No. 21-1422

IN THE

Supreme Court of the United States

BRETT FERRIS,

Petitioner,

v.

CHRYSTAL SCISM, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOSHUA SCISM,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Undercover on a drug buy assignment with two other undercover officers, Petitioner shot and killed a man on the street as the man, who was not a suspect or involved in the drug buy, was running away from him. This occurred after the man had walked over to the undercover officers sitting in an unmarked van and asked them not to do drug deals on his block because his kids lived there. It was obvious that he thought they were drug dealers. As the man then turned and walked away from them, Petitioner saw he a gun tucked in the back of his pants. Petitioner yelled to the others, jumped out with his gun drawn at the man's back, yelled "get on the fucking ground," fired six times, and killed him with a shot to the back of the head. Petitioner never identified himself as police.

Although Petitioner has misstated or omitted much of these facts in his argument, these facts are largely undisputed in the record evidence. What is sharply disputed is each of the foundational claims that frames Petitioner's argument for qualified immunity. Namely, it is heavily disputed whether this man, Joshua Scism, ever was threatening, ignored police commands, and grabbed and pulled his gun out of his waistband and posed the apparent threat of imminent serious injury, as Petitioner claims. Nonetheless, Petitioner framed the qualified immunity question on his interlocutory appeal and in his petition based on his disputed version. The actual questions presented by this case are:

1. Whether the Second Circuit erred in disagreeing with Petitioner's argument that his version of events is undisputed and that the undisputed record establishes

as a matter of law that he reasonably believed his life was in danger when he killed Mr. Scism, such that his actions were objectively reasonable in light of law existing then, when Respondent's version of events supported by the record evidence disputes all claims that Mr. Scism was ever threatening or took any action that threatened serious injury.

2. Having set forth the proper standard for a qualified immunity analysis on interlocutory appeal, whether the Second Circuit misapplied the law in finding that resolution of the qualified immunity question was not possible at the summary stage given disputed material facts and Respondent's version of the full encounter.

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CONSTITUTION AND STATUTES

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their persons. . . against unreasonable . . . seizures, shall not be violated." U.S. Const. Amend. IV.

42 U.S.C. §1983 provide in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law…

42 U.S.C. §1983.

STATEMENT OF THE CASE

I. Introduction

1. This case involves a police officer's fatal shooting of Joshua Scism [Scism] in the back of the head as he was running away from undercover officers who did not identify themselves as police, although they understood that Scism thought they were drug dealers, and who had no reason to suspect Scism of any criminal activity. The gravamen of the petition lies in Petitioner's attempt to frame his entitlement to qualified immunity as a

matter of law based on his version of events that Scism was confrontational from the onset, required pacifying, ignored police commands, and instead grabbed his gun and pulled it out of his waistband during the course of "sudden and chaotic circumstances." (Pet. 12). Despite contrasting version of events having been presented in Respondent's briefs twice below and decisions of the district court and Second Circuit finding genuine disputes of material facts, Petitioner continues to contend that his account of the facts and circumstances is undisputed. The only fact he now concedes is in dispute is whether Scism was turning towards Petitioner with his gun in his hand when Petitioner shot him. (Pet. 6, fn 1) The record evidence plainly establishes, however, that each one of Petitioner's foundational claims is disputed. Based on such a record, summary judgment was properly denied and review by this Court is not warranted.

The record evidence supports finding that Scism was never threatening and never presented any threat of imminent serious injury to anyone. Viewing the facts in the light most favorable to Respondent and all reasonable inferences against Petitioner as required on a motion for summary judgment[1], it would have been evident to a reasonable officer at the scene that Scism approached the undercover officers as a concerned parent making a request relating to his children's safety, passively ended the encounter by walking away, thought the undercover officers were drug dealers and was retreating from them when they jumped out of their van, did not ignore police commands, and did not instead grab his gun and pull it out

1. *Dallas Aerospace, Inc., v. CIS Air Corp.*, 352 F.3d 775, 780 (2d Cir. 2003)

of his waistband, but simply tried to run away. The district court has agreed that the record presents fundamental dispute on material issues and referenced a series of material facts that dispute Petitioner's claims. Pet. App. 46a-47a, 51a-52a. The Second Circuit likewise has agreed that the record is filled with disputes as to material facts and that Petitioner has tended to treat disputed facts as undisputed. Pet. App. 5a. The petition nonetheless still does not address the record candidly.

By continuing to ignore the full record and insisting falsely that it is undisputed that Scism was threatening, ignored police commands and instead grabbed his gun and pulled it out from his waistband, the petition is based on a defective construct that implicitly seeks findings of fact be summarily resolved in Petitioner's favor, then applied to find that there are no triable issues of fact to prevent determination at the summary stage. Given that this is contrary to the law on summary judgment motions, as well as purely improper circular logic, review by this Court is not warranted.

