No. 20-997

In the Supreme Court of the United States

ARLANE JAMES, IN RE: WILLIE GIBBONS;
JRG, A MINOR, BY HIS MOTHER AND LEGAL GUARDIAN,
IKEYA CRAWFORD; AND DKL AND LMG, MINORS, BY THEIR
MOTHER AND LEGAL GUARDIAN, ANGEL STEPHENS

Petitioners,

v.

NOAH BARTELT,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Third Circuit properly exercised jurisdiction pursuant to the collateral order doctrine in determining whether Respondent's actions violated clearly established law.

2. Whether the decision below correctly applied this Court's qualified immunity precedents.

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STATEMENT OF THE CASE

1. On May 24, 2011, Angel Stephens called the police to her house following an argument with her boyfriend, Willie Gibbons. Pet. 4, 3a. Stephens accused Gibbons of threatening her with a gun, and expressed concern that Gibbons had stopped taking his medication for schizophrenia. Pet. 4, 3a, 23a. That night, Stephens obtained a temporary restraining order (TRO) against Gibbons from the Fairfield/Down Joint Municipal Court. Pet. 5, 4a. In her written statement, she wrote that Gibbons "threatened to kill me." Pet. 23a-24a. The TRO prohibited Gibbons from possessing firearms and from returning to Stephens's house without a police escort. Pet. 4a, 24a.

The next day, Gibbons called to request a police escort to retrieve possessions from Stephens's house, but New Jersey State Trooper Korejko told him he needed to get a court order first. Pet. 5, 4a, 24a. Gibbons did not follow the officer's instructions and instead went to Stephens's house alone, in violation of the TRO. Pet. 5, 4a, 24a. When he arrived, Stephens was on the phone with a friend, Clarence Dunns. Pet. 5, 24a.

Stephens and Gibbons began arguing, prompting Dunns to contact the police. See Pet. 4a, 24a-25a, 123a. Dunns told the police that Stephens had filed a restraining order against her boyfriend and that Gibbons was harassing her. Pet. 4a, 24a-25a, 121a. Dunns gave the police Stephens's address and provided directions. Pet. 121a-122a.

Trooper Conza responded to Stephens's house. Pet. 5-6, 4a. By the time he arrived, however, Gibbons had left. Pet. 4a, 25a. Conza told Stephens to make a complaint against Gibbons at the state police barracks.

Pet. 6, 4a, 25a. In the meantime, Conza reported to the police dispatcher that Gibbons had brandished a gun. Pet. 4a, 25a, 125a. The dispatcher announced over the radio that Gibbons had shown up at Stephens's home with a handgun, and departed in a black F-150 pickup truck. Pet. 25a, 124a-125a.

After leaving Stephens's house, Trooper Conza joined Respondent, New Jersey State Police Trooper Noah Bartelt, and Trooper Korejko at the home of Gibbons's mother, Arlane James. Pet. 6, 4a. James told the officers that she did not know where Gibbons was and that he may be off his medication. Pet. 4a.

While driving to the state police barracks to file another complaint against Gibbons, Stephens saw Gibbons walking along Burlington Road. Pet. 6, 4a-5a. She contacted the state police dispatcher and reported as follows: "Uh this is Angel Stephens the cops just sent a dispatch to my house for my baby dad with a gun. I just passed him on uh-Burlington Road walking. He is on foot." Pet. 4a-5a, 25a-26a, 126a. Stephens also stated that Gibbons was wearing a black jacket with yellow on it and that he was walking on the left side of the road. Pet. 25a, 126a.

Respondent and Troopers Conza, Korejko, and Hider responded to Burlington Road. Pet. 6, 25a-26a. Respondent was the first trooper to engage Gibbons. Pet. 6, 5a, 25a. While still in his state police vehicle with the window down, Respondent told Gibbons to "come over here." Pet. 6, 5a, 26a. Gibbons ignored the order. Pet. 6, 5a, 26a. Gibbons then turned his head toward Respondent and said, "Stay away from me." Pet. 6, 5a, 26a. Respondent positioned his vehicle in

the southbound lane and, while exiting his vehicle, saw a gun in Gibbons's left hand pointed at his own head. Pet. 5a, 26a-27a.

Respondent drew his weapon, stood behind the car door, twice ordered Gibbons to drop the gun, and ordered him to "come over here." Pet. 6-7, 5a, 27a.[1] Gibbons did not comply. See Pet. 5a, 26a, 103a-106a. As Respondent stood only seven to fifteen yards from Gibbons, he told him again to drop the gun, but Gibbons did not do so.[2] Pet. 5a, 27a.

Respondent fired his gun twice, hitting Gibbons in the abdominal area. A third round jammed in the gun. Pet. 7, 27a. Respondent's actions took place within seconds of stopping his car and ordering Gibbons to "drop the gun." Pet. 6-7, 5a. Troopers Korejko and Hider arrived soon after the shooting. Pet. 5a, 27a.

The shooting occurred in front of Joanne Layman's house. She testified in a deposition that she heard a noise outside, looked out of her window, and saw an officer leaning over someone saying, "Willie, can you

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[1] While the dissent from denial of rehearing en banc questioned whether Respondent gave this order, Petitioners do not dispute this. In fact, Petitioners' briefing below plainly stated that "Bartelt directed Gibbons to drop his weapon (pointed at his head) and Gibbons did nothing." Br. of Plaintiff-Appellees, No. 18-1432, 2019 WL 3028542, at *8, 28 (CA3 July 8, 2019).

