501. The plaintiff exited the residence, ignoring the officer's command not to close the door, and attempted to run past the officer, who took him to the ground. *Id.* at 502.

In denying qualified immunity, the Ninth Circuit simply stated: "'The right to be free of excessive force was clearly established at the time of the events in question. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013).'" *Emmons*, 139 S. Ct. at 502. This Court

noted that such a generalized statement of the law was improper, this was a case involving active resistance to an officer and that "the Ninth Circuit's *Gravelet-Blondin* case law involved police force against individuals engaged in *passive* resistance. The Court of Appeals made no effort to explain how that case law prohibited Officer Craig's actions in this case." *Id*. at 503-04.

The Court emphasized that this was "a problem under our precedents":

> [W]e 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 [action] beyond debate. . . . Of course, there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. . . . But a body of relevant case law is usually necessary to clearly establish the answer. . . . [*District of Columbia v.*] *Wesby*, 583 U.S. at ___, 138 S. Ct. [577], at 581 [(2018)] (internal quotation marks omitted).

Emmons, 139 S. Ct. at 504.

This Court has repeatedly recognized the importance of qualified immunity, particularly in the context of use of force cases, as the Court observed in *White*. Nonetheless, the lower federal courts have been somewhat recalcitrant in following this Court's dictates concerning the need to apply the doctrine with rigor, particularly at the pre-trial stage, thus repeatedly requiring this Court's intervention. *White*, 137 S. Ct. at 551; *Sheehan*, 575 U.S. at 611 n.3 (collecting cases).

The Eighth Circuit's decision here reflected the concerns voiced by this Court for vindicating the important purposes of qualified immunity, and adhered to this Court's clear admonition to define clearly established law with a high degree of specificity in the context of Fourth Amendment cases in particular. As we discuss, petitioner essentially espouses the very sort of generalized standard of the underlying constitutional claim that this Court expressly rejected in *Emmons* and its progeny, and the Eighth Circuit correctly found no existing precedent that would have apprised respondent of potential liability under the specific, split-second circumstances confronting her here.

B. No Clearly Established Law Put Respondent On Notice That Her Use Of Force Might Violate The Fourth Amendment.

As noted, this Court has repeatedly admonished the lower appellate courts that other than in an obvious case, "officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (citing *Mullenix*, 577 U.S. at 13); *White*, 137 S. Ct. at 551. Here, as the Eighth Circuit panel majority recognized, no existing precedent squarely governs the facts confronted by respondent so as to put her on notice that her use of force might be deemed improper under the Fourth Amendment.

Indeed, the panel majority understood that petitioner's argument rested (and continues to rest) on the very premise this Court decried in *Emmons*—defining the underlying right at a high level of

generality, i.e., that an officer may not use deadly force against a fleeing suspect unless he or she "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). In fact, the Court has emphasized that the excessive force standards set forth in *Garner* and in *Graham v. Connor*, 490 U.S. 386 (1989), are "cast at a high level of generality." *White*, 137 S. Ct. at 552 (citing *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) and *Plumhoff v. Rickard*, 572 U.S. ___, ___, 134 S. Ct. 2012, 2023 (2014)).

Petitioner contends that this is nonetheless an "obvious" case of a constitutional violation that does not require identification of any factually similar case in order to sidestep qualified immunity and impose liability under *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). According to petitioner, this is because respondent shot "Mr. Goffin in the back from pointblank range without warning, *knowing full well* Mr. Goffin was unarmed." (Pet. 15 (emphasis added).) And on what is that characterization based? As the panel majority recognized, it is based on a patently legal conclusion, that as a matter of law, an officer *must* rely on a brief pat down by a fellow officer as conclusively establishing that a suspect known to be armed and dangerous, and still unsecured by handcuffs, possesses no possible threat to justify use of deadly force.

According to petitioner, *"[h]ow* an officer comes to learn a suspect is unarmed does not change the applicability" of the "clearly established rule" of *Garner*. (Pet. 16.) Yet, that is exactly the proposition this Court expressly rejected in *White*. As noted, in *White*,

the key issue was whether the defendant officer could reasonably believe his use of deadly force was warranted based upon the prior actions of other officers. The Circuit court majority held there was no qualified immunity based on application of the general *Graham* and *Garner* standards, and this Court reversed, noting the state of the law concerning an officer's reliance on the conduct of other officers was the key inquiry for purposes of determining qualified immunity:

> Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here.

