No. 20-43

In The
Supreme Court of the United States

AMANDA N. REICH, et al.
Petitioners

v.

CITY OF ELIZABETHTOWN, et al.,
Respondents

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

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Is there an actual conflict among the circuits regarding whether a party may tender a contradictory affidavit after discovery has closed at the summary judgment stage that interjects new facts and evidence into the case?

(2) Do the facts of this case merit abolishing the longstanding doctrine of qualified immunity, where a police officer acts in self-defense and in defense of others by using deadly force to repel an attack by a mentally-ill man high on methamphetamine who makes verbal threats, refuses to comply with officer commands, and actively resists by charging at an officer with his arm raised and with an open-bladed knife in his hand?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents state that they are not subsidiaries or affiliates of a publicly owned corporation. There is not a publicly owned corporation that has a financial interest in the outcome of this matter.

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STATEMENT OF THE CASE

A. Petitioners' Misstatements Of The Record.

Petitioners make numerous misstatements of law and fact. In addition, Petitioners rely heavily on facts created in Amanda Reich's ["Reich"] post-summary judgment sham affidavit which plainly contradicts her own prior testimony and the testimony of numerous independent eyewitnesses.

B. Factual Background.

On July 6, 2015, Joshua Blough, ["Blough"] age twenty-nine, went to a Communicare mental health facility for a psychological assessment. Blough had not taken his mental health medications for four months and he had attempted suicide three times in the previous five days. His counselor at Communicare recommended in-patient admission, but Blough refused.

(1) Blough's Hallucinations.

On July 7, 2015, the next day, Blough traveled from Grayson County to another Communicare facility located in Elizabethtown, Kentucky with his girlfriend Reich. En route, Blough saw a Kentucky State Police vehicle stopped on side of the roadway on the Western Kentucky Parkway. In response, Blough got "really upset," hallucinated that the KSP were

after him, and said "there were police officers everywhere." Reich took the next exit off the Parkway and hoped that a change of scenery might help him.

It did not. Blough hallucinated again while stopped at a stoplight near a Circle K Food Mart on Highway 62 in Elizabethtown. Referring to the police, Blough told Reich, "I'm not gonna let anybody hurt you, but I'm not gonna let anybody hurt me either."

Blough then opened his passenger car door and exited while carrying an open-bladed knife, saying to Reich "that the police were after him." Reich replied, "Josh, there is no police anywhere around. You need to get back in the car," and she was able to successfully coax him back into her vehicle.

However, her success was short-lived, as Blough exited her vehicle a second time at the intersection of Ring Road and Patriot Parkway in Elizabethtown. While on foot and still carrying his open-bladed knife, Blough was oblivious to traffic, which Reich describes as "dangerous" and "it was like when he was walking he wasn't even acknowledging any cars coming by or nothing." Reich asked him to "please get back in the car," but he refused.

(2) Reich's 911 Call For Help.

Reich "called 911 immediately" for assistance because she "felt like she couldn't contain the situation, so she called for help." Reich told the dispatcher he had "schizophrenia and stuff," that

"he's not had his medicine," and "he thinks everybody's out to get him." She relayed that Blough jumped out at the Severns Valley intersection "with a knife" and reported "I don't see him anywhere." Reich was "afraid that somebody else would get the wrong idea and call in thinking that Josh was a threat to someone and that he would end up getting shot." Obviously, she could not control Blough and she knew people could perceive him as dangerous.

Reich was promptly connected to City of Elizabethtown Police Department ["EPD"] officer Matt McMillen's cell phone. They spoke, and within minutes, McMillen arrived to do a welfare check wherein he gathered more information, learning that Blough was off his medication, was on foot, had a knife, was "very paranoid," was "having an episode," and he disliked police.[1]

(3) Reich's Failed Attempt To Coax Blough Into Her Car.

Reich wanted to again try to coax Blough into her vehicle. McMillen agreed and told Reich if Blough was not a threat, they would not need to get involved. McMillen describes, "we were leaving it be" and "were going to clear." Reich asked Blough to drop the knife and get in her car "probably at least 10" times, but he continually refused.

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[1] Presumably one reason Blough likely did not like the police was that he had been previously shot by a KSP trooper named Dewan Kelly in a prior incident.

Blough instead meandered into a nearby residential subdivision. He was still brandishing his knife, had removed his shirt, was sweating profusely, and was still agitated and upset.

(4) People Nearby Were Highly Concerned.

The reaction of several nearby residents and passers-by is telling - they all perceived Blough to be a threat. For example, an elderly resident of the subdivision, Helen Howlett, testifies, "I saw a suspicious-looking man that I did not recognize wandering up-and-down the street into my yard and the yards of my neighbors ... The doors to my house were locked, and seeing this man in the neighborhood concerned me."

On the other end of the age spectrum, a teenager, 17 year-old Madison Pils, was walking home on a street located within this residential neighborhood, and she later relayed to the police in a statement the following facts:

> I was walking home and saw a strange guy walking a little bit of the way down the street on the right side in someone's yard. He had his arms crossed looking down at the ground. I know almost everyone on the street. But they [sic] guy wondering around in the morning around lunch time on a Tuesday concerned me.

A third neighborhood resident, Randall Ray, observed Blough meandering through the neighborhood and was alarmed as well, and he testifies as follows:

> I saw a suspicious-looking man close to David Mills' home, and between two homes in the subdivision on Fontaine Drive. He did not live in our neighborhood, and I did not recognize him. He was suspicious-looking, was unkept, and had his shirt off. He was walking around aimlessly in the subdivision, and appeared to be looking around for something, or at Mr. Mills' home. He saw me and changed directions... I became concerned and locked my truck, closed the garage door, and went into my house to get my pistol. I also told my 25 year-old daughter who was home with my three-year-old granddaughter to lock the doors to our house.