2. While Petitioner on his interlocutory appeal failed to frame the qualified immunity question based on Respondent's version of the facts as required, and so never presented a viable argument within the parameters of the court of appeals' jurisdiction under the collateral order doctrine, the petition nonetheless inappropriately criticizes the Second Circuit for deciding his interlocutory appeal without specifically identifying what facts are material. Petitioner likewise claims that the district court failed to set forth what material facts are in dispute, when in fact the district court presented a litany of "at best contradictory" evidence that disputed Petitioner's claims. Pet. App. 46a.

With its fact-bound argument and misstatement of the decisions below, the petition contrives to formulate grounds for review by claiming that the Second Circuit's decision exemplifies a trend to deny summary judgment on the grounds of disputed facts that are not material and applies a deferral approach that is contrary to this Court's direction that qualified immunity should be decided as early as possible. No such trend is demonstrated, however. Notably, these claims as well simply pare down to the argument that the Second Circuit erred in finding the existence of triable issues fact barring summary resolution of the qualified immunity question.

3. Rendering this case a particularly inappropriate vehicle for this Court to address any issue relating to the qualified immunity question at the summary judgment stage, Petitioner has never squarely addressed the genuine record and Respondent's version of events. Thus, Petitioner has never presented a legitimate argument on the issue – not on his interlocutory appeal, nor in his petition to this Court – for any court's consideration, much less this Court's. Review of the Second Circuit's unpublished decision therefore is not warranted.

II. Factual Background

1. Mr. Scism was shot in the back of his head and killed on June 13, 2016 after encountering undercover Schenectady Police Department [SPD] police officers, including Petitioner, who were on an undercover drug buy assignment. During the entirety of the incident, a confidential informant [CI] was present with the undercover officers and wearing a wire that provides an audio recording of the incident. Pet. App. 30a-32a

SPD staged the undercover operation with the undercover officers and the CI in an unmarked minivan parked on a residential street. Petitioner was in the driver's seat. (CA JA 913, 916, 918, 920, 921, 1675). Other SPD officers on this assignment were at nearby locations and instantaneously available by radio. (CA JA 915-16, 1056). As the undercover team sat in the parked minivan, Petitioner saw a man walking towards them from the center of the street. (CA JA 917, 920, 921). The CI saw that this man came from the steps of the house near the corner. (CA JA 846-47). Pet. App. 30a-31a,

The man, Scism, walked towards the driver side of the minivan to speak to them and Petitioner rolled down his window. (CA JA 917,920-922). The audio recording, which reveals that Scism's tone was not aggressive or threatening, but entreating, records conversation between Scism and Petitioner as follows:

> Scism: "[If you're meeting somebody], don't be [selling] [no drugs] on my block, I've got kids." [*language in brackets not clear, stated in terms of sum and substance*]
>
> Petitioner: "all right, all right, bro."
>
> Scism: "thanks."

Pet. App. 31a,47a; (CA JA 333-34, 1766).

The officers in the van realized that Scism thought they were drug dealers. They did not feel threatened by him. Pet. App. 47a; (CA JA 921; 1057-59, 1216-17, 1219/6-10).

2. After this exchange, Scism turned around and began walking away, back in the direction he came from. With Scism's back now to them, Petitioner and the other occupants in the van saw that Scism had a gun tucked in the back waistband of his pants, which he was tucking and adjusting in his waistband and putting his shirt over as he walked away. (CA JA 849/20-24, 930-31, 1675). It has been acknowledged that in observing this, the officers did not observe any criminal activity, as possession of a concealed firearm is not in and of itself a crime, and Scism was not believed to be involved in any illegal activity. Pet. App. 46a; (CA JA 1221).

3. On seeing the gun, Petitioner exclaimed about it to the others in the van, immediately exited the van with his gun drawn at Scism's back as Scism was walking away, and yelled "get on the fucking ground." The undercover officer sitting in the front passenger's seat, Detective Ryan Kent [Kent], also exited the van with his gun drawn and echoed Petitioner's yell. (CA JA 334-35, 933,939-40,1675). As Scism went from walking away to running away from them, Petitioner fired five shots at him in rapid succession, then fired a sixth shot that hit Scism in the back of the head and killed him. (CA JA 334, A1766). Scism fell forward and landed face down on the ground on the sidewalk in front of the house where he came from. (CA JA 855). No one else had fired a shot. Pet. App. 31a,47a,48a,51a,52a.

None of the undercover officers identified themselves as police, although they admittedly had time to say "police." (CA JA 1135).