[2] Trooper Conza testified that he was present during this exchange and had approached Respondent from behind on foot and stood out in the open, to the left of Respondent's position. Pet. 5a, 106a. Petitioners suggest that this is a disputed fact, but offers a neighbor witness's testimony that she saw one police vehicle as the sole basis for the alleged dispute. Pet. 23.

hear me." Pet. 29a, 86a. Gibbons was flown to a nearby hospital but died several hours later. Pet. 7, 29a.

2. On April 10, 2013, Petitioners filed a complaint in the Superior Court of New Jersey in Cumberland County. Pet. 22a. In addition to Respondent, several troopers were named as defendants. On June 7, 2013, the matter was removed the United States District Court for the District of New Jersey. *Id.*

On December 2, 2015, the district court dismissed all claims except claims under 42 U.S.C. § 1983 for excessive force, withholding medical treatment in violation of the Fourteenth Amendment, having a custom and practice of treating persons of certain races or with mental disabilities in a manner violating their civil rights, and failure to train. Pet. 22a.

On April 20, 2017, defendants filed a motion for summary judgment on all remaining claims. On December 20, 2017, the district court granted summary judgment on all claims against defendants except the Fourth Amendment claim against Respondent. Pet. 40a. The court concluded that disputed facts existed relating to whether Respondent's use of force was reasonable. Pet. 38a. As for the clearly-established prong of the qualified immunity analysis, the district court held Gibbons's right to be free from excessive, deadly force was clearly established by *Tennessee v. Garner*, 471 U.S. 1 (1985). Pet. 36a.

On April 21, 2020, a unanimous panel of the Third Circuit reversed, granting summary judgment to Respondent on grounds of qualified immunity.

In reaching that conclusion, the panel did not review the question of whether Respondent violated a constitutional right, since the district court found that there were genuine issues of disputed fact as to this prong of the analysis. Pet. 6a. The panel noted that the district court did not identify what those disputed facts were, and therefore the panel lacked jurisdiction under the collateral-order doctrine to review the first prong of the qualified immunity inquiry. *Id.* Thus, the panel assumed, without deciding, that Respondent had violated Gibbons's constitutional right and proceeded to the second prong. *Id.*

At the second prong, the panel acknowledged that officers cannot use deadly force against another where the individual does not pose a threat of serious bodily injury to the officers or to others. Pet. 9a-10a n.5 (citing *Lamont v. New Jersey*, 637 F.3d 177, 185 (CA3 2011); *Garner*, 471 U.S., at 3, 11). But that did not resolve the instant case, the panel determined, because "[t]he facts here show that a reasonable officer could have perceived that Gibbons posed a serious threat of immediate harm to others." Pet. 10a n.5 (citations omitted). Even when viewing facts in a light most favorable to Petitioner, the Third Circuit noted that at the time Respondent used deadly force, he "was aware of several facts from which he could reasonably conclude that Gibbons posed a threat to others: Gibbons had violated a restraining order; Gibbons was carrying and earlier that evening had brandished a firearm; and Gibbons was reportedly mentally ill and may not have been taking his medication." Pet. 13a. Moreover, at the time of the confrontation, "(1) Gibbons was armed with a gun; (2) Gibbons ignored [Respondent's]

orders to drop his gun; (3) Gibbons was easily within range to shoot [Respondent] or [another trooper]; and (4) the situation unfolded in seconds." Pet. 11a.

The question then became whether prior decisions warned Respondent with sufficient specificity that the use of force was unlawful in response to these facts. See Pet. 11a (citing *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) for the proposition that, for the second prong, prior decisions must "present a sufficiently similar factual scenario"). In conducting that analysis, the panel considered the decisions of this Court, precedent in the Third Circuit, and persuasive authority from other courts of appeals, but it ultimately found nothing to "squarely govern[]'" the instant scenario. Pet. 15a (citing *Kisela v. Hughes*, 138 S. Ct. 1148, 1151 (2018)).

The panel first found that Respondent "did not violate a right that had been clearly established by Supreme Court precedent." Pet. 11a. To the contrary, the panel explained, in *Kisela*, the Court held that an officer facing a similar scenario did not violate a clearly established right. In that case, this Court found that qualified immunity was proper where "(1) the suspect was armed with a large knife; (2) the suspect ignored officers' orders to drop the weapon; (3) the suspect was within striking distance of a bystander; and (4) the situation unfolded in less than a minute." Pet. 11a (citing *Kisela*, 138 S. Ct., at 1154) (cleaned up). The Third Circuit held that this case was similar, because Gibbons likewise was armed, ignored orders to drop the weapon, and was in range to shoot Respondent and

another officer, and because the confrontation also took place within seconds. *Id.*

Next, the panel considered whether clearly established precedent existed in the Third Circuit. It examined *Bennett v. Murphy*, 274 F.3d 133 (CA3 2002), the closest analogous case, but found it too factually distinct to "squarely govern[]" Respondent's conduct. Pet. 11a-12a. In *Bennett*, the Third Circuit had found that an officer "violated the Fourth Amendment by shooting an armed, suicidal suspect during a prolonged police standoff." Pet. 12a. In that case, however, there was no basis to conclude the suspect "pose[d] a threat to anyone but himself," Pet 13a (citing *Bennett*, 274 F.3d, at 136), in part because the suspect only aimed the gun at himself or in the air throughout an hour-long police standoff, Pet. 12a.

