No. 22-556

IN THE

Supreme Court of the United States

N.S., ONLY CHILD OF DECEDENT, RYAN STOKES, BY AND THROUGH HER NATURAL MOTHER AND NEXT FRIEND, BRITTANY LEE; NARENE JAMES,

Petitioners,

v.

KANSAS CITY BOARD OF POLICE COMMISSIONERS; MICHAEL RADER; LELAND SHURIN; ANGELA WASSON-HUNT; ALVIN BROOKS; MAYOR SLY JAMES; DARRYL FORTE; RICHARD SMITH; WILLIAM THOMPSON; DAVID KENNER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Police officers are entitled to qualified immunity unless (1) they violated a federal statutory or constitutional right; *and* (2) the unlawfulness of their conduct was "clearly established" at the time. To be clearly established, the law must have a clear foundation in existing law, and the specificity of that prior precedent is "especially important in the Fourth Amendment context." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam).

Here, no factually similar precedent illustrated that Officer William Thompson violated clearly established law when he fired his service weapon at a suspect fleeing a fellow officer. After the suspect made eye contact with Officer Thompson—in full police uniform and pointing his gun—the suspect ran past Officer Thompson to a car, opened and closed the driver's door, and ran back toward the pursuing officer. Officer Thompson could not see the suspect's right hand after he reached the car. While running back toward the pursuing officer, the suspect raised his hands to his waist. Making the split-second decision that he was preventing an ambush on his fellow officer, Officer Thompson fired three times, killing the suspect. The questions presented are:

1. When no factually analogous precedent clearly establishes a constitutional violation—and the most analogous circuit precedent indicates that the officer's actions were constitutional—whether courts should follow this Court's precedent and grant qualified immunity, or apply a more lenient standard and deny qualified immunity.

2. Whether this Court should abolish its long-standing doctrine of qualified immunity.

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INTRODUCTION

Five federal judges—through district court proceedings and two appeals—evaluated the summary-judgment record in this case. Each concluded Officer William Thompson is entitled to qualified immunity. No judge dissented from either opinion or from the denial of rehearing *en banc*.

In the latest opinion affirming the grant of qualified immunity, the court of appeals concluded the alleged constitutional violation was not clearly established. The most factually analogous circuit precedent indicated that Officer Thompson's conduct was constitutional and, at the very least, created substantial uncertainty on that question—far short of what is required for petitioners to show clearly established law. This case is a straightforward application of this Court's consistent qualified-immunity precedents.

Here, petitioners allege a circuit split on the abstract question of what level of factual similarity is required to show clearly established law, but the alleged split does not exist. Precedent from the various circuits shows they apply the same law in the same way. Any differences in case outcomes are driven by the facts of specific cases, not some overarching distinction in how circuits apply the law.

Even if the Court wanted to review either question presented, this case is a poor vehicle in which to do so. Most significantly, petitioners waived an argument they now claim is central to this case, which would substantially complicate review of this record. This, along with additional impediments to effective review, compels denial of the petition.

Finally, the court of appeals' decision is correct in all respects, and this Court should not abandon its longstanding application of qualified immunity.

This Court should deny the petition.

STATEMENT OF THE CASE

Against this Court's consistent command, petitioners' statement of the case is replete with "facts" Officer Thompson never knew at the time of the incident. The qualified immunity analysis "is limited to 'the facts that were knowable to the defendant officer[]' at the time [he] engaged in the conduct in question." *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (per curiam) (quoting *White v. Pauly*, 580 U.S. 73, 77 (2017) (per curiam)). "Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant." *Ibid.*; *see also Kingsley v. Hendrickson*, 576 U.S. 389, 399 (2015) ("[W]e have stressed that a court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer."). Accordingly, respondents' statement of the case contains facts known to Officer Thompson at the time of the incident.

I. Facts Known to Officer Thompson.

For over 20 years, William Thompson has served the community as an Officer in the Kansas City Police Department. Pet.App. 188. On July 28, 2013, Officer Thompson and his partner were on foot patrol, assigned to a certain parking lot in downtown Kansas City, Missouri. *Ibid.* In the early-morning hours, Officer Thompson received a radio message that "other officers were pursuing two men suspected

of theft." Pet.App. 36. The radio transmission included specific descriptions of the suspects, their direction of travel, and identification of the alleged crime, stealing. *Ibid.* That transmission alerted Officer Thompson that the suspects were headed toward his location. Pet.App. 4.