4. The CI, who saw the whole thing, testified that when they first saw the gun as they were in the vehicle

and Scism was walking away, Scism was pushing it down into his waistband and only the handle was visible. (CA JA 849/20-21, A879/17-24, A881/8,18-22, A882/18-22). After Scism tucked his shirt over it, he never took his gun out of his shirt. He still was fumbling with it trying to stick it down his pants as he was running away from them. (CA JA 881/25-882/5, 849/22-24). The CI testified that Scism never removed the gun from the back of his pants and that the first time the gun came out was after he was shot and fell to the ground. (CA JA 874/25-875/2; 881/19-21; 883/5-11). Scism never turned in the direction of the officers and never stopped, but was just running away from them from the time they came out of the vehicle until he was shot. (CA JA 852/18-23, A853/11-15).

5. No one heard Scism say anything after Petitioner and Kent exited the van. Although the petition claims that an enhancement of the audio indicates that Scism said "you don't fucking tell me…," the enhanced audio and the testimony of witnesses listening to it at their respective depositions do not support this claim. (Pet 16)(CA JA 963-66, 1124-27). The audio also indicates only two yells to get on the ground, then the immediate sound of gun shots, not three commands as stated in the petition. (Pet 16) (CA JA1766) The petition also states that the undercover officers did not have ballistic vests, but there was at least one in the van. (CA JA 1215)

III. Procedural History

1. Scism's wife commenced this action against Petitioner, Kent, and the City of Schenectady [City] alleging claims under 42 U.S.C. §1983, *inter alia*. After discovery, all defendants moved for summary judgment

contending that Petitioner's use of deadly force was not excessive force and that in any event he was entitled to qualified immunity, that Kent did not fire his gun and so did not violate Scism's constitutional rights, and that the evidence in the record failed to raise a question of fact as to the City's liability.

2. In an unreported decision, the district court granted the motion as related to Kent and the City, and denied it as related to Petitioner. Pet. App. 28a-58a. Applying the well-settled law on excessive force claims and qualified immunity to the summary judgment record, the district court held, *inter alia*, that there was triable issue as to whether Petitioner's use of deadly force was objectively reasonable as in whether he had probable cause to believe that Mr. Scism posed a significant threat of death or serious physical injury to him or others. Pet. App. 51a-52a. The district court further held: "Relatedly, because there are genuine issues of material fact regarding the reasonableness of Ferris's use of force, summary judgment must also be denied on qualified immunity grounds." Pet. App. 52a.

On its review of the record, the district court noted, *inter alia*, that:

- there is "at best" contradictory evidence that Scism ever presented as a threat,

- with the parties offering starkly different interpretations of how to consider the initial interaction and with a recording permitting interpretation, it was for the jury to determine "whether Scism approached the vehicle in a threatening manner or as a concerned citizen,"

- Petitioner and Kent were of the opinion that Scism thought they were drug dealers,

- when the officers saw that Scism had a gun and they exited the vehicle with their guns drawn, there were no facts tending to show that Scism had committed any crime, he was not a suspect of any crime, and Petitioner by his own account did not believe Scism was involved in any illegal activity at that time,

- the officers did not identify themselves as police when they yelled for Scism to get on the ground,

- the jury could find that Scism was not fleeing arrest, but retreating,

- the facts are disputed as to whether Scism posed an immediate threat and was turning towards Petitioner with his gun in his hand as Petitioner claims, but as disputed by the medical evidence with Scism being shot in the back of the head and by the CI's testimony that he never saw Scism stop or turn towards Petitioner, and

- with the record evidence, a jury could find that Petitioner shot Scism as he was retreating and not posing any immediate threat.

Pet. App. 46a-47a, 51a-52a.

3. Petitioner filed an interlocutory appeal as to which the Second Circuit would have jurisdiction pursuant to 28 U.S.C. §1291 and the collateral order doctrine on the question of law regarding the application of qualified

immunity[2]. In its unpublished decision, the Second Circuit preliminarily stated that it assumed the parties' familiarity with the facts and so only referred to them as necessary to explain its decision. Pet App. 3a. The Second Circuit then addressed Respondent's argument pertaining to its jurisdiction to hear the appeal that Petitioner brought on his own version of the facts, rather than Respondent's. The Second Circuit explained that an interlocutory appeal is available to assert that an immunity defense is established as a matter of law "as long as the defendant can support [it] on stipulated facts, facts accepted for purposes of the appeal or the plaintiff's version of the facts that the district judge deemed available for jury resolution.," ("supportable facts"). Pet App 3a-4a, citing, *Lynch v. Ackley*, 811 F3d 569, 576 (2d Cir 2016)(quoting *Mitchell v. Forsyth*, 472 US 511, 530 (1985)). Therefore, the Second Circuit asserted that it had jurisdiction over the appeal so long as not based on Petitioner's version in dispute, but on the record and "the district court's explanation of facts in dispute." Pet. App. 4a, citing, *Lennox v. Miller*, 968 F3d 150, 154 n2 (2d Cir 2020).