137 S. Ct. at 552.

As the panel majority recognized, similarly, here there is no "settled Fourth Amendment principle" that *requires* an officer to assume that a brief, in-the-field pat down search of a reportedly armed and dangerous suspect conclusively establishes the suspect is unarmed, so as to eliminate any reasonable belief that use of deadly force would be justified. Certainly, neither below nor here, has petitioner made any attempt to identify any such case law, nor did the panel dissenting judge cite any remotely similar case. As the Court made clear in *White*, the apparently unique circumstances here effectively compel qualified immunity. *Id*. at 552 ("[T]hat 'this case presents a unique set of facts and circumstances' in light of White's late arrival on the scene," "alone should have been an important

indication to the majority that White's conduct did not violate a 'clearly established' right.").

Moreover, this case underscores with chilling reality why such a per se assumption that a brief, in-the-field search of a reported armed and dangerous suspect, conclusively eliminates any possible possession of a weapon, is manifestly unreasonable, especially in light of the absence of any case law discussing the issue. Notwithstanding petitioner's assertion that Officer Hines "searched every part of [his] body" (Pet. 8)—a search which petitioner concedes did not include going into his pockets (Pet. App. 3a)—officers subsequently found that petitioner had not simply loose bullets in his pockets, but a loaded 9 mm magazine, an object comparable in size to many readily available firearms.[1/]

Indeed, under petitioner's view, even if petitioner had a small pistol and not just a loaded magazine in his pocket, this would still somehow be an "obvious" case, as respondent Ashcraft would purportedly have no grounds to believe petitioner might be armed until she actually saw the weapon in petitioner's hand, a delay that could have deadly consequences for the officers and bystanders. Nothing in this Court's jurisprudence, nor that of the Eighth Circuit, countenances such a risk to public safety. *See Thompson v. Hubbard*,

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[1/]For example, a compact revolver can be a little over 6.6 inches and weigh only 14 ounces. <https://www.smith-wesson.com/product/bodyguard-38> [last visited July 12, 2021]. A Ruger LCP II is a mere 5.2 inches in length and weighs 11.2 ounces. https://ruger.com/products/lcpII/specSheets/13705.html> [last visited July 12, 2021]. A Kel-Tec P32 is 5.1 inches long, and weighs 7 ounces. <https://www.keltecweapons.com/firearms/pistols/p32/> [last visited July 12, 2021]. A 22 caliber NAA-22S is a mere 3.6 inches long and weighs only 4 ounces. <https://northamericanarms.com/shop/firearms/naa-22s/> [last visited July 12, 2021].

257 F.3d 896, 899 (8th Cir. 2001) ("An officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun.").

That brief, in-the-field pat down searches do not necessarily assure other officers that a suspect is unarmed is a fact of life for law enforcement.[2/] Whatever practical experience tells officers in this regard, as the panel majority recognized, no existing legal authority—certainly none offered by petitioner—dictates that an officer must rely on a brief in-the-field search by a fellow officer to dispel any threat that a suspect might pose.

Moreover, as the Court made plain in *White*, circumstances surrounding the uses of force matter for purposes of qualified immunity. This was not a fully restrained prisoner in custody, nor an individual subject to a full blown, stripped down body search incident to imprisonment, but a suspect who had been reported to be armed and dangerous, had just been taken into custody for serious crimes, and not even handcuffed at the time he made a sudden attempt to flee. No case law would have put respondent on notice that her use of deadly force under the specific circumstances she confronted, would cross the "hazy" border between reasonable and excessive force. The Eighth

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[2/] *See, e.g.*, Bogosian, *I thought you did it: the importance of searching suspects well* (July 27, 2015) <https://www.police1.com/police-products/apparel/articles/i-thought-you-did-it-the-importance-of-searching-suspects-well-cVxHDeG3aaNM5GBZ/> [last visited July 12, 2021], noting author's experience of "several instances over the years where, for whatever reason, an initial search has not yielded the fact that the individual was still armed—including once where I was told the suspect had been searched, and found a machete strapped down the middle of their back."

Circuit correctly applied the controlling decisions of this Court and granted respondent qualified immunity.