Thus, Ray was so concerned about Blough that he chose to arm himself with a gun. A fourth neighborhood resident, David Mills, also saw Blough and testifies as follows:

> I saw a man with no shirt on and was wearing camo pants. He was on the patio of my brother's house and it looked like he

> was trying to get in his back door. I called my brother to tell him ... I was alarmed so I turned around at John O's food mart and went back into the neighborhood. I then saw the man standing in my front yard and he had a knife in his right hand.
>
> I pulled up next to a lady in a black car. I asked her what was going on, and she said she tried to get the man back into her car but he would not do so, that he was schizophrenic and was upset. I told her I was calling 911 and she said not to do that because he hates the police. I called 911 anyway to report this, explaining that there were people and kids in the neighborhood.

Also, passers-by became alarmed, as the Hardin County 911 Call Center fielded two (2) telephone calls from concerned citizens driving by the area, the first of whom stated as follows:

> Dispatch: 911, where is your emergency?
>
> Lady: Um, it's at the corner of Ring Road and, shoot, um, 361. There's a gentleman who -- walking around who's got some camouflage clothes on. He has a knife in his hand. He's

walking in the middle of the road.

Dispatch: At Ring and Patriot?

Lady: No sir, it's not Patriot. It's where John O's is, um, about Severns Valley church.

Dispatch: Okay. Yeah. That's Patriot Parkway, 361.

Lady: Okay, I'm sorry. I didn't know that.

Dispatch: That's all right.

Lady: But he's walking in the road. He's got a knife in his hand like he's going to stab somebody or someone.

Dispatch: Okay. I think we might have a call on it already. Let me check real quick. Okay?

Lady: Well, there's a lady sitting in a car, but the windows are down. I'm a little concerned for her.

This passer-by was so concerned that she paused to call 911 because she thought Blough would "stab

somebody or someone." A second concerned passer-by called the 911 Call Center as well, stating as follows:

> Lady: Um, I don't have an emergency. I want to report -- there was a gentleman standing out in between the intersection of Patriot Road and Ring Road. He had a big knife and he crossed out in front of traffic. I don't know what he was doing but --

Across the street, Severns Valley Baptist Church was hosting a day camp with roughly 200 kids on its campus, some of whom were recreating outside on the nearby lawn. Due to this incident with Blough, Severns Valley went on "lock down" and notified parents that their children were safe and secure.

(5) Blough's Presence In The Neighborhood Forced Officer Involvement.

EPD officer Scot Richardson responded to the prior 911 call as well, and while driving by the area, saw Blough on foot in the neighborhood with his shirt off, sweating profusely, pacing back-and-forth by houses, and exhibiting "bizarre" and "uncertain" behavior. Richardson arrived in a separate marked vehicle and parked behind McMillen.

McMillen was speaking with Reich on Fontaine Drive in the subdivision. Reich describes that "Josh must have seen the police - the police talking to me and so he thought that I was involved in trying to get him hurt, too, you know. So he wouldn't get in the car with me or anything" and "it was like he wasn't listening to anything I had to say." Blough hallucinated that she was "in on it" with the police in trying to harm him, so he would not go with her quietly.

Blough's presence in the neighborhood "added another dynamic." Richardson describes, "the situation changed from 'he's probably going to be okay in a field' setting, to now he's in the neighborhood with a knife and there's residents that live in that neighborhood."

Richardson also suspected that Blough was on drugs, testifying, "the physical effects that Mr. Blough was giving that day indicated to me that there was some kind of either drug or intoxicant on -- in his system because he ... was sweating, he was not listening, he was irrational, acting bizarre." Blough's actions were consistent with meth-induced behavior. McMillen concurs that Blough was acting "unpredictable" like he was on meth.

The officers agreed to allow Reich to again try to coax Blough into her vehicle, as she says, "I stopped them and asked them could I help -- could I try to get him to put the knife down first. And they said yes, so I got out of the car and I went down there to him." Blough still had his knife in his right hand. Reich

"walked up to him and I tried to get him to put the knife down." Blough refused. Due to his presence in the neighborhood, the officers were then forced to get involved.

(6) The Officers Formulated A Plan To De-Escalate This Situation.

The officers then devised a tactical plan to attempt to first communicate with Blough, to give him distance, and to try to resolve the situation peacefully and quickly without using any force. In carrying out this plan, they employed the following de-escalation techniques:

1. Richardson calmly initiated conversation with Blough by saying "Hey, what's going on" or "Hey, buddy".

2. The officers never activated their blue lights or sirens.

3. The officers did not call other units to the scene since multiple units could agitate Blough.

4. The officers parked their vehicles far away and "stayed back as far as we could" in the roadway.

5. The officers never chased Blough but gave distance and always left him a way out. Reich agrees the officers "stayed put in the same spot."

6. They gave repeated commands to "stop" and "drop the weapon" which Blough ignored.

7. The officers kept their pistols holstered, and then concealed them from Blough in low-ready position, hoping not to have to use them.

Reich also tried to speak with Blough, saying "Josh, just drop it. They're just trying to help you." All of these de-escalation techniques apparently had no effect on Blough as he responded by walking directly toward Richardson at a "very fast pace."

(7) <u>These Events Happened Rapidly</u>.

From the time the officers arrived at the subdivision, this entire event was a "less than 3 minute encounter." It was a "fluid situation" in which Blough became increasingly aggressive. Blough's actions dictated the officers' response and they had "to react to what is transpiring in front of us."

McMillen heard Blough yelling indiscernibly while "picking up speed." Blough became focused on Richardson with his knife open in his right hand. Richardson backed up to give him space. Richardson's pistol was still holstered. Blough continued advancing toward Richardson.

Blough then spoke to Reich, touched her, and raised his knife toward her in an aggressive manner telling her to "get the f--- back." By then, Richardson

was six feet away from Reich and had raised his pistol to the "on target" position, as he says "I knew that something could happen here, somebody was going to get injured by Mr. Blough."