The Second Circuit then addressed the settled law as to qualified immunity, for which "the dispositive inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Pet. App. 5a, citing *Vasquez v. Maloney*, 990 F.3d 232, 237-38 (2d Cir 2021)(quoting *Hernandez v. Mesa*, 137 S.Ct 2003,

2. Petitioner has claimed that the Second Circuit had jurisdiction pursuant to 28 USC §1292(b), which requires the district court to have certified the appeal. The record does not establish such certification. The Second Circuit in its summary order held that it had jurisdiction under 28 USC §1291 in accordance with case law. Pet. App. 4a.

2007 (2017). On a motion for summary judgment on such grounds, the Second Circuit held that the defendant has the burden of proving "that no rational jury could conclude (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time." Pet. App. 5a, citing, *Vasquez*, 990 F.3d at 238

Applying the law to the record before it, the Second Circuit held that Petitioner's brief did treat disputed facts as undisputed, such as by assertions that Scism "brandished a loaded handgun" and "ignored police commands," and that the record "is filled with disputes as to material facts." Pet. App. 5a. Therefore, it was unable to reach a conclusion based on supportable facts as to whether it would be clear to a reasonable officer in Petitioner's shoes that his conduct was unlawful in the situation he confronted. The Second Circuit concluded that given the full version of the encounter advanced by Plaintiff, Petitioner could not at that stage meet his burden of showing that his decision to use lethal force was objectively reasonable in light of the law existing at that time. Pet. App. 5a. The Second Circuit accordingly affirmed the district court's decision in its unpublished Summary Order without precedential value.

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied As It Is Founded On Objection To The Factual Findings Of The Courts Below And Alleged Misapplication Of Properly Stated Law.

A. The Petition Is Fact-Bound And Case Specific.

The petition does not contest the Second Circuit's statements as to the law, but complains of its application of the law and findings related to the facts in determining that disputed issues of material fact prevented the question being resolved at the summary judgment stage.

While the courts below have determined that numerous issues of triable fact exist such that the record evidence presents two sharply contrasting version of events relating to whether excessive force was used and whether qualified immunity applies, the petition largely ignores the seminal matter of contrasting accounts. The petition instead argues that the courts below erred in failing to grant qualified immunity based on the record as presented and characterized by Petitioner. Thus, the fact-bound petition in essence improperly seeks to have the Court review this case to resolve all factual issues in Petitioner's favor. This Court's review, therefore, is not warranted.

B. The Petition's Objections To The Decisions Below Turn On Misstating and Mischaracterizing The Summary Record.

1. The petition incorrectly asserts that disputed facts are undisputed.

Petitioner falsely argues that it is undisputed that he was confronted by Scism, then after Petitioner placated him, Scism went to the front of the minivan and displayed his gun, grabbed his gun, disregarded police commands, and instead pulled his gun out of his waistband, leading to Petitioner firing his gun six times at him in order to protect himself. The petition also opines that in moving his shirt back to get his gun, Petitioner revealed his badge[3]. To the extent this characterization of events has any support in the record, it is based on the self-serving accounts of Petitioner and Kent, the other named defendant officer. Moreover, it is plainly not undisputed - this description is disputed in all significant respects by the nonparty CI, the audio recording, and other testimony of Petitioner and the other officers.

It is undisputed that throughout the total encounter, Petitioner and the two other officers at the scene were undercover on a drug buy assignment with a CI. For the success of the assignment and the safety of the CI, they needed to appear to be drug dealers, not police. Therefore, they were dressed and presented themselves in public in a manner to hide their identities as police to anyone who

3. There is no record evidence that the badge, which was only at the side of Petitioner's waist, was ever made visible when Petitioner drew his gun.

might see them as they sat in an unmarked minivan parked on the street. They were successful in this regard with Scism, evidently causing him enough concern to walk over to them. The record evidence supports finding that Scism's manner was nonthreatening. Noone felt threatened and Petitioner had no issue rolling down his window to speak to him. Not surprising, and as intended by the officers, Scism apparently thought they were drug dealers.