Based on the undisputed facts, the panel identified three material differences between *Bennett* and this case that would lead "a reasonable officer entering an encounter with Gibbons to perceive that Gibbons presented an increased risk of harm compared with the suspect in *Bennett*," meaning that *Bennett* would not supply clearly established law as to what Respondent could lawfully do in this situation. Pet. 13a. First, Respondent's "pre-standoff knowledge" of Gibbons's acts could lead an officer to find the risk of harm greater here—including Gibbons's restraining order violation and prior brandishing of the firearm, and that he may have stopped taking medication. *Id.* Second, the risk posed was higher in this case because "Gibbons was much closer to and less compliant with [Respondent] than the suspect in *Bennett*"—seven to fifteen yards

away, in contrast to the 80-yard distance in *Bennett*. *Id.* Third, although the nearly hour-long standoff in *Bennett* provided significant evidence that the suspect was not presenting a threat to others, Respondent had "'mere seconds to assess the potential danger' posed by the armed and non-compliant Gibbons." Pet. 14a (quoting *Kisela*, 138 S. Ct., at 1153).

For these reasons, the panel concluded, a "reasonable officer would have difficulty concluding that using force against the distant, comparatively compliant, and unknown suspect in Bennett" after such a long standoff "was clearly factually analogous to using force against the much-closer, noncompliant Gibbons, whose recent behavior was known to" Respondent. *Id.* *Bennett* thus did not establish with sufficient clarity that Respondent's actions were unlawful. *Id.*

Finally, the panel considered whether Respondent violated a right that had been established by a robust consensus of persuasive authority in the courts of appeals, and concluded no cases existed that could have given Respondent fair warning that his actions were illegal. Pet. 15a-16a. As a result, the panel concluded that Respondent was entitled to qualified immunity because he did not violate a clearly established right when using deadly force. Pet. 17a.

On August 6, 2020, the Third Circuit denied Petitioners' application for rehearing en banc. Six judges would have voted to grant rehearing en banc, Pet. 43a, and five judges joined an opinion—authored by Judge McKee—dissenting from denial. Pet. 44a-84a. Their opinion focused on the similarities between the facts in this case and those in *Bennett*, disputed the three

factual distinctions on which the panel had relied, and argued that the panel impermissibly credited facts in favor of Respondent instead of Petitioners.

The instant petition followed.

REASONS FOR DENYING THE PETITION

None of the Court's traditional criteria support certiorari. The instant petition raises two discrete issues: whether the Third Circuit properly exercised jurisdiction over this qualified immunity case, and whether it properly applied this Court's qualified immunity jurisprudence to the facts. But Petitioners identify neither any conflict among the courts of appeals, nor any break from this Court's precedents, on either issue. Instead, this petition presents a prototypical request for fact-bound error correction, disputing not legal principles but the application of those principles to the facts. See Sup. Ct. R. 10; S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 5-45 (11th ed. 2019). Certiorari is especially unwarranted here, where Petitioners' Questions Presented do not ask this Court to reconsider its qualified immunity jurisprudence, and where the decision below directly followed from those precedents. While the events that gave rise to this litigation are tragic, this petition does not warrant certiorari.

I. Certiorari Is Not Warranted To Determine Whether The Panel Properly Exercised Jurisdiction.

While Petitioners' first Question Presented argues that the panel improperly exercised jurisdiction on an interlocutory posture, they identify neither a conflict

among the circuits nor a conflict between the decision below and this Court's precedents on this issue.

This Court's cases already establish what a circuit may decide on interlocutory review, and what it may not. As this Court has concluded, "a district court's order denying a defendant's motion for summary judgment [i]s an immediately appealable 'collateral order' (i.e., a 'final decision') under *Cohen* [*v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)], where (1) the defendant was a public official asserting a defense of 'qualified immunity,' and (2) the issue appealed concerned, not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of clearly established law." *Johnson v. Jones*, 515 U.S. 304, 311 (1995) (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)); see also *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) (noting these issues fall into the class of decisions that "though short of final judgment, are immediately appealable as a collateral order under 28 U.S.C. § 1291 because they 'finally determine claims of right separable from, and collateral to, rights asserted in the action'" (quoting *Cohen*, 337 U.S., at 546)).

That does not mean every issue can be assessed on interlocutory review. As the *Johnson* Court explained, an order denying summary judgment on a sufficiency-of-the-evidence question was not a final decision that was immediately appealable, even in the context of a qualified immunity defense. 515 U.S., at 310-12. But, the Court added, "[w]hen faced with an argument that the district court mistakenly identified clearly established law, the court of appeals can simply take, as

given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason." *Id.*, at 319. In other words, the panel must not review factual determinations,[3] but it could determine on interlocutory review whether the undisputed facts (i.e., the facts with inferences taken against the movant) demonstrate or disprove the violation of any clearly established right.

The petition identifies no confusion or split in the circuits on this point. Indeed, the courts of appeals consistently exercise jurisdiction in interlocutory appeals to "make the legal determination of whether the defendant violated a clearly established right, based on those now (for this purpose) undisputed record facts." *Bunkley v. City of Detroit*, 902 F.3d 552, 561 (CA6 2018); see also, e.g., *Mlodzinski v. Lewis*, 648 F.3d 24, 28 (CA1 2011); *Lennox v. Miller*, 968 F.3d 150, 155 (CA2 2020); *Hunter v. Town of Mocksville, N.C.,* 789 F.3d 389, 400 (CA4 2015); *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 576 (CA5 2009); *Weinmann v. McClone*, 787 F.3d 444, 447 (CA7 2015); *Walton v. Dawson*, 752 F.3d 1109, 1116 (CA8 2014); *Foster v. City of Indio*, 908 F.3d 1204, 1210 (CA9 2018); *Gross v. Pirtle*, 245 F.3d 1151, 1157 (CA10 2001); *Keating v.*

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[3] The one exception is that courts must not accept a version of the facts that "is blatantly contradicted by the record," even on interlocutory appeal. *Scott v. Harris*, 550 U.S. 372, 380-81 (2007); see also *Blaylock v. City of Philadelphia*, 504 F.3d 405, 414 (CA3 2007) ("[W]here the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory review.").