Richardson then reached with one arm to move Reich out of harm's way, while again admonishing Blough to drop his weapon. Blough refused. Richardson continued to back up while doing so, as he describes, "I was trying to retreat from Mr. Blough's attack."

(8) **This Was A Tense Situation As Blough Presented A Threat To All Persons Nearby.**

Reich was in danger. The neighborhood residents were in danger. The officers were in danger. Passers-by reported danger to the 911 Call Center. Officer Richardson subjectively believed his own life was in imminent danger. McMillen concurs, as the testifies, "At a certain point, I mean, you have to defend yourself or those around you, and that's what had to take place."

(9) **Blough Kept Moving Toward Richardson.**

Independent eyewitness Helen Howlett testifies, under oath, that Blough was moving toward Richardson when he was shot as follows:

> The man began walking toward the police officers. The police officers were

> communicating with him. However, the man kept moving toward the police officers. The man was still moving toward the officers and was close to them when they drew their guns and shot him."

Another independent eyewitness, Harry Mills, concurs as follows:

> Saw him walking across yard toward police officer. Thin [sic] the police told him to drop knife. He went at officer, with chest puffed out. Officer shot at him 3-4 times. Dropped to ground.

A third independent eyewitness, David Mills, testifies consistently as follows:

> The officers tried to talk to the man, and repeatedly told him to "stop" and "drop it." When the man did not do so, they pulled their weapons. They continued to issue more warnings to him after that, but he refused to stop or drop his knife.
>
> The man was charging at the police aggressively and quickly with his chest bowed out and the knife still in his right hand. When he was about six feet from the officers, I saw the officer shoot and hit the man with two shots. I saw this shooting from approximately 50 feet away.

Thus, three independent eyewitnesses confirm that Blough was moving toward Richardson during the final encounter.

As he approached Richardson, Reich and both officers clearly heard Blough say to Richardson, "You are going to have to kill me, motherf-----". As Blough was making that verbal threat, Blough had raised his open-bladed knife in his dominant, right hand and was poised to strike Richardson in what Petitioners' expert calls "the ice pick position."

(10) Both Officers Employed Deadly Force.

A knife is a deadly force weapon, and these EPD officers were trained to meet a deadly force threat with deadly force. When Blough was at close range, within 6-10 feet of Richardson and still moving toward him, Richardson fired two shots in succession.

Shot #1 grazed Blough's raised right forearm and deflected into his chest. Shot #2 entered his right rear scapula has he had turned, or become bladed, toward Richardson.

Emergency medicine physician and forensics expert, William Smock, M.D., opines that the wound pattern clearly indicates that Blough was advancing toward Officer Richardson when he was shot.

McMillen fired a third shot during this same timeframe while Blough was moving toward

Richardson, but McMillen's shot missed Blough altogether.

After the first shot, Blough's course did not change, so Shot #2 shot was necessary to end the threat, whereupon Blough fell unconscious. Both officers then promptly rendered first aid, but their life-saving efforts were unsuccessful. Blough's post-mortem lab results revealed toxic levels of methamphetamine and amphetamine in his system.

C. This Case's Procedural History And Reich's Late, Contradictory Affidavit.

On July 5, 2016, Petitioners filed a complaint initiating this action in the United States District Court for the Western District of Kentucky, alleging excessive force under the Fourth Amendment and other claims.

On April 5, 2017, Petitioner Reich was deposed.

On February 1, 2018, discovery closed in the district court case.

On April 2, 2018, Respondents filed their motion for summary judgment, asserting among other defenses, the doctrine of qualified immunity.

On April 7th and April 12th of 2018, a few days after the Respondents' motion for summary judgment was filed, Reich returned to the scene of this shooting

incident, with her attorneys, to take measurements and photographs.

On April 23, 2018, Petitioners filed a response brief in opposition to the Respondents' motion for summary judgment which included, as an exhibit, a never-before-disclosed affidavit from Reich which contained new opinions, notes, photographs, and new measurements of purported distances between all persons present at the scene of this shooting. Her opinions in her affidavit contradict her prior testimony, as Reich had previously testified that she he had no idea where persons were positioned or how far apart they were. Petitioners did not file a motion for leave to file this late affidavit, but merely attached it to their summary judgment response brief.

It is undisputed that Reich's affidavit, notes, photographs, and measurements were not created or disclosed until after discovery had closed and after Respondents' motion for summary judgment had been filed. In fact, Reich admits this new information was prepared to specifically try to refute the summary judgment motion. Respondents never had the opportunity to cross-examine Reich about this information and Respondents' experts never had the opportunity to consider this new information before rendering their opinions in this case.

The Western District Court Judge, Rebecca Grady Jennings, called this tardy and contradictory affidavit and accompanying information "improper" and did not consider it. On appeal, the Sixth Circuit, Judge Amul Thapar, affirmed its exclusion.

REASONS FOR DENYING THE PETITION

I. THERE IS NO COMPELLING SPLIT AMONG THE CIRCUITS REGARDING THE "SHAM AFFIDAVIT DOCTRINE."

A. The Sixth Circuit Excludes "Plainly Contradictory" Affidavits and Narrowly Defines The Term "Contradictory."

Contrary to Petitioners' assertion, the Sixth Circuit does indeed apply a flexible rule regarding late, contradictory affidavits. For example, the Sixth Circuit only excludes "plainly contradictory" affidavits, and has adopted a narrow definition of the term "contradictory," as Judge Thapar noted in his opinion:

> Our precedents suggest "a relatively narrow definition of contradiction." *Briggs*, 463 F.3d at 513. If a party "was not directly questioned about an issue," a later affidavit on that issue simply "fills a gap left open by the moving party." *Aerel*, 448 F.3d at 907. After all, deponents have no obligation to volunteer information the questioner fails to seek. *Id.*; *see Briggs*, 463 F.3d at 513 (holding that a party has no obligation to volunteer the content of a conversation when deponent "was not expressly asked" what another said to him).