Scism approached to speak to them as a concerned parent, indicating that he was anxious about drug dealers in his neighborhood where his kids lived. He made no threats, but appealed to Petitioner's sense of decency to not transact drug business on his block because he had kids. When Petitioner responded merely with "all right, bro," Scism said "thanks," then turned around and began walking away, back in the direction he had come from. As Scism walked away from them with his back to all four occupants in the minivan, Petitioner and the others then could see a gun visible in the back waistband of Scism's pants. They saw Scism tucking and repositioning it in his waistband and putting his shirt over it as he was walking away. There was no one else in the area.

Scism had made no threat, was not a suspect in any criminal matter, was not seen doing anything illegal, had ended the encounter, and was walking away. It was admitted that what the officers observed was not a threat to cause imminent serious injury justifying the use of deadly force.

Petitioner was not limited to just a split second to make a decision about taking any action. He had the time to make a reasoned decision. Nonetheless, he didn't use it.

Instead, he gave a yell to the others in the van, jumped out of the vehicle with his gun drawn and pointed at Scism's back, yelled "get on the fucking ground," which was echoed by Kent who also had exited the van with his gun drawn, then immediately started firing at Scism. Petitioner fired at him six times, hitting Scism in the back of the head with the sixth shot. No one else fired a shot.

Indisputably, Petitioner did not identify himself as police when he exited the minivan or at any time, although there undeniably was time to do so. While the petition claims that in going for his gun he moved his shirt and revealed his badge at his waist, there is no evidence that his badge ever became visible. Petitioner did not know if it was visible, Kent never saw it, and Scism could not have seen it as his back was to Petitioner when Petitioner drew his gun and pointed it at him. Petitioner, in fact, admitted he did not know what Scism saw. (CA JA 940-41, 976, 988, 1128-30)

By the account of the CI, the only nonparty witness, Scism never grabbed his gun, never pulled it out from his waistband, and never stopped or turned as he was walking, then running away. By the CI's account, the only thing Scism was doing with the gun until he was shot and fell forward was working at tucking it in with his shirt at the back of his pants, which Petitioner admitted seeing when he was in the minivan. The gun only came out of Scism's waistband when he was hit and fell to the ground in front of the house he initially walked over from.

While the petition claims that there were three "police commands" to get on the ground, the audio indicates only two yells rapidly made, then gun shots. The petition also

claim that all three officers "simultaneously" scrambled to get out of the van on seeing the gun. The record does not support that claim – the record indicates that Petitioner set all the action in motion and the others reacted to his lead. The petition also claims that the officers had no ballistics vest, but there was at least one in the van.

Given that all factual disputes and all inferences are to be viewed in the light most favorable to Respondent, even if the Court were inclined to review the heavily disputed record to consider Petitioner's fact-bound argument, certiorari is not warranted.

2. The Petition seeks to misconstrue what is material and what is immaterial.

In an attempt to eliminate material facts from consideration, the petition misconstrues the significance of Scism's apparent blameless and decent intentions as a concerned parent and of his exhibited belief that the officers were drug dealers by claiming these are only his subjective perceptions and not material to the Fourth Amendment qualified immunity question. This superficial argument thus tries to erase key information indicating that Scism was not a threat as would have been conveyed to persons at the scene.

Plainly, whether or not Scism's actual thought processes themselves are material, what Scism demonstrated as to his intentions and beliefs are highly material as informing the reasonable officer at the scene about the situation. Excessive force claims are to be measured. by what a reasonable officer on the scene reasonably would have perceived, and so requires the courts to pay

careful attention to the facts and circumstances of each particular case. *County of Los Angeles v. Mendez*, 137 S.Ct. 1529 (2017). "Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred." *Saucier v Katz*, 533 U.S. 194, 207 (2001). Scism's intentions and beliefs that were apparent to those present are part of the totality of the circumstances that would inform a reasonable officer at the scene as to the existence of any threats or need for force. They are highly material as they tended to inform that Scism was not a threat, but a parent concerned about neighborhood safety, was not being belligerent to lawful authority, was not ignoring police commands, and could be expected to run away from them out of reasonable concern for his safety if they came out of their vehicle threatening him.

In conjunction with its attempt to have material circumstances disregarded, the petition illogically claims that what is significant, and supporting the objective perception of a threat requiring lethal force, is the fact that the undercover officers had no knowledge of Scism being anything but a stable, nonviolent, law-abiding citizen. The petition emphasizes that the case here is not one in which the officers were responding to the scene to handle a suspect known to be involved in a volatile and dangerous situation, as arises in many excessive use-of-force cases. Incredibly, the petition takes the untenable position that an innocent encounter with an unknown citizen lawfully on the street who is not suspected of any criminal conduct presents even greater justification for perceiving threats and using lethal force than in those cases dealing with known dangerous persons and volatile situations.

With the petition's reliance on a misstated and mischaracterized record, this is not a meritorious case for this Court's review.