Seconds later, Officer Thompson observed Ryan Stokes—who matched the radio description—run around the corner of a building into the parking lot. Stokes ran in the direction of Officer Thompson, toward a car parked in the lot. Pet.App. 4, 19. "Stokes held his hands and arms close to his body as he ran, with his elbows bent, stationary, and close to his body." Pet.App. 19. Although Officer Thompson consistently testified he saw a gun in Stokes' right hand, the court of appeals assumed Stokes did not for its analysis. Pet.App. 5.

Officer Thompson drew his service weapon, pointing it at Stokes. Pet.App. 20. Stokes continued to run toward Officer Thompson, and when they were less than fifteen feet apart—Officer Thompson being in full police uniform and pointing his gun at Stokes—Stokes looked directly at Officer Thompson. C.A. App. 0096, 1489, 1491, 2102. Instead of surrendering, Stokes ran past Officer Thompson, continuing toward the car. *Ibid.*

Once Stokes reached the car, he opened the driver's side door, the door closest to Officer Thompson. Pet.App. 4. Out of his peripheral vision, Officer Thompson saw his fellow officer, Officer Straub, round the corner of the building and run into the parking lot; Straub was the officer in foot-pursuit of Stokes. Pet.App. 20. Stokes closed the car door and "ran in the direction of the approaching officer,

Officer Straub." *Ibid.* Officer Thompson could not see Stokes' right hand. *Ibid.*

As Stokes moved toward Officer Straub, he raised his hands to his waist, with Officer Thompson still unable to see Stokes' right hand. *Ibid.* Officer Straub was only ten feet from Stokes. C.A. App. 2071. Believing Stokes was going to shoot Officer Straub, and having a split second to react, Officer Thompson fired three times, hitting Stokes twice. C.A. App. 0096, 2099. Stokes later died. *Ibid.*

Although Stokes was unarmed at the time Officer Thompson fired, a gun was found on the driver's seat of the car Stokes accessed. Pet.App. 20-21. A mere seven to ten seconds elapsed between the time Officer Thompson first saw Stokes and when Officer Thompson fired his weapon. Pet.App. 20.

II. Legal Framework.

In their lawsuit, petitioners asserted a Fourth Amendment excessive-force claim against Officer Thompson under 42 U.S.C. § 1983.[1] At summary judgment, Officer Thompson asserted qualified immunity, which is the gravamen of the subsequent proceedings.

"The qualified immunity rule seeks a proper balance between two competing interests." *Ziglar v.*

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[1] Petitioners also asserted claims against the Kansas City Police Board and the Chief of Police under 42 U.S.C. § 1983 and *Monell v. Department of Social Services*, 436 U.S. 658 (1978), as well as a state-law wrongful death claim against Officer Thompson and the Board. Petitioners do not discuss these claims in their petition; they focus solely on the excessive-force claim and the attendant grant of qualified immunity. *See, e.g.*, Pet. 7.

Abbasi, 137 S. Ct. 1843, 1866 (2017). "On one hand, damages suits 'may offer the only realistic avenue for vindication of constitutional guarantees.'" *Ibid.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). "On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Ibid.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). Qualified immunity strikes this balance by giving officials "'breathing room to make reasonable but mistaken judgments about open legal questions.'" *Ibid.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

"[O]fficers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (citation omitted). "'Clearly established' means that, at the time of the officer's conduct, the law was 'sufficiently clear that every reasonable official would understand that what he is doing' is unlawful." *Ibid.* (quoting *al-Kidd*, 563 U.S. at 741).

This Court has "repeatedly told courts not to define clearly established law at too high a level of generality." *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021) (per curiam). Rather, "[t]he rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Wesby*, 138 S. Ct. at 590 (quotation omitted). "This requires a high

'degree of specificity.'" *Ibid.* (quoting *Mullenix v. Luna*, 577 U.S. 7, 13 (2015) (per curiam)).

This authority is particularly relevant here, as "specificity is especially important in the Fourth Amendment context, 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 (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)). "Use of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (quoting *Mullenix*, 577 U.S. at 13).

III. Procedural History.

Following discovery, respondents moved for summary judgment, with Officer Thompson asserting qualified immunity from the § 1983 claim.

