No. 22-513

IN THE

Supreme Court of the United States

HYRUM JAMES GEDDES,

Petitioner,

v.

WEBER COUNTY, WAYNE MOSS, ROBERT SHANER, KARLEE DRAKE, and JAMIE TOONE,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Frank D. Mylar
Counsel of Record
MYLAR LAW, P.C.
2494 Bengal Blvd.
Salt Lake City, Utah 84121
Phone: (801) 858-0700
office@mylarlaw.com

Counsel for Respondents

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REASONS FOR DENYING THE PETITION

Mr. Geddes's Petition fails to provide a compelling reason for this Court to grant review on a writ of certiorari. *See* S. Ct. R. 10. This is because the Petition serves as a poor vehicle to answer the questions it poses. Jurisdiction to review judgments and decrees of court of appeals by certiorari should be exercised sparingly, and only in cases of gravity and general importance, or in order to secure uniformity of decision. *See generally* *In re Lau Ow Bew*, 141 U.S. 583 (1891). This Petition does not raise such concerns; meriting denial.

The Petition presents two questions for this Court to consider. Yet, the Court need not answer either question through this Petition. Additionally, the Court should not go beyond the bounds of the questions posed by Petitioner. A petition for writ of certiorari requires "clear, definite and complete disclosures concerning the controversy," and the Court should limit its review to the questions directly posed. *S. Power Co. v. N.C. Pub. Serv. Co.*, 263 U.S. 508, 509 (1924).

As to the first question in the Petition, Mr. Geddes argues that there is no difference between the standards of the Fourth and Fourteenth Amendments as it relates to excessive force claims. However, a brief examination of this Court's two seminal cases on the subject–*Graham v. Connor*, 490 U.S. 386 (1989) and *Kingsley v. Hendrickson*, 576 U.S. 389 (2015)–reveal that there are distinctions between the two excessive force tests, and that these differences persist even after this Court's decision in *Kingsley*.

As to the second question in the Petition, Mr. Geddes argues that the Court should determine when the protection of the Fourth Amendment ends and the protection of the Fourteenth Amendment begins. Mr. Geddes suggests that there is a split in circuit authority on the issue. However, at least seven circuit courts of appeal agree with the approach used by the Tenth Circuit Court of Appeals, and the issue need not be resolved by this Court at this time.

Alternatively, even if the Court were inclined to examine the questions posed in the Petition, the history of this case provides additional reasons that this Petition is not a good vehicle to answer such questions. First, the individual Respondents/Defendants raised the affirmative defense of qualified immunity, and any ambiguity in the law demonstrates that they are entitled to it in this situation. Second, there is no basis for liability against the Weber County since there is no evidence of multiple similar occurrences of excessive force at the Jail. Third, many of the arguments raised in the Petition were never before the district court, and therefore not properly preserved. For all these reasons this Court should decline to grant the petition for writ of certiorari.

I. There are material differences between the excessive force standards of the Fourteenth and Fourth Amendments.

When excessive force occurs that is in violation of the United States Constitution, a plaintiff may bring a claim under 42 U.S.C. § 1983. Excessive force claims can be maintained under either the Fourth, Fifth, Eighth, or the Fourteenth Amendments, but each

amendment is applicable at different stages of the arrest and incarceration process, and each requires a different test. This Brief focuses only on the Fourth and Fourteenth Amendments' standards.

In *Graham v. Connor*, 490 U.S. 386 (1989), this Court set forth a test for excessive force violations stemming from the Fourth Amendment. Likewise, in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), the Court announced a similar, but not identical, test for excessive force violations stemming from the Fourteenth Amendment. Petitioner argues that the *Kingsley* test is functionally the same as the *Graham* test, and therefore invoking the Fourteenth Amendment in his complaint instead of the Fourth Amendment is a distinction without a difference. However, Mr. Geddes's petition fails to cite the tests from these cases, and a cursory review reveals they remain distinct from each other.

In *Graham*, the Court held that to show a Fourth Amendment excessive force violation, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397. *Kingsley*, by contrast, held that to show a Fourteenth Amendment excessive force violation, "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable." *Kingsley*, 576 U.S. at 396-97.