C. The Petition Should Be Denied As The Courts Below Did Not Actually Rule On The Fact-Bound Question Presented.

In failing to frankly address the record, Petitioner misleadingly presents fact-bound issue that was not ruled on by the courts below. This is epitomized by the petition's "1" Question Presented, which poses a question that does not actually arise in this case, is not material to it, and flatly misreads the courts' decisions below. (Pet. ii). While presumably Petitioner seeks the answer "no" to his question presented - "Whether or not the Fourth Amendment requires a police officer to wait until an armed suspect points the barrel of his handgun in the officer's direction before the officer can deploy lethal force to protect himself and other in the area" – that response would not resolve the issue here and would not support changing the result below. That question blatantly misrepresents the disputed issue and erroneously reduces it to only that of the specific positioning of the gun.

The question rephrased according to Respondent's version of events as Petitioner was required to phrase it on appeal, but did not, would be "whether or not the Fourth Amendment requires an undercover police officer, who encounters a concerned parent who thinks the officer is a drug dealer, to identify himself as police if he intended to engage the concerned parent in his role as a police officer, and to refrain from shooting and killing the concerned parent who has a gun tucked in the back waistband of

his pants, when the concerned parent is not suspected of engaging in any criminal activity, is not a suspect, is not threatening, has not posed any threat of causing injury to the officer or others, has not disobeyed any police commands, and is in fact only attempting to retreat from any further contact with the undercover police officer believed to be a drug dealer. "

The petition's deliberate avoidance of a fact-bound question based on Respondent's version of events is not only misleading, but demonstrates a lack of fundamental credibility with the petition's argument. Therefore, review by this Court is not warranted.

II. There Is No Conflict With The Second Circuit's Decision And This Court's Decisions Or That Of Other Circuits.

A. The Petition Does Not Allege Any Statement Of Law In The Second Circuit's Decision That Conflicts With The Court's Decisions That Present Well-Settled Law.

As the petition admits, the case does not involve any unsettled area of law as might warrant this Court's review. Furthermore, the petition does not claim, much less demonstrate, that the Second Circuit's decision is in conflict with any legal rules set forth in the Court's decisions relating to the legality of a police officer's use of deadly force, to the quality immunity defense, or to summary judgment resolution.

1. There is no conflict with this Court's decisions establishing settled law on the qualified immunity analysis.

As the Court held in *Tolan v. Cotton*, 572 U.S. 650, 655-57 (2014), qualified immunity analysis considers whether or not a constitutional right was violated, and whether or not the right was "clearly established" at the time of the violation. Evaluation of the constitutionality of a police officer's use of force is based on "whether the officers' actions were 'objectively reasonable in light of the facts and circumstances confronting them.'" *Lombardo v. City of St. Louis*, 141 S.Ct. 2239 (2021), citing, *Graham v. Connor*, 490 U.S. 386, 397 (1989). This inquiry 'is not capable of precise definition or mechanical application […] [but] requires careful attention to the facts and circumstances of each particular case." *Graham*, supra, at 396.

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White* v. *Pauly*, 137 S.Ct. 548 (2017) (*per curiam*), *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018). "Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers." *White*, supra at 552, (internal quotation marks omitted); *Kisela*, supra, at 1153. "[I]n an obvious case, these standards [set out in *Graham* and *Garner*] can 'clearly establish' the answer, even without a body of relevant case law." *Brousseau v. Haugen*, 543 U.S. 194, 199.(2004). "'[T]he salient question . . . is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct]

was unconstitutional.'" *Tolan*, supra, at 656, citing *Hope v. Pelzer*, 536 U.S. 730 (2002). This does not require that "the very action in question has previously been held unlawful, [...] but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Hope,* 536 U.S. at 739, (citations omitted). I.e., "the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard*, 572 U.S. 765 (2014).

When deadly force is used, the question of constitutionality hinges on whether "the officer has probable cause to believe that the suspect poses the risk of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). "Absent such a perceived threat, the use of deadly force is constitutionally unreasonable." *Rasanen v. Doe,* 723 F.3d 325, 333 (2d Cir. 2013), citing *Garner*, 471 U.S. at 11. In the case of a fleeing suspect, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Garner*, supra, at 11-12. New York State Penal Law §35.30 and the SPD's *Use of Force* policy echo this clearly established law.

The petition does not claim that the law set forth by the Second Circuit is in conflict with decisions of this Court, nor any other court, governing the qualified immunity analysis. Thus, there is no direct conflict warranting the Court's review.

2. Case law does not permit the use of deadly force in the absence of probable cause to believe that a suspect poses a serious threat of imminent serious injury.