App. A, p.9a[2]. Thus, not all late affidavits are disallowed in this judicial circuit, and in fact, only subsequent affidavits that plainly contradict prior testimony are excluded.

The Sixth Circuit has long held that a party cannot create a factual dispute by filing an affidavit, after a motion for summary judgment has been made, which directly contradicts earlier testimony. *Dotson v. U.S. Postal Service,* 977 F.2d 976, 978 (6th Cir. 1992). The case of *n v. Huron Co., Ohio*, WL 271657 (N.D. Ohio 2008), is highly relevant and was relied upon by the lower court.

In *Myers*, the plaintiff tried to submit a contradictory affidavit at the summary judgment stage. and the district court disallowed it stating:

> Plaintiff failed, either during his deposition or otherwise prior to the close of discovery, to update his deposition responses with the assertions he now makes in his affidavit, and his failure to do so, aside from failing to abide by a general duty to update discovery responses, violates his obligation under Fed. R. Civ. P. 37(e)(1)(B) to set forth any changes in substance in his deposition testimony, and to the extent that the plaintiff's affidavit interjects new assertions, those assertions

[2] Citations to "App." refer to petitioners' appendices.

> should not be considered in adjudication their motion for summary judgment.

Id. at 2, 4 [footnote 2]. Where a deponent is "asked specific questions about, yet denies knowledge of, the material aspects of her case, the material allegations in her affidavit directly contradict her deposition." *Powell-Pickett v. A.K. Steel Corp.*, 549 F. App'x 347, 353 (6th Cir. 2013).

In *Biechele v. Cedar Point, Inc.*, 747 F.2d 209 (6th Cir. 1984), the Sixth Circuit found that if a party who had been examined at length in his/her deposition could raise an issue of fact simply by submitting an affidavit contradicting his/her prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact. *Id.* at 215.

B. Reich's Affidavit Is "Plainly Contradictory."

In this case, Reich was directly, and repeatedly, in her deposition about the distances between all persons at the scene of this shooting. Reich's affidavit is not discussing issues never before asked. Rather, as Judge Thapar noted, her affidavit "plainly contradicts her deposition testimony." App. A, p.11a.

The day of this incident, in her interview with the KSP, Reich could not recall any information about distances or locations of persons in relation to one another at the scene.

On April 5, 2017, at her discovery deposition, Reich was asked repeatedly to describe the positions of the persons and distances between them, whereupon she refused to do so, testifying, "No, because I'm not sure."

Over one year post-deposition, on April 7th and 12th of 2018, Reich "returned to the scene of the incident with my attorneys to assist with the prosecution of this civil action and respond to a motion for summary judgment filed by the defendants' attorneys." Amazingly, she then had total recall and vividly remembered, to the inch, where everyone was positioned during this 2015 shooting. As the Sixth Circuit noted:

> Almost a year to the day later, Reich's affidavit swore something different. She asserted that once she returned to the scene of the shooting in April 2018—over two months after discovery closed—she accurately recalled where all four stood when the officers fired on Blough. So nearly three years after the shooting she measured *977 and recorded the distances between them. She placed the distance between Blough and Officer Richardson—who fired the first shot—at just over twenty-five feet. Her measurements put Officer McMillen over thirty-six feet away from Blough. And she placed herself thirty-four-and-a-half feet from him.

> Reich's affidavit plainly contradicts her deposition testimony.
>
> ...
>
> Not knowing the distances before her deposition, is one thing. But not using the many months between that deposition date and the end of the discovery period to visit the site, take measurements, and amend her testimony is quite another. Rather, she waited until after discovery closed and she could no longer be deposed to offer her revised view. This timing supports evaluating the evidence as "newly discovered" only in the sense that she refused to "discover" it earlier. We see no abuse of discretion in the district court so deciding.

App. A, p.10a-12a. Reich's affidavit contradicts her own testimony and that of her own police practices expert witness, Roy Taylor, who says Blough and Richardson were "anywhere from 10 to 12 feet away." Reich's affidavit further contradicts independent eyewitness David Mills who says Blough was "about six feet from the officers" when he was shot.

These new facts in Reich's affidavit were nowhere previously in the record. As Judge Jennings described, "there is no other support in the record for this factual assertion." App. B, p. 51a. Even under the Sixth Circuit's narrow definition of the term

contradictory, Reich's new affidavit cannot be deemed anything but "plainly contradictory". As Judge Thapar explained, she cannot "duck her deposition" or "hold her cards in anticipation of a later advantage." App. , p. 9a, *citing Powell-Pickett v. A.K. Steel Corp.*, 549 F. App'x 347, 353 (6th Cir. 2013).

In contrast, one of the cases cited by Petitioners involved a non-contradictory affidavit, and the Fifth Circuit rightly stated, "There is nothing inherently inconsistent between Henry's original complaint and the summary judgment affidavit. *Winzer v. Kaufman County*, 916 F.3d 464, 472 (5th Cir. 2019). That obviously is not the case here, and *Winzer* is inapplicable.

In summary, Sixth Circuit law is well-developed regarding this issue. Both Judge Jennings and Judge Thapar properly applied that applicable law to these facts. A district court's evidentiary rulings will be affirmed unless the court has made a clear error of judgment or has applied an incorrect legal standard. *Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295 (11th Cir. 2016).

C. There Is No Actual Split Among The Circuits.

Petitioners attempt to fabricate a circuit split in an effort to sell this sham affidavit issue to the Supreme Court.