1. In its first attempt, the district court denied qualified immunity to Officer Thompson, ruling that "[a]s a general matter," the right to be free from excessive force is clearly established. Pet.App. 49. Based on that "clearly established" right, the district court concluded that genuine issues of material fact precluded qualified immunity.

2. On interlocutory appeal, the Eighth Circuit reversed. The court held that the district court did not uphold its "threshold duty" to make a "thorough determination" of Officer Thompson's assertion of qualified immunity. Pet.App. 38. The district court's

order "did little more than summarize the parties' allegations and decide that the combination of a '*general* . . . right to be free from excessive force' and the presence of 'genuine issues of material fact' precluded summary judgment." *Ibid.*

The court remanded the case "for a second look," providing specific guidance to the district court: "On remand the court should begin by specifically identifying the plaintiff-friendly version of the disputed facts, rather than, as it did before, simply reciting the parties' general allegations." Pet.App. 39. "It must then evaluate whether Thompson, in light of all the information available to him at the moment, violated clearly established law when he shot Stokes." Pet.App. 40.

3. On remand, the district court complied, setting out the background proceedings and uncontroverted facts. Pet.App. 14-21. The district court began its analysis by setting forth the plaintiff-friendly version of disputed facts, then engaging in the qualified-immunity inquiry. Pet.App. 21-29.

Appropriately conducting the full analysis this time, the district court concluded Officer Thompson was entitled to qualified immunity. It made that finding on *both* prongs of the inquiry. Pet.App. 24-29. That is, the district court concluded (1) that no constitutional violation occurred; *and* (2) the right at issue was not clearly established. *Ibid.*

4. Petitioners appealed. The Eighth Circuit set forth the qualified-immunity standard, noting its discretion to address the two prongs in either order. Pet.App. 5; *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The court of appeals proceeded to the second prong, because the lack of clearly established law

was sufficient to affirm. Specifically, the court explained that the most factually analogous Eighth Circuit precedent held that an officer's use of force in a similar situation was constitutional. Pet.App. 5-6 (discussing *Thompson v. Hubbard*, 257 F.3d 896, 898 (8th Cir. 2001)). The court identified substantial dissimilarities in the cases petitioners cited to proffer a clearly established right, explaining that, at most, these authorities created uncertainty for an officer, far short of this Court's required standard. Pet.App. 7-8. Accordingly, the court of appeals affirmed.

Petitioners filed a petition for rehearing and rehearing *en banc*, which the court of appeals denied without dissent. Pet.App. 56-57. This petition follows.

REASONS FOR DENYING THE PETITION

Attempting to obtain review of the lower courts' careful application of this Court's consistent precedent, petitioners manufacture a circuit split, present the Court with a case that is a poor vehicle to resolve either question presented, and attack a decision that was correct in all respects. This Court should deny the petition.

I. There Is No Circuit Split.

Instead of framing their alleged circuit split in the traditional way—claiming cases with similar facts are decided differently across circuits—petitioners allege a more abstract split. They claim circuits are divided on the level of factual specificity required to show a "clearly established" right under the second prong of this Court's qualified-immunity test. Pet. 12-18.

To the extent this Court will entertain discussion of this abstract split, petitioners are incorrect that any dichotomy exists. Authority from each identified circuit illustrates the circuits simply apply this Court's precedents to factual records before them. Any varying outcome in cases—either within or across circuits—is due to factual circumstances of particular cases, not systematic differentiation of legal standards.

As previously summarized, *supra* at 5-6, extensive authority defines the "clearly established" inquiry. "To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent." *Wesby*, 138 S. Ct. at 589. The rule must be "settled" law, meaning it is "dictated by controlling authority" or "a robust consensus of cases of persuasive authority." *Id.* at 589-90 (citations omitted). It is insufficient for the rule to be merely "suggested" by precedent, it must be "clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Ibid.*

To be sure, there does not need to be a case "directly on point," but existing precedent must place the rule "beyond debate." *Ibid.* (citation omitted). A plaintiff makes this showing by offering prior authority that "clearly prohibit[s] the officer's conduct in the particular circumstances before him." *Ibid.* This specificity is especially important in the Fourth Amendment context, where plaintiffs must "identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." *White*, 137 S. Ct. at 552.

Finally, "there can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Wesby*, 138 S. Ct. at 590. But this exception is reserved for truly rare circumstances[2]; "a body of relevant case law is usually necessary." *Ibid.* (citation omitted).