C. Petitioner Identifies No Conflict Among The Circuits On An Important Issue of Law Warranting Intervention By This Court.

As noted, petitioner makes no claim that there is any existing case law addressing the specific facts confronting respondent, more particularly, no case law suggesting that an officer must rely on another officer's in-the-field pat down search of a suspect as indisputably establishing that a reported armed and dangerous suspect is unarmed. Instead, petitioner argues that this is an "obvious" case under *Hope*, and attempts to manufacture a conflict by asserting that, unlike the Eighth Circuit here, other Circuits have found the "clearly established law" prong of qualified immunity to be irrelevant, given that violation of the *Garner* standard is "obvious" where facts dispel an officer's belief that a suspect poses a threat. (Pet. 17-23.) Yet, review of the cited cases belies petitioner's argument.

In *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29 (2d Cir. 2003) officers were summoned to a domestic dispute and advised by the victim standing outside the residence that she had been beaten and that her husband was inside. *Id.* at 33. When they called for the suspect to come out, he replied, "I will blow your fucking heads off." *Id.* When asked if the suspect was armed, the victim noted that there were rifles in the house. *Id.* An officer observed the suspect prior to entry, who did not appear to be carrying a weapon. *Id.* When the officers entered, one attempted to tackle the still visibly unarmed suspect, who

suddenly lunged away, prompting another officer to shoot him. *Id.* at 34.

In affirming the denial of summary judgment to the officer, the Second Circuit held that if plaintiff's version of the facts was credited, the officer might be liable for excessive force, as there was no reason to believe that the suspect might be armed. *Id.* ("By reason of the earlier conversations with Miller, the officers knew or had reason to know that O'Bert only had a rifle or long gun for hunting, not a handgun that would have been concealed as he stood there"). That of course is nothing like this case, where, as noted, the officers were summoned precisely because petitioner was armed and considered dangerous. Moreover, in *O'Bert*, the defendant officer never purported to argue, nor did the court have reason to decide, whether the conduct at issue violated clearly established law: The officer's sole argument on appeal was that the force used was reasonable as a matter of law. *Id.* at 36 ("On appeal, Vargo contends that he is entitled to qualified immunity as a matter of law on the ground that, even on plaintiff's version of the events, which Vargo states he adopts for these purposes, it was objectively reasonable for him to use deadly force against O'Bert in the belief that O'Bert posed an immediate threat of death or serious injury to Vargo and/or the other officers.").

Petitioner urges via footnote, that in *Davis v. Little*, 851 F.2d 605, 606-08 (2d Cir. 1988) the court affirmed a judgment in a bench trial finding an "officer guilty of violating the plaintiff's Fourth Amendment rights where the officer patted the plaintiff down, put him in the back of the police car, the plaintiff got out and tried to escape,

and the officer shot him from behind." (Pet. 19 n.3.) Omitted from petitioner's account is the fact that the plaintiff was not wanted for any violent felony, nor did the officer have any reason to believe he was armed. 851 F.2d at 607 ("Magistrate Smith found that at the time of the shooting Officer Little knew that Davis was an escaped felon who was in flight from Officer Cleveland's custody, *that Davis was unarmed*, and that *Davis had made no threat to use deadly force on them or on any third party*.") (emphasis added). Again, in contrast, here, the officers were responding to reports that petitioner was armed and dangerous.

Nor does *Streater v. Wilson*, 565 F. App'x. 208 (4th Cir. 2014), another factually dissimilar case, support petitioner's argument. In *Streate*r, officers responded to the scene of a stabbing where they were informed the assailant had already fled and weighed approximately 240 pounds. *Id*. at 209. The victim's minor son, weighing between 115 and 120 pounds, was "walking quickly toward the scene" and "carrying a kitchen knife that he picked up at home after learning that his mother had been stabbed." *Id*. Observing the knife, the officer unholstered his gun and told the son to drop his knife three times. *Id*. The son "failed to immediately comply and continued to approach." *Id*. The son stopped 31.9 feet from the officer and dropped his knife. *Id*. Nevertheless, the officer fired a total of four shots, hitting the son twice. *Id*. In affirming the denial of qualified immunity to the officer the court noted that there was simply no justification for the final two shots, taken after the officer could plainly see the son had no weapon. *Id*. at 211 ("At the point when Officer Wilson chose to fire a third and

then a fourth shot, he knew or should have known that J.G. was over 30 feet away, standing still, unarmed, complying with his orders, and making no attempt to escape. His mistaken belief that J.G. posed an immediate threat of serious physical injury to himself or to Officer Helms and civilians, who were even further away, was objectively unreasonable.").

