No. 20-183

In The Supreme Court of the United States

BILLY D. STAIR, individually, and in his official capacity with the Jacksonville Police Department,

Petitioner,

vs.

CHARLES JACKSON,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TIMOTHY T. COATES
Counsel of Record
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-mail: tcoates@gmsr.com

M. KEITH WREN
Executive Center Drive, Suite A
Little Rock, Arkansas 72211
Telephone: (501) 223-0025
E-mail: mkwren@wrenlawfirm.com

JOHN L. WILKERSON
P.O. Box 38
North Little Rock, Arkansas 72115
Telephone: (501) 978-6136
Facsimile: (501) 978-6567
E-mail: jwilkerson@arml.org

Counsel for Petitioner Billy D. Stair

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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ARGUMENT

I. REVIEW IS NECESSARY TO ADDRESS *GRAHAM*'S TOTALITY OF CIRCUMSTANCES TEST IN THE CONTEXT OF TASER DEPLOYMENT, WHERE AN ONGOING COURSE OF COMBATIVE RESISTANCE MAY REQUIRE SEVERAL DISCRETE TASER ACTIVATIONS.

The Brief in Opposition ("BIO") characterizes the case as "[f]actbound and splitless" (BIO 1), but catch phrases are not a substitute for evidence in the record, nor governing authority. Here, both underscore the need for review.

Respondent all but ignores the most salient fact in the case—that the application of force occurred in a highly compacted time frame—nineteen seconds from beginning to end. These are the very sort of "tense, uncertain, and rapidly evolving" circumstances that the Court in *Graham v. Connor*, 490 U.S. 386 (1989) held should not be subject to second-guessing with the "20/20 vision of hindsight." *Id*. at 396-97. The totality of circumstances test dictates that no application of force can be taken in isolation, yet that is exactly what the panel majority of the Eighth Circuit endorsed here.

Contrary to respondent's assertion (BIO 1), in *County of Los Angeles v. Mendez*, ___ U.S. ___, 137 S. Ct. 1539 (2017), this Court did not hold that every application of force must be analyzed in isolation. In *Mendez*, officers, acting without a warrant, entered property to search for a fugitive. *Id*. at 1544. The officers entered an outbuilding which they did not know

was occupied by the plaintiffs, without first knocking or announcing their presence. *Id.* The plaintiffs were in bed, and one of them, thinking the landowner was entering, picked up a BB gun to steady himself as he rose. *Id*. at 1544-45. Perceiving a threat, the officers fired, wounding both plaintiffs. *Id*. at 1545.

The Ninth Circuit held that initial warrantless entry onto the property violated the Fourth Amendment. *Id*. at 1545. It also held that although the entry into the outbuilding violated the Fourth Amendment because there was no knock-notice, the defendants were entitled to qualified immunity given the absence of clearly established law pertaining to search of outbuildings. *Id*. It also agreed with the district court that the use of force was justified under the *Graham* standards. *Id*. However, the Ninth Circuit held that the plaintiffs could still assert an excessive force claim based upon the Circuit's "provocation rule." *Id*. at 1545-46. Under that rule, an earlier, reckless constitutional violation—there the initial warrantless entry onto the property—could be said to have provoked the later use of force and rendered it excessive, notwithstanding that the force was otherwise reasonable under the *Graham* standards. *Id*.

This Court reversed and remanded, holding that the "provocation rule" was inconsistent with *Graham*. *Id*. at 1547. In the passage cited by respondent, the Court did not hold that every use of force be analyzed separately without regard to the totality of circumstances. Rather, the Court held that excessive force claims were governed by the *Graham* standards, and

that other *types* of Fourth Amendment violations, such as the unlawful entry, were to be analyzed separately:

> This approach [the provocation rule] mistakenly conflates distinct Fourth Amendment claims. Contrary to this approach, the objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional. An excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances. It is not a claim that an officer used reasonable force after committing a distinct Fourth Amendment violation such as an unreasonable entry.

Id.