For example, they argue that the Eleventh Circuit only allows courts to disregard affidavits in

"limited circumstances" where it "flatly contradicts" prior deposition testimony. *Petition*, p. 16, citing *Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1306-1307 (11th Cir. 2016). Petitioners argue that the Fifth Circuit excludes affidavits that are "markedly inconsistent" with a prior statement. *Petition*, p. 17. *Winzer v. Kaufman County*, 916 F.3d 464, 472 (5th Cir. 2019). Petitioners state that the Ninth Circuit applies a different test requiring any affidavit exclusion to be applied "with caution." *Petition*, p. 17. However, the case cited, *Van Asdale v. International Game Tech.*, 577 F.3d 989 (9th Cir. 2009), echoes the Sixth Circuit test, stating that "the inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit". *Id.* at 998-999.

Petitioners allege that the Tenth Circuit employs the sham affidavit rule "with caution," and cite *Law Co. v. Mohawk Constr. & Supply Co.*, 577 F.3d 1164 (10th Cir. 2009), which is not materially different that the Sixth Circuit's position. The *Law* case states, an affidavit may not be disregarded solely because it conflicts with the affiant's prior sworn statements, however, courts will disregard a contrary affidavit when they conclude that it constitutes an attempt to create a sham fact issue. *Id.* at 1169.

Thus, Petitioners argue that the tests employed by the Eleventh, Fifth, Ninth, and Tenth Circuits are materially different than the standard employed by the Sixth Circuit. However, in reality, the tests employed by each of these circuits are not materially different, as the following chart illustrates:

CIRCUIT	LANGUAGE EMPLOYED
Fifth Circuit	Excludes affidavits that are "markedly inconsistent" with a prior statement.
Sixth Circuit	Narrowly defines "contradictory," meaning an affidavit must "plainly contradict" prior testimony to be excluded.
Ninth Circuit	States "the inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit".
Tenth Circuit	Affidavits are not disregarded solely because the conflict with a prior sworn statement, but they are excluded when they constitute an attempt to create a sham fact issue.
Eleventh Circuit	Affidavits are disregarded in limited circumstances only when they "flatly contradict" prior deposition testimony.

The words chosen by the Eleventh, Fifth, Ninth, Tenth, and Sixth Circuits have similar

meaning and connotation. Granted, the precise wording employed from circuit-to-circuit varies to some degree; however, each circuit employs a similar, flexible approach to contradictory affidavits allowing courts, based upon the facts of each case, to decide when, and if, to exclude sham affidavit testimony.

Thus, the legal tests employed by each circuit are, in actuality, highly similar. Accordingly, there is no actual, significant or compelling circuit split with regard to the sham affidavit doctrine.

D. This Is Not An Issue Of Significant, National Importance.

Regardless of any slight variance in the language used by each circuit to address late, contradictory affidavit testimony, this sham affidavit issue is not one of compelling, national importance. Obviously, not every issue upon which circuit courts vary, or even disagree, merits granting certiorari.

In fact, the Supreme Court regularly denies petitions for writs of certiorari despite apparent conflicts between the circuits. *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990). Denials of certiorari despite an obvious circuit split are customary. In other words, the fact that lower courts may conflict about certain legal issue is not enough; rather, the circuit split must involve compelling issues of national importance.

The use, or non-use, of contradictory sham-affidavits is not a matter of national urgency. This is an issue best left to the discretion of each judicial circuit. There is no need for national uniformity, or a single broad-based rule.

Judicial circuits enjoy flexibility to decide a myriad of both substantive and procedural issues. Each circuit has crafted its own similarly flexible rule regarding how to treat late, contradictory affidavit testimony. There is no compelling need for a uniform, national rule.

E. Even If The Contents Of Reich's Affidavit Were Credited As True, It Would Not Change The Outcome Of The Respondents' Summary Judgment Motion.

A district court's decision to strike an affidavit as a sham is reviewed for abuse of discretion, and even a clearly erroneous evidentiary ruling will be affirmed if harmless. *Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295 (11th Cir. 2016).

The harmless error doctrine applies to the review of evidentiary rulings, so even if a district court has abused its discretion, the Court of Appeals will not reverse unless the error affected the substantial rights of the parties. *Winzer v. Kaufman County*, 916 F.3d 464 (5th Cir. 2019).

The issues concerning this sham affidavit do not substantively affect the rights of the parties and

are not outcome-determinative. Judge Jennings stated as follows:

> Even if the Court accepted Reich's affidavit, her assertions about the distance of the parties would not change the Court's ruling. Reich puts the distance between Blough and Officer Richardson at 25 feet 6 inches - more than double the estimates made by third-party witnesses shortly after the shooting. Even so, the officers could still reasonably believe that Blough was a danger to themselves and other parties on the scene, including the 200 day-camp children at nearby Severns Valley Baptist Church, concerned residents watching the scene, and Reich herself.

App. B, p. 53a. There was no error in excluding this late, sham affidavit.

In the alternative and for the sake of argument only, if the exclusion of Reich's affidavit was erroneous, then it was merely harmless error. Even taking Reich's assertions in her contradictory affidavit as true, summary judgment would still have been properly entered for the Respondents on the basis of qualified immunity.

II. THIS CASE PRESENTS AN EXCEPTIONALLY POOR VEHICLE TO ABROGATE THE QUALIFIED IMMUNITY DOCTRINE.

Petitioners make the broad, sweeping argument that that the doctrine of qualified immunity should be "recalibrated" or even "reversed." There may be noise from some news media, certain special interest groups, or political forces who seek to abrogate the long-standing doctrine of qualified immunity. However, this doctrine is of vital necessity and plays a critically important role in the American legal system.

A. The Qualified Immunity Doctrine Is Critically Important To American Jurisprudence For a Variety Of Policy Reasons.

First, the doctrine of qualified immunity rightly protects the good faith actions of police officers and other governmental officials. The vast majority of cases are decided rightly, and the good faith decisions of government officials should be given the benefit of the doubt.

Secondly, qualified immunity allows courts to winnow certain cases from their already-crowded dockets. By doing so, then proper attention and resources can be allocated to more significant cases. Cases that involve closer, narrower legal questions can then be given the Court's full attention.