City of Miami, 598 F.3d 753, 760 (CA11 2010); *Farmer v. Moritsugu*, 163 F.3d 610, 614 (CADC 1998).

These courts recognize that they cannot review the disputed facts themselves, but can review whether undisputed facts—taking all inferences against the movant—require finding the officer did or did not violate clearly established law. Contrary to Petitioners' claim of a "need for this Court to provide a clear delineated procedure for determining qualified immunity when disputed facts exist at the summary judgment phase," Pet. 29, the lower courts have instead canvassed the Supreme Court's governing decisions and found that "the Supreme Court has given us clear guidance on the limits of our jurisdiction in these sorts of appeals." *Walker v. Horn*, 286 F.3d 705, 710 (CA3 2002).

The Third Circuit's decision to address the second prong of the qualified immunity analysis in this case fits well within this approach. As noted above, the district court determined "genuine issues of disputed fact prevent the Court from holding that [Respondent] was reasonable in his belief that Gibbons posed a danger to him or someone else" under the Fourth Amendment analysis itself. Pet. 38a. Because the court's reference to the existence of genuine issues of material fact related to the question whether the officer's conduct violated any constitutional right in the first place, and given the lack of clarity was to what precisely those genuine issues were, the panel recognized it "lack[ed] jurisdiction under the collateral-order doctrine to review [the] holding on this prong." Pet. 3a.

But the panel recognized that it could still consider the second prong—namely whether, based only on record facts "undisputed by the parties," Respondent violated a clearly established right. Pet. 5a. Indeed, the specific facts on which the panel relied to hold *Bennett* distinguishable (the core of its second-prong analysis) are all plainly gleaned from the face of the record and are not actually disputed. First, that Gibbons violated a restraining order is not in dispute; in fact, the entire incident unfolded because Gibbons went to Stephens's house in violation of the restraining order. See Pet. 24, 4a, 24a. Second, the record indisputably shows Stephens told police that Gibbons was carrying a gun earlier that day. See Pet. 5, 124a-25a (transcript of call indicating that Stephens stated "the cops just sent a dispatch to my house for my baby dad with a gun"); see also Br. of Plaintiff-Appellees, 2019 WL 3028542, at *8 (CA3 July 8, 2019) ("[Dispatchers] then asked [Stephens] if [Gibbons] had a gun previously and she said yes.").[4] Finally, Petitioners agree that the officers knew Gibbons had schizophrenia and might have been off his medication. See Pet. 4, 14, 3a-4a, 24a. There was also no dispute that Respondent was seven to fifteen yards from Gibbons, and that the encounter unfolded within seconds. Pet. 5a. These are the facts on which the panel relied, and even though Petitioners point to *additional*, separate facts that are in dispute, those were of no moment given the panel's holding

[4] Petitioners claim that Stephens's statement itself was "specious," Pet. 12, but the relevant fact is what she told the officers, and therefore what they reasonably believed.

that the undisputed facts alone proved *Bennett* did not squarely govern.

Finally, Petitioners conflate the broader jurisdictional question with references to a procedural Third Circuit supervisory rule. Pet. 9; see also Pet. 58a-60a (dissenting opinion criticizing panel application of supervisory rule). The Third Circuit's supervisory rule—governing qualified immunity determinations by district courts—requires that "dispositions of a motion in which a party pleads qualified immunity include, at minimum, an identification of relevant factual issues and an analysis of the law that justifies the ruling with respect to those issues," *Forbes v. Twp. of Lower Merion*, 313 F.3d 144, 149 (CA3 2002), something that this district court did not do. Petitioners argue that, had the panel correctly followed its supervisory rule, it would have been required to remand the matter to the district court to specify which material facts were subject to a genuine dispute, and which were not. *Id.* But this Court does not grant certiorari to review the application of a circuit supervisory rule, which solely provides district courts in the circuit with guidance on how to lay out any disputed facts in qualified immunity opinions to facilitate interlocutory review.

And in any event, Petitioners misunderstand the supervisory rule. While the district court's conformity with the supervisory rule may have allowed the panel to consider the issue of whether Respondent violated Gibbons's constitutional rights in this case—if the district court had spelled out which facts were genuinely in dispute—the panel assumed without deciding that there *were* such genuine issues on that issue. Instead,

the Third Circuit proceeded to the legal question of whether the law was clearly established at the time of Respondent's actions. That analysis did not require remand, because (as noted above) the Third Circuit could readily identify sufficient undisputed facts from which to conduct a clearly-established-law analysis, and from which to decide that *Bennett* could not squarely govern this case. Pet. 6a-7a; see also *E.D. v. Sharkey*, 928 F.3d 299, 310 (CA3 2019) (Smith, C.J., concurring) (noting remand is not necessary where the legal questions are "capable of resolution without the need to closely examine the nuances of the District Court's fact-finding"). That sufficed for the exercise of interlocutory jurisdiction.

II. Certiorari Is Also Not Warranted To Determine Whether The Panel Properly Applied Qualified Immunity Case Law.

Petitioners' remaining three Questions Presented all urge that the panel should not have granted qualified immunity on the specific facts of this case. These questions do not warrant certiorari: there is no split requiring resolution from this Court, and this petition presents only a request for fact-bound error correction regarding the *application* of this Court's qualified immunity decisions to this record.

a. Petitioners' Request For Splitless Error Correction Does Not Warrant Certiorari.