While not asserting a conflict in the law, Petitioner does contend that clearly established law entitled him to use deadly force, citing to the use of deadly force in *Brothers v. Akshar*, 2007 U.S. Dist. Lexis 103474 (NDNY 2007), aff'd, 383 Fed. Appx. 47 (2d Cir. 2020)(summary order); *Costello v. Town of Warwick*, 273 Fed. Appx. 118 (2d Cir, 2008)(summary order); *Mullenix v. Luna*, 577 U.S. 7 (2016); *Plumhoff v. Rickard*, 572 U.S. 765 (2014). His argument, however, again relies on adopting his set of facts and begs the question. Critical in each of those cases, the totality of the circumstances and the conduct of the individual at issue did present the officer with probable cause to believe that the suspect posed a serious threat of serious physical to the officer or others at the scene. That is not the case here. Although Petitioner claims that such were the same circumstances he faced, Respondent's version of events refutes that.

Certainly, clearly established law as of June 13, 2016 made it clear that it is a violation of the Fourth Amendment to shoot and kill an unknown person on a public street when the person is not suspected of criminal conduct, does not appear dangerous, is not fleeing arrest, is not being noncompliant to known lawful authority, and does not pose a risk of serious physical harm. Petitioner has never disputed that, notwithstanding that these are the circumstances under Respondent's version of events. Accordingly, not only is there no conflict, the Second Circuit properly applied the law and determined that

disputed facts in the record barred resolution of the question of whether it would be clear to a reasonable officer in Petitioner's shoes that using lethal force was unlawful in the situation he confronted, and that Petitioner failed to meet his burden of establishing that his decision to use lethal force was objectively reasonable in light of then-existing law. Pet App. 5a. Certiorari, therefore, is not warranted.

B. There Is No Trend To Improperly Apply A Deferral Approach.

1. Finding summary resolution not possible here due to disputed issues of material fact does not conflict with this Court's decisions.

The petition complains of the fact that the Second Circuit held that it could not resolve the qualified immunity question on the summary judgment record due to triable issues of facts, which statement of the law is entirely in accord with this Court's decisions. The fact that, as the Court has asserted and the petition recites, qualified immunity is intended to provide protection from suit as well as judgment, such that the immunity question should be resolved "at the earliest possible stage in litigation," (*Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009), *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)), does not override the fact that resolution is not necessarily possible at the summary judgment stage. While the petition acknowledges this, it inconsistently also inaptly describes the lower courts' findings of triable issues of fact barring summary resolution as a "deferral approach" that "runs afoul of this Court's" directives on resolving qualified immunity at the earliest possible stage.

On a motion for summary judgment on qualified immunity, the court is to consider "whether the party opposing the motion has raised any triable issue barring summary adjudication." *Ortiz v. Jordan* , 562 U.S.180, 184 (2011). If so, the matter needs to proceed to trial; after which, the availability of qualified immunity is to be determined by the trial record. Id. at 184. "[C]ourts may not resolve genuine disputes of fact in favor of the party seeking summary judgment" in conducting analysis of the qualified immunity question at the summary stage. *Tolan,* 572 U.S. at 656. On such a motion, the court is constrained by the general rules, e.g.: it is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial;" is to grant summary judgment only if 'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law;" and must "view the evidence in the light most favorable to the opposing party." Id. at 656-657.

Thus, the Second Circuit found that qualified immunity could not be resolved at the summary stage due to numerous disputed issues of material fact and Petitioner's failure to meet his burden. This is squarely in line with the Court's decisions and presents no conflict.

2. The Second Circuit's decision does not exemplify any trend.

The petition attempts to falsely depict a broader significance to this case beyond that limited to the parties by claiming that the Second Circuit's decision exemplifies a trend to deny summary judgment based on disputed facts that are not material. This claim of a trend, which

Petitioner never made below, is contrived. As the courts below did not err in finding disputed issues of material fact requiring resolution after trial, their decisions cannot exemplify any trend to erroneously defer the question until trial based on disputed facts that are not material. The petition, furthermore, fails to establish the existence of any such a trend.

The petition cites to no Second Circuit case to support the existence of any trend in that circuit. Petitioner also fails to establish a trend in any other circuit to defer the qualified immunity issue based on disputed facts that are immaterial. Petitioner cites to three cases in support of his claim of a trend, namely, *City of Tahlequah v. Bond*, 142 SCt 9 (2021), reversing 981 F.3d. 808 (10th Cir. 2020); *Kisela v. Hughes,* 138 SCt 1148 (2018), reversing, 862 F3d 775 (9th Cir. 2017), and *City & Cnty of San Franscisco v. Sheehan*, 575 US 600, reversing 743 F3d 1211 (9th Cir. 2014). These three fact-specific cases out of the multitude of excessive force cases that the courts of appeals hear do not create or reflect any type of trend among the courts of appeals.