Thirdly, qualified immunity encourages persons to go into the field of law enforcement. We need good police officers. Good candidates will be reluctant to serve and protect as a sworn police officer if they have to risk their own personal assets to do so. This important public policy consideration ensures that our society will have intelligent, motivated, and well-trained police officers, which we need now more than ever before.

Fourthly, the qualified immunity doctrine is applied appropriately by the courts. The very nature of the immunity afforded by this doctrine is only "qualified," and is partial as opposed to absolute. The qualified immunity doctrine does not bar aggrieved plaintiffs from the courtroom, and litigants with appropriate cases are still allowed to have their day in court against government officials.

B. Qualified Immunity Clearly Applies To The Facts Of This Case.

(1) The Qualified Immunity Standard.

Qualified immunity protects "to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Qualified immunity is an entitlement to avoid trial. *Pearson v. Callahan*, 555 U.S. 223 (2009). Government officials are safeguarded from liability so long as "their conduct does not violate clearly established statutory or constitutional rights of which

a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).

(2) The Clearly Established Sixth Circuit Law.

Qualified immunity shields government officials from personal liability for civil damages insofar as their conduct does not violate "clearly established statutory or constitutional rights." *Everson v. Leis*, 556 F.3d 484 (6th Cir. 2009). Justice Scalia wrote that the law must be "sufficiently clear such that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011); *Mullenix v. Luna*, 136 S. Ct. at 305 (2015). The "existing precedent must have placed the statutory or constitutional question beyond debate." *Reichle v. Howards*, 566 U.S. 658, 664 (2012).

The law cannot be established at a high level of generality, and specificity is particularly important in the Fourth Amendment context where it is difficult for officers to determine how relevant legal doctrines of use of force will apply to the factual situation at hand. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018).

In *Newcomb v. City of Troy*, 719 F.3d 1408 (E.D. Mich. 1989), a suspect named Newcomb had a knife but put it away once police arrived. *Id.* at 1410. After a tussle, the police shot and killed Newcomb. *Id.* In granting qualified immunity, the district court found that Newcomb "did not become 'unarmed' merely because he placed the weapon in his pocket"

and he was never deprived of the availability of the weapon. *Id.* at 1415-1416.

In *Rhodes v. McDannel*, 945 F.2d 117 (6th Cir. 1991), James West chased his girlfriend around a home with a machete, refused to drop the weapon, and advanced within 4-6 feet of her and police officers, with machete raised, whereupon an officer shot him. *Id.* at 118. The Sixth Circuit found the officers were "justified in using deadly force" inside the home because West was non-compliant, had a knife, and approached the officers. *Id.* at 118; 120.

In *Boyd v. Baeppler*, 215 F.3d 594 (6th Cir. 2000), as police officers approached an armed suspect named Boyd, he ran toward their vehicle. *Id.* at 597-598. The officers exited with weapons drawn and admonished Boyd to drop his weapon, but he refused, pointing his gun at the officers. *Id.* at 598-599. The officers shot him thirteen times. *Id.* The Sixth Circuit granted qualified immunity finding deadly force was justified despite the lack of imminent threat. *Id.* at 601-604. One officer shot Boyd seven times after Boyd had been knocked to the ground by another officer's shot, but was nevertheless immune. *Id.* at 602-604.

In *Whitlow v. City of Louisville*, 39 Fed. Appx. 297 (6th Cir. 2002), police confronted an armed suspect named Whitlow in his home, who refused to drop the weapon and pointed his gun directly at officer Estes. *Id.* Estes fired three times, killing Whitlow. *Id.* They later learned Whitlow's gun was not loaded. *Id.* The Sixth Circuit nevertheless found qualified immunity applied since "Estes was acting in

self-defense," and that deadly force was justified, despite a mistaken assumption about Whitlow's firearm. *Id.* at 306.

In *Gaddis v. Redford Township*, 364 F.3d 763 (6th Cir. 2004), a mentally-ill man named Gaddis was pulled over for DUI by three officers, and Gaddis exited his vehicle brandishing a knife. *Id.* at 766-767. The officers told him to drop his knife, but he refused. *Id.* The officers thought he was attempting to stab one of them, so they fired sixteen shots at Gaddis, who survived. *Id.* The Sixth Circuit affirmed a finding of qualified immunity, finding that shooting a non-compliant, mentally-ill man with a knife sixteen times was constitutional. *Id.* at 777.

In *Estate of Sowards v. City of Trenton*, 125 Fed. Appx. 31 (6th Cir. 2005), a schizophrenic man pointed a handgun at the officers through a doorway in his home, and the officers shot him. *Id.* at 34; 38. The Sixth Circuit held the officers' use of deadly force was reasonable, regardless of whether Sowards fired first, or at all. *Id.*

In *Untalan v. City of Lorain*, 430 Fed.3d 312 (6th Cir. 2005), a schizophrenic with a knife threatened his mother, who called 911. *Id.* at 313. Officers tried to de-escalate the situation but Untalan lunged at and stabbed an officer. *Id.* An altercation ensued, and another officer shot Untalan, who was by then unarmed. *Id.* at 313-314. The Sixth Circuit held the officer had qualified immunity for reasonably, although incorrectly, perceiving an immediate threat, since "the *Graham* standard recognizes that danger to

anyone in the area is sufficient to justify the use of deadly force." *Id.* at 315-317.

In *Chappell v. City of Cleveland*, 585 F.3d 901, 907 (6th Cir. 2009), a fifteen year-old suspect named McCloud made no verbal threats and never waved his knife in a threatening manner. *Id.* at 911. McCloud hid in his bedroom closet with an open knife, refused to drop it, and moved slowly toward multiple police officers, whereupon they shot ten times, killing him. *Id.* at 904-905; 910. The Sixth Circuit found that qualified immunity protected the officers despite their "potentially misinterpreting McCloud's actions." *Id.* at 916.