In the first instance, certiorari is not warranted because Petitioners fail to identify any plausible split in the courts of appeals that suggest a different legal outcome had the events taken place in a different circuit.

See Pet. 34. Petitioners make passing references to decisions in *Glenn v. Washington Cty.*, 673 F.3d 864, 870 (CA9 2011) (Pet. 32), *Weinman v. McClone*, 787 F.3d 444, 450 (CA7 2015) (Pet. 22), and *Cole v. Carson*, 935 F.3d 444, 452 (CA5 2019) (Pet. 31), but none of these cases form a split with the decision below.

Begin with *Glenn*. That case involved an eighteen-year-old with no history of violence or criminal activity, who was intoxicated, wielding a knife, and threatening to kill himself but not threatening anybody else. *Id.*, at 866-68, 874. Officers first shot Glenn with six rounds of a "beanbag shotgun," a "less-lethal" weapon. *Id.*, at 869, 871. Even though that led him to retreat, officers *then* fired eleven shots from their semiautomatic pistols, killing him. *Id.*, at 869 (noting that "[a]ll the lethal fire occurred before the last beanbag round was fired"). The decision in that case does not form a split for two reasons. First, the facts were meaningfully distinct: Glenn had a knife rather than a gun; the officers in *Glenn* had no knowledge of any history of violence or criminal activity, while Respondent had been informed that Gibbons violated a TRO and brandished a gun that day; Glenn was retreating after other force had been used; and the events in *Glenn* unfolded over minutes, reducing the need for split-second decisions. Second and more importantly, *Glenn* did *not* hold those officers violated established law. Instead, the court only held there were triable issues as to whether Glenn's Fourth Amendment rights were violated, and "express[ed] no opinion as to the second part of the qualified immunity analysis." 673 F.3d, at 870. Since the Third Circuit assumed without deciding that Respondent's conduct violated Gibbons's

Fourth Amendment rights, no conflict exists between the decision below and *Glenn*.[5]

As for *Weinmann*, too many factual differences exist for a split to arise. *Weinmann* involved an officer who shot the plaintiff inside his home immediately after making an unannounced entry. 787 F.3d, at 446-48. Facts viewed in a light most favorable to the plaintiff indicated that when the officer had barged in, the plaintiff was sitting alone and his shotgun was lying across his lap, not pointed at the officer. *Id.*, at 447. In the instant case, the parties were on the side of a road, where Respondent verbally engaged Gibbons, Gibbons had the gun in his hand, and Gibbons did not drop the weapon. There was also no evidence suggesting that the plaintiff in *Weinmann* had previously brandished the weapon at anyone, or violated any TRO, unlike in the instant case where reports to police indicated Gibbons had a domestic dispute in which he brandished a gun and violated a restraining order.

Cole, for its part, involved officers who followed a seventeen-year-old boy to a wooded area after hearing reports that he was walking with a gun, and shot him without the boy knowing that the officers were even present. 935 F.3d, at 448-449. Facts viewed in a light

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[5] Nor is there any split with *Bryan v. MacPherson*, 630 F.3d 805, 832 (CA9 2010), see Pet. 32, in which the Ninth Circuit held that an officer violated the Fourth Amendment when he used a Taser against an unarmed and disturbed man who left his car during a traffic stop for a seatbelt violation. The facts of that case bear little relation to the case here, and in any event, the Ninth Circuit held—on interlocutory appeal of a denial of summary judgment—that qualified immunity *did* apply because the law was not clearly established. *Bryan*, 630 F.3d, at 833.

most favorable to the plaintiff showed the boy was completely "unaware of the officers' presence"—who were concealed by an embankment and vegetation—when he pointed the gun at his own head, *id.*, at 448-49, unlike Gibbons, who was speaking to Respondent in the open while holding the gun. Whereas the plaintiff in *Cole* would have had to climb a "steep embankment" to approach the officers, *id.*, Gibbons stood just seven to fifteen yards from Respondent in the open air. Moreover, in *Cole*, the officers gave no warning for the boy to disarm, even though they "had the time and opportunity" to do so, *id.*, at 449; in this case, Respondent gave commands that Gibbons ignored. See *id.*, at 453 (emphasizing importance of lack of warning to the qualified immunity analysis in *Cole*). The distinct outcomes do not form a split but reflect application of the same body of law to materially different facts.

The dissent from denial of rehearing en banc cited other cases where courts denied qualified immunity, see Pet. 80a-81a n.157, but none form a split with the instant case, either. Most importantly, none involved an individual who the police knew posed a risk to others with a gun before the encounter, and all involved additional facts that made the scenario materially different from the one Respondent faced. For example, several involved an individual holding a knife instead of a gun, which impacts the risks presented. See *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 900-01, 903 (CA6 1998) (suicidal man who had cut himself several times and had been sprayed with mace was shot when opening the screen door to parents' house, and court did not resolve whether officers' conduct violated clearly established law); *Walker v. City of Orem*, 451 F.3d

1139, 1145, 1160 (CA10 2006) (suicidal man described by dispatch to be not a risk to others, had only a two-inch knife and was not given any warning or command before he was shot standing in parents' driveway); *Mercado v. City of Orlando*, 407 F.3d 1152, 1154-55, 1157-61 (CA11 2005) (suicidal man, who was sitting on floor of apartment crying with telephone cord wrapped around his neck and kitchen knife pointed to himself, was shot in head with Sage Launcher).