Petitioners seek to dilute the test, but this Court confirms it is a "demanding standard," one that protects "all but the plainly incompetent or those who knowingly violate the law." *Wesby*, 138 S. Ct. at 589 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Just last term, this Court summarily, and unanimously, reversed denials of qualified immunity on this precise issue—the lack of particularized authority. *Bond*, 142 S. Ct. at 11-12; *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7-8 (2021) (per curiam).

Rather than being "somewhat conflicting" (Pet. 10, 11), these standards provide guideposts to lower courts in evaluating the variety of factual scenarios before them. Any variation among decisions is attributable to facts of particular cases, not an overarching dichotomy of legal analysis.

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[2] *See, e.g.*, *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam) (applying the "rare obvious case" exception where an inmate was held for six days "in a pair of shockingly unsanitary cells," which were covered in "massive amounts of feces," were "frigidly cold," and had clogged drains, forcing the inmate "to sleep naked in sewage.").

A. The Eighth Circuit adheres to this Court's consistent precedents and does not conflict with other circuits.

In their first question presented, petitioners claim the Eighth Circuit requires "factually identical precedent" to illustrate clearly established law (Pet. i), a refrain repeated throughout the petition. *See* Pet. 13, 14, 18. It is this characterization that petitioners claim conflicts with other circuits.

Unfortunately for petitioners, that court has expressly rejected petitioners' portrayal. In the Eighth Circuit, a plaintiff "does not have to point to a nearly identical case on the facts for the right to be clearly established." *Banks v. Hawkins*, 999 F.3d 521, 528 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 2674 (2022). "Our precedent does not set such a prohibitively difficult standard." *Ibid.*

The court in *Banks* did more than just recite these standards; it described a series of cases in which the Eighth Circuit *applied* these principles. The court discussed, for example, *Howard v. Kansas City Police Department*, 570 F.3d 984 (8th Cir. 2009), where it found that pushing a shirtless suspect onto hot asphalt causing him second degree burns during questioning was clearly established as a constitutional violation, because it occurred while the suspect complained of pain. *Howard*, 570 F.3d at 987. In finding that right clearly established, the court relied on prior cases involving unconstitutional seizures by overly tight handcuffs. *Id.* at 991. "It mattered not that hot asphalt is different from tight restraints . . . or that the duration of the challenged conduct differed from that in the cited decisions." *Banks*, 999 F.3d at 529 (discussing *Howard*, 570 F.3d

at 991-92). "Existing case law made the constitutional violation sufficiently clear, even in unique circumstances." *Ibid.*

Howard is not the only example *Banks* identified; the court cited *nine* examples of cases in which the Eighth Circuit found a clearly established right despite a lack of identical circumstances. *See id.* at 529 & n.7 (citing *Luer v. Clinton*, 987 F.3d 1160, 1164, 1169-70 (8th Cir. 2021); *Quraishi v. St. Charles Cnty.*, 986 F.3d 831, 839 (8th Cir. 2021); *Robbins v. City of Des Moines*, 984 F.3d 673, 681 (8th Cir. 2021); *Bell v. Neukirch*, 979 F.3d 594, 607-08 (8th Cir. 2020); *Z.J. ex rel. Jones v. Kansas City Bd. of Police Comm'rs*, 931 F.3d 672, 683-84 (8th Cir. 2019); *Johnson v. City of Minneapolis*, 901 F.3d 963, 971 (8th Cir. 2018); *Shekleton v. Eichenberger*, 677 F.3d 361, 367 (8th Cir. 2012); *Rohrbough v. Hall*, 586 F.3d 582, 586-87 (8th Cir. 2009); *Brown v. City of Golden Valley*, 574 F.3d 491, 499-500 (8th Cir. 2009)).

This is not to say the Eighth Circuit fails to adhere to this Court's admonition "not to define clearly established law at too high a level of generality." *Bond*, 142 S. Ct. at 11. Nor does it mean individual judges will always agree about whether a body of authority is particularized enough that "every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Wesby*, 138 S. Ct. at 590. Indeed, there was a dissent in *Banks*, and the court of appeals opinion here illustrates that an appropriate degree of specific authority remains necessary. Judges are carefully considering—as they are supposed to—the facts of the particular case before them alongside the body of relevant precedent.