In *Pollard v. City of Columbus*, 805 F.2d 760 (6th Cir. 2015),[3] a suspect named Bynum led police officers on a car chase before he wrecked. *Id.* at 399. Officers surrounded his car and commanded him to show his hands, but he instead clasped his hands into a shooting posture. *Id.* at 400. In two volleys of shots, the officers fired 80 shots, killing him. The Sixth Circuit found qualified immunity existed because, although he was unarmed, Bynum's conduct gave the officers probable cause to believe he had a gun and thereby posed a threat of physical harm. *Id.* at 402.

In *Mullins v. Cyranek*, 805 F.2d 760 (6th Cir. 2015),[4] officer Cyranek performed a stop-and-frisk on

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[3] *Pollard* was decided four months before Respondents shot Blough, and thus it clearly shows the state of Sixth Circuit law at the time of this shooting.

[4] While *Mullins, Rush, Rucinski, White, Evans,* and *Kisela* were decided later, they affirm the law as of July of 2015.

a 16 year-old named Mullins. *Id.* at 763. The officer suspected Mullins of illegally carrying a gun, and an altercation ensued wherein a gun became visible. *Id.* Cyranek told Mullins to drop the gun, whereupon Mullins threw the gun over Cyranek's shoulder 10-15 feet away. *Id.* at 763-764. Five seconds later, Cyranek fired two shots, killing Mullins. *Id.* at 764. The Sixth Circuit affirmed qualified immunity and held that it was reasonable for Cyranek to fire two shots within five seconds, even though Mullins no longer presented a threat. *Id.* at 766-768.

In *Rush v. City of Lansing*, 644 Fed. Appx. 415 (6th Cir., February 29, 2016), officers responded to a bank and found a 125-pound, 17 year-old girl named Clay, hiding in a storage closet. *Id.* at 416-417; 425. She "was frantic, shaking, and saying 'I'm sorry, I'm sorry.'" *Id.* at 417. She brandished a steak knife, and while on her knees and after having been shot once, slashed at an officer. *Id.* at 425. While backing away, officer Rendon shot Clay twice killing her. *Id.* at 471-418. The Sixth Circuit noted that that police work is dangerous work, that qualified immunity protects officers from civil liability even for mistakes of judgment, and it insulates officers from liability in situations where they make split-second, life-or-death decisions. *Id.* at 416; 425.

In *Rucinski v. County of Oakland*, 655 Fed. Appx. 338 (6th Cir. 2017), a bipolar, schizophrenic, paranoid man pulled a switchblade knife on his girlfriend. *Id.* at 339. She called 911 and three deputies responded to do a welfare check. *Id.* She told the officers that Rucinski had a knife and was off his

meds. *Id.* at 340. The deputies never developed a plan. *Id.* at 339. A female deputy named Rymarz entered the garage and said "Jeremy, Jeremy," whereupon Rucinski looked at her, pulled out an open switchblade, said "bring it on" or "here we go," and walked toward another officer. *Id.* at 340. Rucinski refused drop his weapon and approached to within five feet of officer McCann with his knife. *Id.* A third female deputy fired her taser at Rucinski, and McCann then discharged her pistol hitting Rucinski in the chest and killing him. *Id.* The Sixth Circuit applied the "segmented approach," and stated that mere "bad tactics that result in a deadly confrontation that could have been avoided" is not a Fourth Amendment violation. *Id.* at 342-343.

In *Evans v. United States*, WL 1603326 (6th Cir. 2018), the Sixth Circuit affirmed *Rucinski* and *Chappell* in granting qualified immunity to FBI agents who shot an erratically-behaving, armed man three times in his bedroom. *Evans*, WL 1603326 at 1.

In *Kisela v. Hughes*, 138 S. Ct. 1148 (2018), a mentally-ill female named Hughes was talking to her roommate while holding a kitchen knife. *Id.* at 1155. Hughes had been acting erratically earlier, but had calmed and the knife was at her side. *Id.* at 1155-1156. Her roommate perceived no danger, and Hughes had committed no crime. *Id.* at 1151. The officers were located behind a chain-link fence. *Id.* One of them, Officer Kisela, fired four shots through the fence because he subjectively thought the roommate was in danger. *Id.* The two other officers present never fired, as they wanted to try to de-

escalate the situation. *Id.* at 1155. The Supreme Court reversed the Ninth Circuit and granted qualified immunity to Kisela, stating that the calculus of reasonableness recognizes that officers are forced to make split-second judgments in tense, uncertain, and rapidly-evolving circumstances. *Id.* at 1152; 1154-1155.

(3) The Sixth Circuit Properly Analyzed This Fourth Amendment Claim.

As the above cases indicate, the Sixth Circuit was clearly established at the time of this incident. There was no case on the books that clearly established beyond debate that what these officers did was unconstitutional. Rather, the clearly established law indicates they used force appropriately.

In addition, Judge Jennings and Judge Thapar rightly applied the "segmented approach," focusing on the moments immediately preceding the use of force. *Rucinski,* 655 Fed. Appx. At 342-343. Judge Jennings noted, "when analyzing excessive force claims, the Sixth Circuit has adopted the view of doing so in segments … the relevant inquiry whether Officers Richardson and McMillen acted reasonably during the final encounter with Blough on the resident's front yard." The final encounter was the relevant focus by the lower courts, which is the proper analysis for this Fourth Amendment use of deadly force issue.

(a) Under A *Graham* Analysis, These Officers Used Reasonable Force During The "Final Encounter."

In *Graham v. Connor*, 490 U.S. 386, 388 (1989), the Supreme Court stated that "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.* at 396-397. The Sixth Circuit has re-iterated this important hindsight principle, stating:

> A court should avoid substituting personal notions of proper police procedures for the instantaneous decisions of officers at the scene, and should never allow the theoretical, sanitized world of our imaginations to replace the dangerous and complex world policemen face every day, as what constitutes 'reasonable' action may seem quite different to someone facing a possible assailant that to someone analyzing the question at leisure.