Indeed, the Court expressly declined to address what constitutes the time frame for assessing the "totality of circumstances" under *Graham*, because the issue was not embraced within the questions on which certiorari had been granted, nor addressed in the Ninth Circuit decision. *Id*. at 1547 n.2.

None of the cases respondent cites as supporting a segmented analysis of the use of force here (BIO 9-10 n.4), involves application of a Taser within the extremely compacted nineteen-second time period depicted on the video. The closest respondent comes is *Dockery v. Blackburn*, 911 F.3d 458 (7th Cir. 2018), which involved an incident "under one minute" but not multiple Taser deployments within a mere nineteen

seconds, nor an "unreasonable" activation somehow sandwiched between two "reasonable" activations within that short time frame. And while respondent cites *Abbott v. Sangamon County, Ill.*, 705 F.3d 706 (7th Cir. 2013) as "separately analyzing Taser deployments" (BIO 9 n.4), on appeal only the second of two activations was challenged (*id*. at 729 ("Cindy, like Travis, does not challenge the first tasing on appeal.")). Moreover, the Seventh Circuit has recognized that the time period in which force is employed is critical in assessing reasonableness. *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994) ("Our historical emphasis on the shortness of the legally relevant time period is not accidental. The time-frame is a crucial aspect of excessive force cases.").

This Court has also recognized that a particular search or seizure may be continuous in nature, even if broken into discrete acts. "'[B]ecause the two entries were part of a single, continuous search or seizure, the officers [were] not required to justify the continuing emergency with respect to the second entry.'" *City and Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1775 (2015); *see also Michigan v. Tyler*, 436 U.S. 499, 511 (1978) ("we find that the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence").

The Court has also declined to parse out the reasonableness of each individual use of force deployed within an extremely short time frame. In *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014), the Court held that

officers acted reasonably in using deadly force in attempting to halt a vehicle being driven in a dangerous manner. Crucial to the Court's determination was the short time period in which the officers had to react and the absence of any *clear* cessation of resistance:

> Here, during the 10-second span when all the shots were fired, Rickard never abandoned his attempt to flee. Indeed, even after all the shots had been fired, he managed to drive away and to continue driving until he crashed. This would be a different case if petitioners had initiated a second round of shots after an initial round *had clearly incapacitated Rickard* and had ended any threat of continued flight, *or if Rickard had clearly given himself up.* But that is not what happened.

Id. (emphasis added).

The Eighth Circuit panel majority departed from the principles set forth in *Graham* and *Plumhoff*. Instead of evaluating the three Taser activations over a nineteen second period in light of the *totality* of circumstances, i.e., plaintiff's initial and continued physical resistance and lack of compliance with lawful officer commands, the majority instead parsed each activation separately. In doing so, as the dissenting opinion noted, the majority lost sight of the forest for the trees. It transformed what, to a reasonable officer under *Graham*'s "tense, uncertain, and rapidly evolving" circumstances standard could appear to be (and was) only a "momentary" suspension of combat, into "a clearly punctuated interim of compliance," sufficient to render

the second activation potentially unreasonable. (Pet. App. 17.)

Where, as here, the application of force occurs in the context of a highly compacted time frame, the totality of circumstance standard necessarily requires that a court not evaluate each use of force as subject to a separate constitutional inquiry, divorced from what preceded and followed. The tendency to focus on individual applications of force, as opposed to the circumstances surrounding the use of force, is particularly acute in the context of Taser deployment. And given the ubiquity of video, whether Taser mounted video as here, officer body cameras or civilian cell phones, the ability to parse each activation in the most minute detail, no matter how short the time frame, fosters precisely the sort of improper second-guessing embraced by the panel majority here contrary to *Graham*.

As both the district court and dissenting judge Wollman concluded, review of the Taser video of the incident establishes that Stair's use of force was reasonable under *Graham*. The struggle with Jackson occurred over an extremely brief, but tense, period of time and against the background of Jackson's highly agitated state from the very outset of his encounter with the officers. As the panel majority concedes, even after the Taser was activated a second time, Jackson attempted to attack the officers, moving towards Stair in a manner the majority acknowledges could reasonably prompt the use of force to forestall a perceived assault. At no point prior to the third Taser activation did Jackson cease moving or resisting for any meaningful

interval of time, nor in any other way signal his acquiescence to the officers' commands.