First, it must be noted that the framing of *Graham* calls for determining whether officers' conduct was "objectively reasonable," while *Kingsley* calls for determining whether their conduct was "objectively

unreasonable." Notwithstanding the opposite framing of these two tests, as noted in the Tenth Circuit's opinion in this case, "the Fourth Amendment inquiry is arguably more favorable to a plaintiff because it protects from unreasonable seizures of *free citizens*." (App. at 21-22.) The Tenth Circuit elaborated on this thought in its opinion: "On the other hand, the balance is recalibrated in the pre-trial detainee context in a manner arguably less favorable to the plaintiff; there, the inquiry is whether the conduct was related to 'legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained,' so long as that conduct is not punitive in character." (App. at 22 (*quoting* *Kingsley*, 576 U.S. at 397) (brackets in original).) As such, the tests discussed in *Graham* and *Kingsley* are distinct from each other. *Kingsley* never says it is expressly adopting the *Graham* standard, and there is no reason the Court should do so at this time.

Furthermore, *Graham* and *Kingsley* listed different factors to consider in determining an excessive force violation. To guide this inquiry in *Graham*, the Court gave three factors to consider: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396 (brackets added).

Conversely, non-exclusive factors found in *Kingsley* include: "[1] the relationship between the need for the use of force and the amount of force used; [2] the extent of the plaintiff's injury; [3] any effort made by the officer to temper or to limit the amount

of force; [4] the severity of the security problem at issue; [5] the threat reasonably perceived by the officer; and [5] whether the plaintiff was actively resisting." 576 U.S. at 397 (brackets added).

Clearly, the factors from *Graham* and *Kingsley* are different. *Kingsley* lists several more factors to consider than what is listed in *Graham*. "These additional factors supplement the *Graham* analysis with an additional deference 'to policies and practices that in th[e] judgment of jail officials are needed to preserve internal order and discipline and to maintain institutional security.'" (App. at 22 (*quoting Kingsley*, 576 U.S. at 397) (brackets in original).)

Suffice to say, the tests from *Graham* and *Kingsley*, even if similar, are distinct, and Petitioner has not shown otherwise. Moreover, Petitioner's attempt to blend excessive force tests is expressly rejected in *Graham*. 490 U.S. at 393 (rejecting the notion "that all excessive force claims brought under § 1983 are governed by a single generic standard.")

Additionally, Petitioner only ever raised a Fourteenth Amendment claim in his complaint and subsequent briefing. (App. at 3-4.) His attempt to blend the tests of the Fourteenth Amendment and Fourth Amendment is a futile attempt to save his inadequate pleading and briefing in this case. This is not a sufficient reason to grant a petition for certiorari. While *Kingsley* changed Fourteenth Amendment excessive force analysis, Petitioner has never had recourse under the Fourteenth Amendment as explained in Point II, and therefore *Kingsley*'s similarity to *Graham* is immaterial. That is, this case serves as a poor vehicle to determine whether the

Fourth and Fourteenth Amendment excessive force standards are the same since Petitioner only has recourse under the Fourth Amendment, and its standard has not changed since *Graham*. Petitioner adamantly refused to plead his claim under the Fourth Amendment, and this Court should not reward his stubbornness by granting this Petition. (App. at 27-29.)

II. Circuits generally agree on the line of demarcation between the Fourth and Fourteenth Amendments.

In Petitioner's second question, he argues that if the Court determines the Fourth and Fourteenth Amendment excessive force standards are in fact different, then the goal posts regarding when the protection of one amendment ends and the other begins should be moved. That is, he argues the Court should determine that his Fourteenth Amendment rights attach earlier than a judicial probable cause determination. This is different than how most circuit courts of appeal have ruled on the issue, and the Court should decline to answer it with this Petition.

First, the Tenth Circuit has held at least since 1991 that the Fourteenth Amendment does not apply prior to a judicial probable cause determination. *See* *Austin v. Hamilton*, 945 F.2d 1155, 1160 (10th Cir. 1991). More recently, the Tenth Circuit again ruled that the Fourteenth Amendment does not apply to an arrestee prior to a judicial probable cause determination and that different legal standards apply to different constitutional claims. This is because, "the Fourth Amendment, not the Fourteenth, governs excessive force claims arising

from 'treatment of [an] arrestee detained *without a warrant*' and '*prior to* any probable cause hearing.'" *Walton v. Gomez (In re Estate of Booker)*, 745 F.3d 405, 419 (10th Cir. 2014) (brackets and italics in original) (*quoting* *Austin*, 945 F.2d at 1160). And as noted by the Tenth Circuit's opinion in this case, "[t]he Supreme Court's decision in *Kingsley* did not alter or disturb [the Tenth Circuit's] precedent on this point." (App. at 17 n.4.)