That is all that is happening in *Goffin v. Ashcraft* as well. 977 F.3d 687 (8th Cir. 2020). There, Judge Kelley disagreed about whether existing precedent clearly established the right at issue, but even her dissenting opinion explained that existing Eighth Circuit precedent did not require identical precedent. *Id.* at 696 (Kelley, J., dissenting). And that was true even *before* that court decided *Banks*.

Further, *Banks* remains good law in the circuit (as do the other discussed cases). And they conclusively disprove petitioners' characterization of Eighth Circuit authority as requiring "virtually identical facts" to show clearly established law. *See* Pet. 18. That is simply not the law in the Eighth Circuit. *See also Capps v. Olson*, 780 F.3d 879, 886 (8th Cir. 2015) ("For a constitutional right to be clearly established, there does not have to be a previous case with exactly the same factual issues" (citation omitted)); *Craighead v. Lee*, 399 F.3d 954, 962 (8th Cir. 2005) ("[T]he issue is not whether prior cases present facts substantially similar to the present case but whether prior cases would have put a reasonable officer on notice that the use of deadly force in these circumstances would violate [the plaintiff]'s right not to be seized by the use of excessive force.").

B. The Fifth and Sixth Circuits likewise follow this Court's precedents and are not in conflict with other circuits.

Petitioners claim the Fifth and Sixth Circuits also require factually identical precedent to show clearly established law. Once again, decisions from those circuits show otherwise.

In the Fifth Circuit, "[t]he central concept is that of fair warning: The law can be clearly established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Trammell v. Fruge*, 868 F.3d 332, 339 (5th Cir. 2017) (internal quotation marks and citations omitted). That the Fifth Circuit "has not previously considered an identical fact pattern does not mean that a litigant's rights were not clearly established." *Juarez v. Aguilar*, 666 F.3d 325, 336 (5th Cir. 2011). "As long as the officials received fair notice that their conduct violated the litigant's rights, the right was clearly established." *Ibid.*

Ignoring this precedent, petitioners direct the Court to *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019). But petitioners neglect to discuss the court's *application* of the test there, one which drew no dissent. Not only was the plaintiff unable to identify particularized authority, the court of appeals described that "[t]o the extent we can identify clearly established law in excessive-force cases, it supports [the officer], not [the plaintiff]." *Id.* at 877. Thus, it was unquestionably proper for the court to deny qualified immunity. Petitioners instead cherry-pick certain words from the court's discussion of the general legal standard, which petitioners believe are helpful to their narrative. But that discussion is grounded squarely in this Court's precedent, repeatedly citing and quoting this Court's cases. *Morrow*, 917 F.3d at 874-76. What's more, petitioners omit reference to footnote 5, where the court expressly includes the principles petitioners

believe essential: "Of course, '[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.'" *Id.* at 875 n.5 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)).

Petitioners also offer two separate opinions from individual Fifth Circuit judges, but those opinions do not establish any split. First is Judge Willett's separate opinion in *Zadeh v. Robinson*, 928 F.3d 457 (5th Cir. 2019), but it fails to cite single case from any other circuit, nor does it illustrate the Fifth Circuit is different from any others. Petitioners nevertheless cite to this opinion time and again (Pet. 11, 13, 18, 35), leaning on its quote that "courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part). But that quote is unsupported by citation to any decision of any circuit. To be sure, Judge Willett wrote this opinion to express his "broader unease with the real-world functioning of modern immunity practice," not to illustrate a concrete circuit split. *Ibid.* But for purposes of the present discussion, his opinion does not illustrate the Fifth Circuit applies a legal standard different than others.

Judge Dennis' dissenting opinion in *Cope v. Cogdill*, 3 F.4th 198 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2573 (2022), doesn't help either. There, he criticized the panel majority for "defin[ing] the clearly established right in an overly narrow manner" by requiring "a case with virtually identical facts to prove that this excessively narrow description of the right has been clearly established."

Cope, 3 F.4th at 218 (Dennis, J., dissenting). But the basis for criticism was Judge Dennis' belief that the majority deviated from the Fifth Circuit's *own precedent*, as well as this Court's precedent. *See id.* at 218-20 (discussing, e.g., *Jacobs v. W. Feliciana Sheriff's Dep't*, 228 F.3d 388 (5th Cir. 2000); *Taylor*, 141 S. Ct. 52). Thus, even in that dissent's view, the problem was the application of governing law to particular facts in the case, not an overarching difference in applicable circuit law.

The Sixth Circuit tells a similar story. There, petitioners cite two cases, both decided unanimously, both applying this Court's consistent precedent, and both acknowledging an identical case is unnecessary.