Smith v. Frelund, 954 F.2d 343, 347 (6th Cir. 1992). Under *Graham*, a court considers three factors to determine whether the amount of force used was reasonable: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and, (3) whether the suspect is actively resisting arrest or attempting to evade by flight. *Graham*, 490 U.S. at 396.

First, Blough's conduct was criminal. McMillen characterized it as disorderly, menacing, wanton endangerment, and attempted murder.

Secondly, Blough presented an immediate threat to the officers and others. Blough was mentally ill, on meth, non-responsive, off his medications, and was acting in a bizarre and unpredictable manner. Blough came at Richardson at close range with his chest bowed out with an open-bladed knife raised in his dominant hand in the "ice pick position" as if to stab someone, and says "You're going to have to kill me motherf-----." The threat of bodily harm was imminent.

David Mills, an independent eyewitness 50 feet away, says Blough was "charging at the police aggressively and quickly with his chest bowed out and the knife still in his right hand." Eyewitness, Harry Mills, testifies that Blough "went at officer, with chest puffed out." A third eyewitness, Helen Howlett, stated, "The man was still moving toward the officers and was close to them when they drew their guns and shot him." In fact, Reich initially told the KSP that Blough took a step forward and was advancing toward the officers when shot, and again in her discovery deposition months later she confirms that Blough "took a step forward" before being shot.

Blough also presented an immediate threat to the officers based upon the shot sequence. Petitioners misrepresent this, arguing that Richardson's Shot #1 was to Blough's back and Shot #2 to his front. This is

contradicted by the only expert qualified to discuss this issue, William Smock, M.D, who opines that there was no frontal exit wound, so the physical evidence proves that Blough had not turned his back to the officers and was not shot in the back.

Petitioners further argue Blough's arm was not raised. Dr. Smock refutes this stating that "while Mr. Blough was advancing toward Officer Richardson he was seen to raise his right arm and right hand brandishing the knife." Petitioners' own expert, Roy Taylor, admits Blough had his knife in "... the ice pick position, yes sir."

Blough presented an immediate threat to persons in the neighborhood too. Petitioners argue that these neighbors did not see Blough and were safe in their homes. This is preposterous, as Blough was seen by many and perceived to be a threat.

Helen Howlett says “I saw a suspicious-looking man that I did not recognize wandering up-and-down the street into my yard and the yards of my neighbors … The doors to my house were locked, and seeing this man in the neighborhood concerned me.”

Seventeen year-old Madison Pils says, "[Blough] wondering around in the morning around lunch time on a Tuesday concerned me."

Randall Ray testifies he “became concerned and locked my truck, closed the garage door, and went into my house to get my pistol. I also told my 25 year-

old daughter who was home with my three-year-old granddaughter to lock the doors to our house."

David Mills saw Blough lurking on the back patio of his brother's house appearing to try to gain entry to the home.

Two different passers-by called 911 about Blough. Nearby Severns Valley Baptist Church put its kids' camp on "lock down."

Blough also presented an immediate threat to Reich. Prior to this shooting, Blough spoke to Reich, touched her, and raised his knife toward her in an aggressive manner telling her to "get the f--- back." Richardson reached closer to move her out of harm's way while admonishing Blough to drop the knife.

Turning to the third prong of the *Graham* analysis, Blough actively resisted. Despite the officers' implementation of various de-escalation techniques, Blough refused to get back in Reich's car, drop his weapon, or comply with any of the officers' multiple commands. Instead, Blough kept moving toward Richardson with his knife raised.

The Sixth Circuit has found "active resistance" for more benign conduct, such as where a perpetrator merely disobeys officers or refuses to be handcuffed. *Thomas v. City of Eastpointe*, WL 4461072 at 2 (6th Cir. 2017). In fact, verbal hostility alone may constitute active resistance. *Eldride v. City of Warren*, 533 Fed. App'x 529, 534 (6th Cir. 2013).

(b) Under a *Miracle* Analysis, These Officers Used Reasonable Force During the "Final Encounter."

In *Estate of Hill v. Miracle*, 853 F.3d 306 (6th Cir. 2017), the Sixth Circuit formulated an alternative test to analyze use of force claims involving mentally incapacitated persons, as follows:

(1) whether the person was experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others;

(2) whether some degree of force was reasonably necessary to ameliorate the immediate threat; and

(3) whether the force used was more than reasonably necessary under the circumstances.

Id. at 314. This test is still "aimed towards the ultimate goal of determining whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them." *Id.*

Blough experienced multiple emergencies. He was "in the throes of his mental illness." He hallucinated that the KSP, Reich, and EPD were after him. He had not taken his medications for months and was in a drug-induced high with toxic levels of

methamphetamine in his system. He had reported three recent suicide attempts in the preceding five days. His aunt, Cindy Skeeters, told the KSP that Blough "wanted out" and they knew "this was coming." Blough had recently told his brother he was "tired of living and nobody wanted him."

KSP investigators suspected suicide-by-cop, or officer-assisted suicide, stating, "I explained to Mr. Skeeter [sic] that this may be a suicide-by-cop issue." Blough's brother told the KSP he would not be surprised if this incident was suicide-by-cop. Dr. Smock opines that "Mr. Joshua Blough's death is consistent with a law enforcement-assisted suicide."

In summary, Blough presented an immediate threat to the officers, all persons nearby, and Reich. Under either a *Graham* or *Miracle* analysis, the deadly force used by these officers was reasonable and necessary. These officers followed their training and responded to a deadly force threat with deadly force. Their use of deadly force was an appropriate and commensurate response to a bizarre, unpredictable, and non-compliant knife-wielding suspect.

CONCLUSION

The Respondents respectfully request that the Petitioners' Petition For Writ of Certiorari be denied because none of the considerations governing review on certiorari are implicated.

This the 14th day of August, 2020.

Respectfully submitted,

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