An officer in the field confronted with an agitated suspect actively engaged in physically resisting arrest—indeed assaulting a fellow officer—does not have the luxury of assuming that a momentary cessation of outright attack during a course of assaultive behavior signals full blown surrender. Given Jackson's *entire* course of conduct, under *Graham*'s totality of circumstances standard, petitioner Stair's use of force was manifestly reasonable.

II. THE COURT SHOULD GRANT REVIEW TO COMPEL COMPLIANCE WITH *KISELA V. HUGHES* AND OTHER DECISIONS REQUIRING COURTS TO GRANT QUALIFIED IMMUNITY WHERE THE LAW IS NOT CLEARLY ESTABLISHED.

Respondent argues that petitioner's entitlement to qualified immunity turns on an issue of fact, namely whether respondent momentarily ceased resisting before continuing to attack the officers, thus prompting a third (and concededly reasonable) Taser activation which finally subdued him. (BIO 15.) According to respondent it must therefore be assumed he was compliant. (*Id.*) Not so.

The events as depicted in the video are not subject to dispute—the video shows what it shows. As this court made clear in *Plumhoff v. Rickard*, 572 U.S. at 778-81, even where a lower court asserts there is a

triable issue of fact, the qualified immunity inquiry focuses on whether an officer could believe his or her actions reasonable in light of what is depicted in the video and the clearly established law.

Since first articulating the clearly established law standard for qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court has made it clear that it is an exacting standard, favorable to public entity employees and officials. The Court has repeatedly noted that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The constitutional violation must be "beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305 (2015) (per curiam). The law must be "sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (emphasis added, internal quotation marks and alteration omitted); *District of Columbia v. Wesby*, 583 U.S. ___, 138 S. Ct. 577, 586-90 (2018). Government employees and officials are entitled to qualified immunity "unless existing precedent 'squarely governs' the specific facts at issue." *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148, 1153 (2018) (per curiam).

To be sure, in the "rare, obvious" case where a public employee or official has engaged in unlawful conduct, a court may deny qualified immunity in the absence of an on-point case. *Wesby*, 138 S. Ct. at 590 (citing *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)

(per curiam)) ("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."); *see also Taylor v. Riojas*, 592 U.S. ___, 141 S. Ct. 52, 53 (2020) ("no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time"). But there is nothing "obvious" about the alleged constitutional violation here. This is underscored by the fact that two federal judges, with the benefit of time for reflection that petitioner Stair did not have in confronting a tense, rapidly evolving situation, both found that the second Taser activation was reasonable.

Nor, contrary to respondent's argument, is petitioner's purported violation on any internal departmental regulation relevant to the qualified immunity. (BIO 14.) In *City and County of San Francisco v. Sheehan*, 135 S. Ct. at 1777, the Court expressly held that "[e]ven if an officer acts contrary to her training" that would "not itself negate qualified immunity where it would otherwise be warranted." The pertinent question is whether the existing law is clearly established in light of the specific circumstances confronted by an officer.

As the dissent from denial of rehearing en banc recognized, the panel majority did exactly what this Court decried in *City of Escondido v. Emmons*, ___ U.S. ___, 139 S. Ct. 500, 503-04 (2019) and a host of other

cases—defined the underlying right at a high level of generality, i.e., the right to be free of excessive force, and held that cases involving use of force against unresisting suspects generally were sufficient to give petitioner fair warning that his use of force under the particular facts of this case could give rise to liability for purposes of denying qualified immunity. (Pet. App. 53 (citing opinion at Pet. App. 15-16).)

Respondent cites the same cases cited by the panel majority (BIO 18-19), which, as noted in the petition, are not remotely factually similar to the incident here (Pet. 26-27).