The same is true of *A.K.H. by & through Landeros v. City of Tustin*, 837 F.3d 1005 (9th Cir. 2016) which, unlike here, involved the shooting of a suspect who was not even suspected of possessing a weapon or posing a threat of any kind. There, officers were told by the suspect's girlfriend that he had stolen her phone by grabbing it from her hand and she expressly noted he did not threaten her with any weapon, nor did he carry one. *Id*. at 1008. While detaining the suspect in the middle of the street for an investigatory stop, an officer shot the suspect, asserting that he believed the suspect might be pulling a weapon from his pocket. *Id*. at 1009. In affirming the denial of qualified immunity, the court noted the absence of any evidence indicating the officer could reasonably believe the suspect was armed and would pose any threat. *Id*. ("It is undisputed that Herrera was unarmed. Ramirez had reported to the police dispatcher that Herrera did not carry weapons. The dispatcher had reported to the officers that Herrera 'is not known to carry weapons.'").

Carr v. Castle, 337 F.3d 1221 (10th Cir. 2003) is also inapposite to the present case. In *Carr*, the court affirmed the denial of qualified immunity to officers who shot a suspect who was purportedly about to strike them with a block of concrete, because there was evidence that

the suspect no longer had the concrete block at the time he was shot, and in fact had his back turned to the officers, posing no threat. *Id.* at 1227 ("[T]he testimony of witness Williams expressly said that Randall was no longer holding the concrete at the time the shots were fired. And it will also be remembered that the forensic evidence was that the entire fusillade of shots struck Randall from the back.").

Petitioner has failed to identify any division among the lower federal appellate courts on any issue relevant to the constitutional claims asserted here. There are no grounds for review by this Court.

D. There Is No Basis For Remand Based On Of This Court's Decision In *Taylor v. Riojas.*

As a fallback position, petitioner contends that at the very least, this Court should grant the petition and remand the matter to the Eighth Circuit to consider the impact of this Court's decision in *Taylor v. Riojas*, ___U.S. ___, 141 S. Ct. 52 (2020). (Pet. 23.) Yet, this is only a different spin on petitioner's contention that any constitutional violation here is "obvious," which, as noted, simply does not withstand scrutiny.

Indeed, if anything, *Taylor* underscores the type of egregious, manifestly unconstitutional conduct that can be deemed "obvious," so as to avoid the need to point to clearly established law. In *Taylor*, correctional officers were sued for subjecting a prisoner to deplorable unsanitary conditions of confinement, including failure to afford proper toilet facilities. The Fifth Circuit held that the officers were entitled to qualified immunity given the absence of any clearly established law imposing liability under closely similar facts.

The Court reversed in a per curiam opinion. Citing *Hope*, 536 U.S. 730, 741, the Court noted that given the egregious nature of the alleged conduct—holding the prisoner for six days without toilet facilities and "teeming in human waste"—the officers had fair notice that their conduct violated the Eighth Amendment, even in the absence of a case directly on point. 141 S. Ct. at 53-54.

In contrast, what we have here is a decision made by an officer in the field under tense, rapidly evolving circumstances, in a Fourth Amendment claim involving evaluation of a broad universe of facts that utterly defies any categorization as "obvious." Indeed, the complete absence of any cited case law to the effect that a pat down search of a reportedly armed and dangerous suspect necessarily removes all doubt about the risk posed by the suspect underscores the less than obvious nature of any purported constitutional violation here. There is no basis to remand for reconsideration in light of *Taylor*.[3/]

———————♦———————

[3/]Nor would remand in light of the Court's recent decision in in *Lombardo v. City of St. Louis*, No. 20-391, __ U.S. __, 2021 WL 2637856 (June 28, 2021), be appropriate. *Lombardo* did not involve determination of clearly established law for purposes of qualified immunity. The Court reversed the Eighth Circuit's determination that force employed against a restrained, but resisting suspect was per se reasonable, and remanded for the lower court to consider all factors pertinent to the merits inquiry. *Id*. at *2.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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