Moreover, even if these three could be considered to constitute a trend, the case at hand plainly does not exemplify it. In these three cases, in contrast to the case here, it was undisputed that the person at issue was engaged in threatening and/or unstable conduct prior to and at the time of the officers' arrival on the scene, did disregard police commands, had a weapon in their hands, and did take specific deliberate action that reasonably appeared to be threatening imminent serious injury to another. In *Bond*, the officers, called to a scene expected to "get ugly real quick," shot an intoxicated man who

refused to leave his ex-wife's home, when the man took action indicating that he was about to throw a hammer at the officer or charge at him with it. In *Kisela,* after the officer was called to the scene due to a report of a woman engaging in erratic behavior with a knife, the officer from the other side of a chain link fence saw the woman with the knife approaching another woman, getting six feet from her, while the woman ignored at least two commands to drop the knife. And in *Sheehan,* the plaintiff grabbed a knife and threatened to kill the officers, then kept coming at them with a knife.

Here, it is disputed that Scism ever engaged in any threatening or unstable conduct, ignored police commands, or grabbed the gun out of his waistband under circumstances presenting a threat of imminent serious injury. As this dispute involves material facts, the Second Circuit's decision cannot be viewed as exemplifying any trend allegedly suggested by the courts of appeals' decisions in *Bond, Kisela* and *Sheehan*.

In sum, there is no logical rationale for anticipating that the Second Circuits' finding that summary resolution was not possible here would have any significance other than to the parties in this case. Its decision supports no new rule or precedent that would encourage deferral of the qualified immunity question under an improper summary judgment record. Moreover, the Second Circuit's ruling is an unpublished summary order that does not have any precedential value. Thus, this case does not present an importance beyond that to the parties at issue as might warrant review.

III. The Case Is Not A Proper Vehicle To Address Any Legal Question Relating To Qualified Immunity On Summary Judgment.

This case is not an appropriate vehicle to review any complaint by Petitioner as to how the courts below presented their findings or framed issues in deciding his interlocutory appeal, given that Petitioner did not attempt to properly frame the qualified immunity question for the Second Circuit's review but asserted disputed facts were undisputed. While the Second Circuit did not outline the numerous parts of the record evidence that were in dispute and which bore on the totality of the circumstances that Petitioner faced, the Second Circuit's decision made clear that it applied the correct legal standards to the record evidence in rejecting Petitioner's claims, as did the district court.

Given that this Court "reviews judgments, not statements in opinions," and so may affirm on any ground supported by the record, (See, *Black v. Cutter Labs.*, 351 U.S. 292 (1956) the petition's complaint about the form of the Second Circuit's decision provides no meritorious basis for this Court's review.

Moreover, the petition misstates the decisions of the courts below. The decisions make it clear, as material to the question of qualified immunity, that the parties have presented two contrasting versions of events, one in which Scism never presented any threat whatsoever and Petitioner could not have reasonably believed that Scism posed any threat of imminent harm to him or anyone else in the area, and the other alleging the complete opposite scenario. Additionally, the district court in its decision

did lay out numerous, specific instances of disputed issues of material fact relating to these contrasting scenarios. The Second Circuit subsequently agreed with the district court that there were numerous issues of material fact that prevented summary judgment.

Petitioner's complaint about the format of the Second Circuit's decision also is particularly unjustified given the irregularity of his interlocutory appeal as improperly based on his own version of the facts. On his interlocutory appeal, it was Petitioner's burden to show an entitlement to qualified immunity as a matter of law based on undisputed facts and/or the facts as alleged by the opposing party and all inferences in the opposing party's favor. See, e.g., *Coollick v. Hughes*, 699 F.3d 211 (2d Cir. 2012); *O'Bert v. Vargo*, 331 F.3d 29, 38 (2d Cir. 2003). Not only is that the appellant's burden, the court of appeals' jurisdiction to hear appeal of an interlocutory order is limited to such facts. *McCue v. City of New York*, 921 F.2d 169, 180 (2d Cir. 2008). Petitioner in his appellate brief, however, improperly adhered to his own version of the facts, inaccurately claimed they were undisputed, and disregarded all facts and inferences in Respondent's favor. Pet. App. 5a-6a. Petitioner, therefore, did not present proper argument for the Second Circuit's consideration and did not meet his burden. With that, even if the petition had presented a genuine legal question, which it does not, this case is not an appropriate vehicle for resolving any legal question on qualified immunity or the format to be used in opinions on that question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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