In *Gordon v. Bierenga*, 20 F.4th 1077, 1082 (6th Cir. 2021), *cert. denied*, 143 S. Ct. 302 (2022), the court reversed a denial of qualified immunity. It expressly stated that "[a] case 'directly on point' is not required, but 'existing precedent must have placed the statutory or constitutional question beyond debate,'" and the court appropriately recognized the elevated importance of particularized precedent in Fourth Amendment cases. *Id.* at 1082. Applying that precedent—and recognizing that the case presented "a close call"—the court concluded that prior precedent did not "squarely govern[]" the facts at issue. *Id.* at 1083-85 (citation omitted). Petitioners' apparent disagreement with that unanimous outcome does not illustrate that the Sixth Circuit is applying a different analytical framework.

Nor does *Kenjoh Outdoor, LLC v. Marchbanks*, 23 F.4th 686 (6th Cir. 2022) help petitioners. There, the unanimous panel again began by recognizing that "although the plaintiff need not provide 'a case

directly on point,' the 'existing precedent must have placed the . . . question beyond debate.'" *Id.* at 694 (quoting *Mullenix*, 577 U.S. at 12). The court discussed prior Sixth Circuit precedent *rejecting* the rule the plaintiff wanted, explaining that the plaintiff "attempt[ed] to get around this by generalizing its right." *Ibid.*

Without discussing that analysis, petitioners seize on a single quote, where the court says it rejected qualified immunity "because not a single judicial opinion ha[s] held the official's action unconstitutional." Pet. 14. First, that conclusion can be understood only in the context of the broader opinion, which explained that the most analogous circuit precedent *rejected* constitutional liability. Second, petitioners' quotation included a parenthetical noting "quotation marks omitted." Pet. 14. But that's a significant omission here, where that quote actually comes from *this Court's* own precedent:

> All in all, we will do here what the Supreme Court did in *al-Kidd*. We will "affirm[] the application of qualified immunity" because it is "apparent from the complaint that the law was not clearly established because 'not a single judicial opinion' ha[s] held the official's action unconstitutional." [*Crawford v. Tilley*, 15 F.4th 752, 766 (6th Cir. 2021)] (quoting *al-Kidd*, 563 U.S. at 741).

Kenjoh Outdoor, 23 F.4th at 695. Far from showing a circuit split, *Kenjoh Outdoor* illustrates the Sixth Circuit dutifully applies this Court's precedents.

Finally, a survey of Sixth Circuit precedent illustrates that petitioners' characterization of that

circuit's precedent is incorrect. *See, e.g.*, *Caskey v. Fenton*, No. 22-3100, 2022 WL 16964963, at *8 (6th Cir. Nov. 16, 2022) (rejecting defendants' argument that the law was not clearly established, explaining that the "requested scenario reaches a level of specificity that defies the Supreme Court's instruction that factual scenarios need not be identical to put officers on notice of the rights violation caused by their conduct"); *Lee v. Russ*, 33 F.4th 860, 863 (6th Cir. 2022) (*denying* qualified immunity and applying the governing standard that the facts "need not be identical, but they must be similar enough that the other case squarely governs this one" (citation omitted)); *Courtright v. City of Battle Creek*, 839 F.3d 513, 520 (6th Cir. 2016) ("Requiring any more particularity than this would contravene the Supreme Court's explicit rulings that neither a 'materially similar,' 'fundamentally similar,' or 'case directly on point'—let alone a factually identical case—is required, and that the specific acts or conduct at issue need not previously have been found unconstitutional for a right to be clearly established law." (citation omitted)).

Petitioners' manufactured "circuit split" is no split at all. This Court should deny the petition.

C. The remaining circuits discussed by petitioners apply the doctrine in the same way.

On the other side of petitioners' alleged split, they identify the First, Third, Fourth, Seventh, Ninth, and Eleventh Circuits as holding "that the law can be clearly established even if prior case law is not an exact match." Pet. 15. The petition gives examples of these circuits finding clearly established law

despite the lack of an identical factual analog. Little discussion of these cases is necessary here, however, because all they illustrate is that these circuits apply the doctrine just like the Fifth, Sixth, and Eighth Circuits, as discussed. Outcomes are driven by factual circumstances the courts encounter, not by a disagreement on legal framework.