In other cases involving a firearm, the individual was either complying with officers' commands, or was never given a command before being shot. See *McKenney v. Mangino*, 873 F.3d 75, 78-79 (CA1 2017) (officers interacted with and observed for ten minutes suicidal man wandering into and out of house with gun without posing a threat, and when he walked out an eighth time with his gun "dangling" by his side, officer shot him from behind police cruiser 69 feet away without warning); *Cooper v. Sheehan*, 735 F.3d 153, 159-60 (CA4 2013) (officers silently approached house at night, did not respond to man's call for identification, and shot him 11 to 14 times when he came to his porch with a shotgun pointing to the ground); *Partridge v. City of Benton, Arkansas*, 929 F.3d 562, 565-67 (CA8 2019) (seventeen-year-old whose mother told police he was not a threat to anyone in process of complying with a command to drop weapon when he was shot).[6] These cases do not form a split in need of resolution.

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[6] Given the lack of any split, Petitioners spend more of their time focusing on three cases in which the courts confronted uses of lethal force and found no constitutional violation. See Pet. 23-

b. Petitioners' Request For Fact-Bound Error Correction Does Not Warrant Certiorari.

Absent any split, certiorari cannot be justified. For one, Petitioners do not present a dispute over principles of law—the Third Circuit relied explicitly on this Court's own qualified immunity cases for the governing test, and none of the Questions Presented call this Court's qualified immunity decisions into question. To the contrary, Petitioners disagree with the panel's *application* of qualified immunity law to the set of facts before it, but this application follows directly from this Court's own repeated instruction.

1. Certiorari is not warranted because Petitioners present not a dispute over principles of qualified immunity law, but over a panel's application of that law to the set of facts before it.

This Court has held that qualified immunity turns on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Under this Court's precedents, a "clearly established

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24 (citing *Rhodes v. McDannell*, 945 F.2d 117 (CA6 1991), *Montoute v. Carr*, 114 F.3d 181 (CA11 1997), and *Sigman v. Town of Chapel Hill*, 161 F.3d 782 (CA4 1998)). Petitioners' argument appears to be that because the risk of harm was greater in those cases than here, use of force was (by implication) unlawful in this case. But cases rejecting a Fourth Amendment claim do not form a split with one granting qualified immunity. And none of those cases suggested that they were the floor for when the risks presented could justify Respondent's conduct.

right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2014) (citation omitted). For a right to be "sufficiently definite," there must be "controlling authority" or "robust consensus of cases of persuasive authority" on the books when the official acted that "placed the statutory or constitutional question beyond debate." *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014) (citations omitted).

This Court's cases also instruct as to how to identify clearly established law. This Court has found that clearly established law should not be defined "at a high level of generality," and established law instead must "'squarely govern[]' the specific facts at issue." *Kisela*, 138 S. Ct., at 1152 (citations omitted). To find such clearly established law, "there does not have to be a case directly on point" with identical facts, but the "existing precedent must place the lawfulness of the particular [action] beyond debate." *Wesby*, 138 S. Ct. at 590 (citations and quotation marks omitted). This Court has further explained that "specificity is especially important in the Fourth Amendment context," like this one, "where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" *Mullenix*, 577 U.S., at 12 (citation omitted); see also *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (noting specificity requires "identify[ing] a case where an officer acting under similar circumstances as [a de-

fendant] was held to have violated the Fourth Amendment," and not relying on precedents that "lay out excessive-force principles at only a general level").[7]

Although Petitioners disagree with how the panel applied this test to these facts, the panel's statements of law fit this Court's precedents—and do not conflict with the legal rules of other circuits.[8] Like this Court, the Third Circuit held that to demonstrate a violation of clearly-established law, precedent "must 'squarely govern[]the specific facts at issue.'" Pet. 8a (quoting *Kisela*, 138 S. Ct., at 1152). And again following this Court's instruction, the panel concluded that Petitioners "may satisfy this standard by 'identify[ing] a case where an officer acting under similar circumstances as [the defendant officer] was held to have violated the [constitutional provision at issue].'" *Id.* (quoting

[7] There can also be an "'obvious case' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Wesby*, 138 S. Ct., at 590; see Pet. 7a-8a (Third Circuit agreeing a right can be clearly established if the violation is obvious). The petition does not argue that this is such a case.

[8] Lower courts consistently apply these same precedents, expressly requiring a particularized inquiry without requiring precisely identical facts. See, e.g., *Stamps v. Town of Framingham*, 813 F.3d 27, 42 (CA1 2016); *Sloley v. Vanbramer*, 945 F.3d 30, 39-40 (CA2 2019); *Adams v. Ferguson*, 884 F.3d 219, 228-31 (CA4 2018); *Morrow v. Meachum*, 917 F.3d 870, 879 (CA5 2019); *Latits v. Phillips*, 878 F.3d 541, 552 (CA6 2017); *Kemp v. Liebel*, 877 F.3d 346, 351-54 (CA7 2017); *Lane v. Nading*, 927 F.3d 1018, 1022-23 (CA8 2019); *Orn v. City of Tacoma*, 949 F.3d 1167, 1180 (CA9 2020); *A.M. v. Holmes*, 830 F.3d 1123, 1150 (CA10 2016); *Glasscox v. Argo*, 903 F.3d 1207, 1217-20 (CA11 2018); *Fenwick v. Pudimott*, 778 F.3d 133, 139-40 (CADC 2015).

White, 137 S. Ct., at 552) (brackets in original). In further describing the inquiry, the Court did not require that the prior precedent be precisely identical, but determined that clearly established law could come from "factually analogous precedents of the Supreme Court and the Third Circuit," as well as from "persuasive authorities, such as our nonprecedential opinions and decisions from other Courts of Appeals." Pet. 9a.