Petitioner argues that the Tenth Circuit's reasoning comes from interpreting this Court's opinion in *Bell v. Wolfish*, 441 U.S. 520, 536 (1979). However, *Austin* does not reference *Bell* at all, and in fact is interpreting *Graham* to determine that arrestees are protected by the Fourth Amendment and not the Fourteenth Amendment. *See* *Graham*, 490 U.S. at 395 n.10 (where this Court declined to determine "whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins.")

The issue Petitioner is attempting to get at is when does pretrial detainment begin, and thus when do the protections of the Fourteenth Amendment attach? To that end, it is true that this Court's language from *Bell* expressly states that: "A person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest." *Bell*, 441 U.S. at 536 (brackets in original) (internal quotation marks and citations omitted). And if pretrial

detention does not begin until this point, then by extension, the Fourteenth Amendment's protections cannot attach until then either. As such, the Tenth Circuit's line of demarcation on where the protections of the Fourth Amendment end and the protections of the Fourteenth Amendment begin is in harmony with this Court's statements on the issue.

Petitioner argues that there is discord between the circuit courts on this issue, but this is not entirely accurate. While Petitioner does identify a possible circuit court split, the Tenth Circuit is squarely aligned with majority of other jurisdictions, and therefore there is no need to correct the Tenth Circuit's opinion.

At least seven other circuit courts, beyond the Tenth Circuit, have decided the issue the same way.

This includes the First,[1] Second,[2] Third,[3] Sixth,[4] Seventh,[5] Eighth,[6] and Ninth Circuits.[7] All told then,

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[1] *Miranda-Rivera v. Toledo-Dávila*, 813 F.3d 64, 70 (1st Cir. 2016) (applying the Fourth Amendment to a situation where the alleged excessive force occurred when officers were transporting an arrestee "to the police station and then to a jail cell.")

[2] *Powell v. Gardner*, 891 F.2d 1039, 1044 (2nd Cir. 1989) ("We think the Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned or formally charged, and remains in the custody (sole or joint) of the arresting officer.").

Petitioner incorrectly claims the Second Circuit "appears to have taken a hybrid approach that depends both on a judicial determination of probable cause on relinquishment of custody." (Pet. at 25.) However, he fails to cite any Second Circuit authority for this statement.

[3] *United States v. Johnstone*, 107 F.3d 200, 206-07 (3rd Cir. 1997) ("*Graham* shows us that a citizen can remain 'free' for Fourth Amendment purposes for some time after he or she is stopped by police and even handcuffed. Hence, pre-trial detention does not necessarily begin the moment that a suspect is not free to leave; rather, the seizure can continue and the Fourth Amendment protection against unreasonable seizures can apply beyond that point.").

[4] *Aldini v. Johnson*, 609 F.3d 858, 866 (6th Cir. 2010) (establishing "the line between Fourth and Fourteenth Amendment protection at the probable-cause hearing" for those arrested without a warrant).

Petitioner claims "the Sixth Circuit appears to have changed its position to the Fourteenth Amendment" (Pet. at 24-25), but does not provide any authority for this notion.

at least eight circuits have definitively ruled the Fourth Amendment governs until a probable cause determination.

The Eleventh Circuit has stated that the answer remains unanswered. *Crocker v. Beatty*, 995 F.3d 1232, 1247 (11th Cir. 2021) ("For someone who could plausibly be characterized as either an arrestee or a pretrial detainee, it's hard to say whether the Fourth or Fourteenth Amendment should govern the analysis. The day may well come when we need to clarify the distinction. Today, though, isn't that day.") (footnote omitted).[8] However, the concurrence from *Crocker* acknowledged that "it seems fair to say that

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[5] *Villanova v. Abrams*, 972 F.2d 792, 797 (7th Cir. 1992) ("[T]he Fourth Amendment governs the period of confinement between arrest without a warrant and the preliminary hearing at which a determination of probable cause is made, while due process regulates the period of confinement after the initial determination of probable cause.").