Moreover, each of these circuits readily utilizes the clearly-established test to grant qualified immunity when the plaintiff is unable to identify particularized case law illustrating the rule at issue is clearly established. *See, e.g.*, *Rahim v. Doe*, 51 F.4th 402, 412 (1st Cir. 2022) (granting qualified immunity because the plaintiff "failed to meet its burden to identify controlling authority or a consensus of persuasive authority sufficient to put the officers on notice that their conduct violated the law"); *Rivera v. Monko*, 37 F.4th 909, 919 (3d Cir. 2022) (granting qualified immunity because the plaintiff did not identify "controlling authority, or a robust consensus of persuasive authority" that the "right defendants violated was not beyond doubt"); *Sharpe v. Winterville Police Dep't*, No. 21-1827, 2023 WL 1787881, at *6 (4th Cir. Feb. 7, 2023) (granting qualified immunity because there was "no precedent in this Circuit nor consensus of authority from the other Circuits establish[ing that an officer's] actions were unconstitutional"); *Doxtator v. O'Brien*, 39 F.4th 852, 863 (7th Cir. 2022) (granting qualified immunity because the authority plaintiff presented was not "at all close to being particularized to the facts of [this] case" and was insufficient to "satsif[y] the high bar required to defeat" qualified immunity (citation omitted)); *Seidner v. de Vries*, 39 F.4th 591, 602 (9th

Cir. 2022) (granting qualified immunity because of "material differences" between the use of force in prior cases the plaintiff presented); *Wade v. Daniels*, 36 F.4th 1318, 1328-29 (11th Cir. 2022) (granting qualified immunity where the plaintiff failed to cite to any "analogous cases showing that [the officer] violated a clearly established right").

* * *

Petitioners' alleged circuit split is illusory. The Eighth, Fifth, and Sixth Circuits each faithfully apply this Court's precedents. Contrary to petitioners' suggestion, none of them require "identical" or "nearly identical" precedent to find clearly established law; in fact, they expressly reject that approach.

Tellingly, in 2019, this Court denied a petition for writ of certiorari presenting very similar questions to those presented here. *See* Petition, *I.B. v. Woodard* (No. 18-1173). On the clearly-established test, the petitioners in *I.B.* said the Eighth Circuit was on the *lenient* side of the split, because it "uses 'a flexible standard, requiring some, but not precise factual correspondence with precedent, and demanding that officials apply general, well-developed legal principles.'" Petition at 17, *I.B. v. Woodard* (No. 18-1173) (quoting *Mountain Pure, LLC v. Roberts*, 814 F.3d 928, 932 (8th Cir. 2016)). And that was *before Banks*, where the Eighth Circuit *expressly* rejected the need for a "nearly identical case." *See supra* at 11-12. But characterizing the Eighth Circuit as lenient wouldn't play well for petitioners' case here, so we are now told the Eighth Circuit is on the strict side of the split, requiring identical precedent. Simply put, the "split" is illusory, and the

characterization of circuit precedent is driven by individual petitioners' interests.

Petitioners' manufactured circuit split does not warrant this Court's review.

II. This Case Is A Poor Vehicle To Address Petitioners' Questions Presented.

Although no circuit split exists, this case is also unfit for review for at least five reasons: petitioners waived an argument they now contend is central to the case; petitioners misconstrue the Eighth Circuit's precedents; the second question presented was not raised below; the district court separately found for respondents on the first prong of qualified immunity; and this Court has denied review of these questions many times and has no shortage of opportunities to review them in a proper case.

1. If the Court grants this petition, it will be forced to resolve a waiver issue that petitioners inject into this case. The court of appeals held that no clearly established law existed, especially considering "that Stokes had just accessed the inside of an unknown vehicle before raising his hands." Pet.App. 7.

Petitioners are highly critical of this, claiming the court of appeals improperly relied on the "defendant-friendly fact" that Stokes opened and shut the car door, a fact they claim to have "squarely disputed" in the district court. Pet. 27. Not so. As the court of appeals explained:

> We acknowledge the family's attorney treated this fact as disputed at oral argument. But this position appears to be a late-breaking change: the family's appellate brief assumes it

> to be true, and it was never contested before the district court.

Pet.App. 4 n.2.