That disposes of Petitioners' fourth Question Presented. The panel did not "creat[e] a new standard of review to the established" qualified immunity analysis, nor did it grant Respondent "absolute immunity for his use of deadly force." Pet. i, 27. To the contrary, the panel proceeded to review cases from this Court, the Third Circuit, and other circuits to determine if "factually analogous precedents" put Respondent on notice that his actions in response to this scenario was unlawful—the test for qualified, not absolute, immunity. Pet. 8a-15a. Although Petitioners disagree with how this panel applied that test, this Court "rarely grant[s] review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Salazar-Limon v. Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in denial of certiorari).

2. Certiorari is also unwarranted to review this application of qualified immunity since the panel closely followed this Court's approach under current law.

As a threshold matter, the panel adhered to this Court's teachings regarding the meaning of its precedents. Contra the district court, the Third Circuit rejected the idea that this case could be resolved based

on *Garner*'s language that deadly force is unlawful absent a risk of harm to the officer or to others because that "viewed the right at too high a level of generality." Pet. 9a-10a (citation omitted). Instead, relying on explicit language from this Court, the panel noted that "*Garner* ... do[es] not by [itself] create clearly established law outside 'an obvious case.'" Pet. 10a (quoting *White*, 137 S. Ct., at 552). This case was not "obvious" because Respondent "was aware of several facts from which he could reasonably conclude that Gibbons posed a threat to others: Gibbons had violated a restraining order; Gibbons was carrying and earlier that evening had brandished a firearm; and Gibbons was reportedly mentally ill and may not have been taking his medication." Pet. 13a. Moreover, at the time of the confrontation, "(1) Gibbons was armed with a gun; (2) Gibbons ignored [Respondent's] orders to drop his gun; (3) Gibbons was easily within range to shoot [Respondent] or [another trooper]; and (4) the situation unfolded in 'seconds.'" Pet. 11a.

Nor, the panel continued, was there any factually analogous Supreme Court precedent "where an officer acting under similar circumstances as [the defendant officer] was held to have violated the [constitutional provision at issue]." Pet. 9a (quoting *White*, 137 S. Ct., at 552). To the contrary, this Court's decision to grant qualified immunity in *Kisela* indicated that Respondent's actions did not violate a clearly established right. Many of the salient facts that meant the *Kisela* plaintiff's use of force did not violate any clearly established right applied here: "Gibbons was armed with a gun" and the *Kisela* plaintiff had a large knife; both ignored

commands from the officer to drop their weapons; Gibbons "was easily within range to shoot" officers and the *Kisela* plaintiff was close to a bystander; and in both instances, "the situation unfolded in less than a minute." Pet. 11a (quoting *Kisela*, 138 S. Ct., at 1154). And while Petitioners emphasize that Gibbons did not make verbal threats to anyone on the scene, neither did the individual in *Kisela*. Compare Pet. 21-22, with *Kisela*, 138 S. Ct., at 1156 (Sotomayor, J., dissenting) ("Hughes never acted in a threatening manner." (quotation marks omitted)).

Given the lack of Supreme Court precedent to form clearly established law, the real question was whether the Third Circuit's own precedents—specifically *Bennett*—established with sufficient specificity that Respondent violated a clearly established right.[9] In *Bennett*, police were called to an apartment courtyard where they encountered a suspect who was armed with a single shot shotgun with the barrel pointed up to his head. 274 F.3d, at 135 n.2. The suspect did not point the gun at anyone and he stated he wanted to

[9] This Court has reserved the question whether circuit precedents can supply clearly established law, see *Wesby*, 138 S. Ct., at 591, n.8 ("We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity."), but the Third Circuit has held that it can. Pet. 8a (citing *Bland v. City of Newark*, 900 F.3d 77, 84 (CA3 2018)). This is another sign that the petition is not about the legal principles advanced below, but application of those principles to these facts. Moreover, to rule for Petitioners, this Court would need to consider this question—an antecedent issue that the petition does not raise or address.

kill himself. *Id.* As troopers took up positions surrounding him, the suspect became agitated and began moving toward the troopers, but stopped. *Id.* The suspect was then shot by a trooper who was positioned 80 yards behind him. *Id.* Almost an hour had passed between the time the state troopers first arrived and the suspect was shot. *Id.* The Third Circuit held that the shooting violated the suspect's Fourth Amendment rights. *Id.*, at 136

The panel below determined that *Bennett* did not "squarely govern[]" Respondent's conduct in light of three categories of dispositive factual differences between the two cases. Pet. 13a-15a. First, Respondent's pre-standoff knowledge of Gibbons differed from the officers in *Bennett* in several respects that "would lead a reasonable officer entering an encounter with Gibbons to perceive that Gibbons presented an increased risk of harm compared with the suspect in *Bennett*." Pet. 13a. Respondent had been made aware that Gibbons had "violated a restraining order; Gibbons was carrying and earlier that evening had brandished a firearm; and Gibbons was reportedly mentally ill and may not have been taking his medication." *Id.* None of these factors existed in *Bennett*.