Neither *Shannon v. Koehler*, 616 F.3d 855 (8th Cir. 2010) nor *Montoya v. City of Flandreau*, 669 F.3d 867 (8th Cir. 2012) involved use of a Taser. In both cases the court found an issue of fact whether a leg sweep takedown of an unarmed, compliant suspect was excessive force. *Shannon*, 616 F.3d at 859; *Montoya*, 669 F.3d at 870.

Shekleton v. Eichenberger, 677 F.3d 361, 366-67 (8th Cir. 2012) addressed an officer's use of a Taser against a compliant, nonviolent, non-fleeing misdemeanant after the officer unsuccessfully sought to handcuff the suspect and the two men accidentally fell to the ground. *Brown v. City of Golden Valley*, 574 F.3d 491, 496-97 (8th Cir. 2009) held that use of a Taser against a seat-belt restrained passenger cowering in her automobile was unreasonable.

Respondent also cites other Eighth Circuit decisions as purporting to render the law clearly established with respect to the underlying incident here. (BIO 19.) None supports respondent's argument.

In *Blazek v. City of Iowa City*, 761 F.3d 920, 925 (8th Cir. 2014), the court denied qualified immunity for use of force on the plaintiff who "was handcuffed and under control." Here respondent was neither handcuffed nor under control.

In *Krout v. Goemmer*, 583 F.3d 557, 566 (8th Cir. 2009), the court denied qualified immunity to officers who punched and kicked the plaintiff when he "was on the ground—handcuffed, and no longer resisting." Again, here, plaintiff was not handcuffed and the video belies the notion that an officer could not reasonably believe plaintiff was actively resisting, a fact borne out by the need to activate the Taser a third time in what all judges concluded was a reasonable use of force.

Gill v. Maciejewski, 546 F.3d 557 (8th Cir. 2008) is even farther afield. There, the court affirmed a jury verdict for the plaintiff for excessive force, noting "[t]he evidence shows [plaintiff] did not resist and complied with the officers' demands" and while plaintiff "was pinned to the ground by multiple officers" the defendant "smashed his knee into the hapless suspect's head." *Id*. at 562.

As Judge Colloton observed, no cited case comes close to addressing the question at issue here, i.e., "whether the Fourth Amendment forbids two five-second deployments of a taser to subdue a rage-filled

subject who threatens force against an officer." (Pet. App. 54.) In short:

> The panel opinion cited no comparable decision involving application of a taser against a non-compliant subject who threatened use of force against a police officer, and no decision holding that a subject's "momentary post-tasered position on the ground" requires an officer to consider it "a clearly punctuated interim of compliance" that makes another use of the taser unreasonable under the Fourth Amendment.

(*Id*. at 53.)

Application of this Court's requirement for factual specificity in the context of excessive force claims makes it clear that Stair is entitled to qualified immunity. There was no Eighth Circuit case remotely suggesting that activation of a Taser three times in nineteen seconds against a non-compliant suspect could constitute excessive force.

Indeed, as Judge Colloton noted, given that two of the four judges who have analyzed the use of force here concluded that it was reasonable as a matter of law, it cannot seriously be contended that the issue is "beyond debate" or that Stair was "plainly incompetent" or "knowingly violat[ing] the law." (Pet. App. 49-50 (quoting *Ashcroft v. al-Kidd*, 563 U.S. at 741 and *Malley v. Briggs*, 475 U.S. 341).)

Under the decisions of this Court, the Eighth Circuit was required to grant petitioner qualified immunity. It is therefore necessary for the Court to grant review to compel compliance with precedent, and reinforce the important public policies served by qualified immunity.

CONCLUSION

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

Respectfully submitted,

TIMOTHY T. COATES
Counsel of Record
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-mail: tcoates@gmsr.com

M. KEITH WREN
Executive Center Drive, Suite A
Little Rock, Arkansas 72211
Telephone: (501) 223-0025
E-mail: mkwren@wrenlawfirm.com

JOHN L. WILKERSON
P.O. Box 38
North Little Rock, Arkansas 72115
Telephone: (501) 978-6136
Facsimile: (501) 978-6567
E-mail: jwilkerson@arml.org

Counsel for Petitioner Billy D. Stair