[6] *Wilson v. Spain*, 209 F.3d 713, 715 (8th Cir. 2000) (applying Fourth Amendment standard to an arrestee at jail that had not received a probable cause determination).

[7] *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996) (holding "that the Fourth Amendment sets the applicable constitutional limitations on the treatment of an arrestee detained without a warrant up until the time such arrestee is released or found to be legally in custody based upon probable cause for arrest").

[8] Petitioner claims the Eleventh Circuit "appear[s] to have landed at the position that the Fourteenth Amendment applies" (Pet. at 24), but then states that it "has acknowledged that the issue has remained unanswered." (*Id.* at 24 n.7.)

most circuits to have answered this question have lined up behind the Fourth Amendment." *Id.* at 1255 (Newsom, J., concurring).

To that end, the only Circuits that have definitively ruled the Fourteenth Amendment governs are the Fourth[9] and Fifth Circuits.[10]

Petitioner overstates the extent of the circuit split on this issue. As demonstrated, most circuit have lined up behind the approach taken by the Tenth Circuit, and this approach is consistent with this Court's decision in *Graham*. So, while two circuits may differ from the rest of the circuits regarding this issue, this is insufficient reason to grant the Petition. The Tenth Circuit's approach is correct, and there is no legal error to correct in this case.

Moreover, to hold that the Fourteenth Amendment's protection begin after the initial seizure would unnecessarily muddy the lines of protection

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[9] *Orem v. Rephann*, 523 F.3d 442, 446 (4th Cir. 2008) ("[t]he point at which Fourth Amendment protections end and Fourteenth Amendment protections begin is often murky," but an excessive-force claim based on events during post-arrest transport "requires application of the Fourteenth Amendment.").

[10] *Valencia v. Wiggins*, 981 F.2d 1440, 1443-44 (5th Cir. 1993) ("We do not believe that the Fourth Amendment provides an appropriate constitutional basis for protecting against deliberate official uses of force occurring . . . *after* the incidents of arrest are completed, *after* the plaintiff has been released from the arresting officer's custody, and *after* the plaintiff has been in detention awaiting trial for a significant period of time" (italics in original).)

between the Fourth Amendment and Fourteenth Amendments. It would require Courts to do additional analysis of whether an initial seizure was complete or not. The line between when a seizure ends and detainment begins is inherently fuzzy, and courts need not establish such boundaries.

The better reasoned approach recognizes that the probable cause determination provides a concrete touchpoint that is legally required to happen every time a person is detained for a prolonged period. With this approach there is no guessing when the protection of one amendment ends and the other begins. Most circuit courts have ruled the same way, and there is no compelling need for this Court to visit the issue via this Petition.

III. The Petition could be denied for other reasons.

Alternatively, even if the Court were inclined to entertain the questions posed by the Petition, there are alternative grounds that can be invoked on the merits to affirm the Tenth Circuit's position. Therefore, the Court should deny the Petition at this stage. A "respondent may make any argument presented below that supports the judgment of the lower court." *Hankerson v. North Carolina*, 432 U.S. 233, 240 n.6 (1977) (*citing Massachusetts Mutual Ins. Co.* v. *Ludwig*, 426 U.S. 479 (1976)). Throughout the proceedings of this case, Respondents have consistently argued (1) that they are entitled to the affirmative defense of qualified immunity, (2) that there is no basis for liability against Weber County irrespective of whatever excessive force theory is applied, and (3) that Petitioner failed to preserve the

question of whether the excessive force standards enunciated under *Graham* and *Kingsley* are the same.

A. Respondents are entitled to qualified immunity.

Respondents recognize that qualified immunity is not the thrust of this Petition. However, they point it out now, so the Court is aware of it as another reason to deny the Petition.

If this matter were to reach the merits, this Court can rule that individual Respondents are entitled to qualified immunity and affirm the lower courts' opinions.[11] A defendant who raises an affirmative defense of qualified immunity shifts the burden to the plaintiff as a matter of law to show that (1) the defendant's actions violated a constitutional right and (2) the right was clearly established at the time of the defendant's conduct. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Romero v. Board of County Comm'rs*, 60 F.3d 702 (10th Cir. 1995).