Second, Gibbons was much closer (seven to fifteen yards) to the officer, and was less compliant than the suspect in *Bennett*, who was 80 yards away and facing away from the officer. Pet. 13a-14a. Indeed, the court held in *Bennett* that "officers far closer than [the defendant] … had ordered [Bennett] to halt," and (taking all inferences in those plaintiffs' favor) Bennett "obeyed that 'halt' order for a full four seconds when

[the defendant] nevertheless chose to shoot him"—undermining the claim he posed any danger to others. *Bennett v. Murphy*, 120 F. App'x 914, 918 n.1 (CA3 2005); see also Pet. 14a. Here, by contrast, Respondent "*was* the closest officer to Gibbons," and "Gibbons ignored [Respondent's] orders to drop his gun." Pet. 14a. That matters under this Court's precedents because a "reasonable officer would have difficulty concluding that using force against the distant, comparatively compliant, and unknown suspect in Bennett was clearly factually analogous to using force against the much-closer, noncompliant Gibbons." *Id.*

Third, Respondent's standoff with Gibbons lasted only moments, while the standoff with Bennett lasted nearly an hour. *Id.* As the panel explained, this Court has stressed this as an important difference, and one that can make prior decisions insufficiently factually analogous to supply clearly established law. *Id.* (citing *Kisela,* 138 S. Ct., at 1153) (distinguishing between a case involving a standoff for "roughly 40 minutes" and a case involving a standoff that "unfolded in less than a minute," finding a legal holding as to the former did not clearly establish a right that was applicable to the latter). In relying on this consideration, the panel was thus following this Court's precedents.

Petitioners' initial response is that the Third Circuit impermissibly ignored genuine issues of material fact that undermined its decision. See Pet. 11-14, 31 (citing *Tolan v. Cotton*, 572 U.S. 650, 657 (2014)). But disputes over whether a panel misapprehended the record evidence or gave too much or too little credit to any specific evidence are rarely a basis for certiorari

in any context. And certiorari here is especially unwarranted because the two facts the petition lays out—that Gibbons may not have brandished a gun earlier that day, and that Gibbons had schizophrenia—do not evince a "clear misapprehension of summary judgment standards." *Id.*, at 659. Instead, as to the former, the petition itself admits that the police dispatcher informed other officers that Gibbons had brandished a gun. Pet. 12. Whether the dispatcher was correct, or whether he was relying on "specious" claims from a witness, *id.,* that was the information Respondent had at the time, and thus the relevant information to the analysis. See *Kisela*, 138 S. Ct., at 1152. As to the latter, the Third Circuit discussed Gibbons's schizophrenia. As noted above, see *supra* at 7-8, 13-14, the panel relied on specific undisputed facts in distinguishing *Bennett*, and in the process the panel did not "credit[] the evidence of the party seeking summary judgment" or "fail[] properly to acknowledge key evidence offered by the party opposing that motion." *Tolan*, 572 U.S., at 659.

Petitioners also disagree with the distinctions that the panel drew with *Bennett*, but they are consistent with this Court's approach, and do not independently justify certiorari. For one, although Petitioners argue that the pre-encounter actions, including the violation of the TRO, "did not make [Gibbons] any more dangerous when [Respondent] encountered him," Pet. 16, this Court has already held that such pre-encounter knowledge can bear on the actions that officer could permissibly take. See, e.g., *Kisela*, 138 S. Ct., at 1153 (noting officer knowledge of individual's prior actions

that day could bear on his "assess[ment of] the potential danger" at moment of shooting). For another, Petitioners emphasize that "[w]hat is evident in both cases is that neither suspect complied with the command the drop their weapon," Pet. 17 (citing *Bennett*, 120 F. App'x, at 918), but ignores the fact that Bennett was in the process of complying with the officers' commands to halt, and had not aimed his weapon at anyone else during a long standoff. *Bennett*, 120 F. App'x, at 918. The panel thus carefully applied this Court's requirement that a prior decision must be sufficiently analogous as to "place the lawfulness of the particular [action] beyond debate." *Wesby*, 138 S. Ct., at 590 (citations and quotation marks omitted).[10]

3. Finally, though Petitioners suggest the decision below will have broad ramifications, a number of considerations show it is unlikely the decision below will

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[10] None of the other arguments justify certiorari under this Court's criteria either. Petitioners dedicate a Question Presented to whether Respondent is entitled to qualified immunity when he himself "was not in fear of his life or the lives of others nor did he feel threatened," Pet. i, and argue the Third Circuit should have considered how undisputed facts might have impacted Respondent's subjective state of mind. See Pet. 15-19. But that plays no role in the analysis. See *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (holding that the relevant analysis is objective, and officers' "subjective beliefs about the search are irrelevant"). Petitioners also at various times demand reversal based on the incorrect legal standards, arguing "a reasonable officer similarly situated would not have been compelled to use deadly force," Pet. 25, and claiming this Court "must consider whether the officer's conduct was 'objectively reasonable' under the circumstances," Pet. 26, which are questions this Court has reserved to the first prong of the qualified immunity test, not the second.

affect other cases even in the Third Circuit. For one, Respondent's actions occurred on May 25, 2011, meaning the decisions on which the parties and panel could rely to identify the clearly established law are at least a decade old, as nothing later can "have given fair notice" to Respondent. Pet. 16a. Future claims of excessive force will rely on a different body of precedent. For another, future cases that are more similar to *Bennett* than the instant one may well come out differently. See Pet. 44a-45a (dissent from denial of rehearing en banc emphasizing *Bennett* is still the law of the Third Circuit). And in any event, much of the debate among the judges below arose from a district court's failure to follow a Third Circuit supervisory rule that aids in the analysis of qualified immunity cases, see Pet. 6a-7a n.4 (panel); Pet. 58a-60a (dissenting from denial en banc), again suggesting a case like this is unlikely to arise in the same manner again.

In short, while a debate persists over qualified immunity law generally, the Questions Presented in this case challenge only *application* of that jurisprudence to these facts. The petition therefore presents a splitless and fact-bound request, one where a panel hewed to this Court's precedents, and one that is unlikely to significantly impact other cases in the future.

CONCLUSION

For these reasons, this Court should deny the petition.

Respectfully submitted.

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May 12, 2021