Qualified immunity shields an officer from suit "when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). It is further important to emphasize that the inquiry must be made in light of the specific context of the case and

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[11] Petitioner previously conceded, in his briefing before the Tenth Circuit, to the entry of summary judgment as to his claims against Respondents Drake and Toone. His Petition as it relates to these two Respondents should be denied on this basis alone.

not as a broad proposition. *Saucier v. Katz*, 533 U.S. 194, 201. The inquiry is the more "particularized" acts of the defendants in the case at hand. *Id.* at 202.

Respondents have consistently argued throughout this litigation that they are entitled to qualified immunity because (1) their actions did not violate the Fourteenth or the Fourth Amendment, and (2) even if they did, such a violation was not clearly established at the time of the conduct. If this Petition were to reach the merits, qualified immunity would provide ample reasons to affirm the lower courts decisions.

Additionally, Respondents point out that if the Court were inclined to grant the Petition based upon the questions presented, this only bolsters the argument that the law is not clearly established. And if the law is not clearly established, Respondents would be entitled to qualified immunity. As such, the Petition should be denied.

B. There is no basis for liability against Weber County.

Similarly, Respondents have argued that there is no basis for liability against Weber County throughout these proceedings. Petitioner's Second Cause of Action is a municipal liability claim against Weber County. (App. at 83-84.) A governmental entity under 42 U.S.C. § 1983 may only be liable "if the governmental body itself 'subjects' a person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation." *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (*citing Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 692 (1978)). "But, under § 1983, local governments are responsible only

for 'their *own* illegal acts.' They are not vicariously liable under § 1983 for their employees' actions." *Id.* (italics in original) (internal citations omitted). A plaintiff must prove that "'action pursuant to official municipal policy'" caused their injury. *Id.* "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Id.* at 61.

Thus, a plaintiff must show (1) a Constitutionally defective policy, (2) that the final policymaker who implemented the policy or custom acted with "deliberate indifference" to the constitutional rights of the plaintiff, and (3) that the policy or custom "directly caused" and was the "moving force" behind an underlying constitutional violation that caused constitutional harm to the plaintiff. *See generally Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397 (1997).

Respondents have argued throughout these proceedings that Petitioner cannot show any of these needed elements of municipal liability. Particularly because there is no evidence of any similar incidents at the Weber County Jail, Petitioner cannot show deliberate indifference on the part of the County. The Court should deny his Petition on this basis as well.

C. Petitioner did not preserve his question regarding excessive force standards in the district court.

Finally, on appeal with the Tenth Circuit, Petitioner raised new legal issues that were not before the district court. This Court should not consider these issues and can dismiss this Petition for this

reason alone. This Court "ordinarily will not decide questions not raised or litigated in the lower courts." *Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (*citing California v. Taylor*, 353 U.S. 553, 556 n.2 (1957)).

Specifically, Petitioner asks this Court to answer whether the excessive force standards from *Graham* and *Kingsley* are the same. However, *Kingsley* was never mentioned, by any party, at any stage of the proceedings in the district court. In fact, Plaintiff's complaint references the legal standard of "deliberate indifference." (App at 69.) It is inappropriate for Petitioner to argue for the first time on appeal that *Kingsley* blended the Fourth Amendment and Fourteenth Amendment standards without ever having argued this in the district court, but in fact alleging that "deliberate indifference" was the standard. Therefore, Plaintiff forfeited this argument by not preserving it in the district court at any time.

CONCLUSION

Petitioner does not assert compelling reasons to grant his Petition. His only protection, based upon the facts of this case, is provided under the Fourth Amendment, and he has not stated a valid claim under this theory throughout these proceedings. The Fourth Amendment and Fourteenth Amendment tests for excessive force remain distinct, even if similar, and the Court should not merge the two tests that have always been separate. Additionally, the vast majority of circuit courts agree Fourteenth Amendment protections do not attach until a probable cause determination, and there is no need to overrule the majority of circuits on this issue. Finally, even if the Court were inclined to answer the questions posed

by Petitioner, this particular Petition is not a good case to accomplish such means because there are ample reasons to affirm the decisions of the lower courts.

Respectfully submitted this 3rd day of January, 2023.

Frank D. Mylar
Counsel of Record
MYLAR LAW, P.C.
2494 Bengal Blvd.
Salt Lake City, Utah 84121
Phone: (801) 858-0700
office@mylarlaw.com
Counsel for Respondents