Now, in their petition to this Court, petitioners challenge this, but they don't point to anywhere in the district court record where they contested this fact; to the contrary, the record supports the court of appeals. C.A. App. 0096, 0125, 2096. In any event, petitioners separately waived this issue by *conceding* the fact in their court of appeals briefing. *See* C.A. Appellant Br. 19 ("[Officer] Straub saw [Stokes] at the driver's side door of the red Monte Carlo after the door was open and the lights were on inside. . . . [Stokes] saw Straub, shut the car door and moved toward Straub.").

Irrespective of how this waiver issue resolves, it provides a substantial impediment to effective review. Before this Court could even establish a factual record for review of the opinion below, it would have to resolve these underlying waiver questions. To the extent this Court is interested in the questions presented, it should wait for a case with a clean record, free from issues of waiver and contested concessions.

2. As discussed, petitioners mischaracterize the Eighth Circuit as requiring factually "identical" precedent. *See supra* at 11-13; *Banks*, 999 F.3d at 528 (holding that a plaintiff "does not have to point to a nearly identical case on the facts for the right to be clearly established."). And the court of appeals below did not apply a different rule. As discussed *infra* at 25-33, the court did not require identical precedent; rather, it concluded that the most factually analogous binding precedent available, at

the very least, created substantial uncertainty as to the constitutionality of the conduct, thereby justifying qualified immunity. Pet.App. 6-8.

Petitioners therefore place this case in the awkward posture of asking this Court to reverse the Eighth Circuit, which already applies the very rule petitioners want applied. If this Court wants to revisit its qualified-immunity jurisprudence, it should do so in a case where the circuits' precedents are accurately portrayed, and one in which the decision being reviewed is out of step with this Court's consistent authority.

3. Petitioners' second question presented suggests that the "judge-made doctrine of qualified immunity should be narrowed or abolished." Pet. i. Petitioners' discussion of this issue frequently invokes Justice Thomas' concerns with the underpinnings of this Court's qualified-immunity jurisprudence. *See* Pet. 30-31. Justice Thomas most recently outlined his concerns in *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421-22 (2021) (Thomas, J., respecting the denial of certiorari). He concluded by suggesting that the Court review those issues "in an appropriate case," but explained that "[t]he parties did not raise or brief these specific issues below." *Id.* at 2422.

So too here. Petitioners did not raise or brief these issues below, and this Court should not review them here in the first instance. *See, e.g.*, *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (holding that a "question was not raised in the Court of Appeals and is not properly before us").

4. The district court granted qualified immunity to Officer Thompson on *both* prongs of the analysis,

concluding that petitioners did not establish a constitutional violation, *and* that the alleged violation was not clearly established. Pet.App. 24-29. The court of appeals addressed *only* the second prong. Pet.App. 5. This precludes effective review for two reasons.

First, any reversal by this Court would not impact the outcome of this case, because Officer Thompson remains entitled to qualified immunity on the first prong. Second, petitioners appear to ask the Court to go further than just the second prong, suggesting the Court should not only hold that the law is clearly established, but also that Officer Thompson *violated* the clearly established law. *See, e.g.*, Pet. 29 ("Officer Thompson violated clearly established law when he shot and killed Mr. Stokes."). But the court of appeals did not opine on that issue, and this Court should not either. *See City of S.F. v. Sheehan*, 575 U.S. 600, 609 (2015) ("The Court does not ordinarily decide questions that were not passed on below.").

5. This is far from the first time this Court has been asked to review its qualified-immunity precedents. Just last term, this Court denied a petition presenting a nearly *identical* question to the petition here, without even requesting a response following the respondent's waiver. *See* Order Denying Petition for Writ of Certiorari, *Tucker v. City of Shreveport, Louisiana*, No. 21-569 (Dec. 6, 2021). There is no reason for a different result now.

Further, given all the hurdles to effective review here, even if this Court were inclined to opine on these questions, it should wait for an appropriate case. There is no shortage of opportunities; for purposes of illustration, a Westlaw search shows that

the courts of appeals issued 17 opinions involving the grant or denial of qualified immunity in January 2023 alone. This Court should not stretch to grant review in this ill-suited case.

III. The Decision Below Is Correct.

Petitioners dedicate at least half their petition to discussing the substantive merits of their questions presented, illustrating this is much more an effort to revive individual claims than it is to resolve any circuit split. In any event, the court of appeals' decision is correct in all respects—not a single judge on either panel disagreed, nor did any judge dissent from the denial of rehearing *en banc*.

A. The court of appeals correctly affirmed the grant of qualified immunity to Officer Thompson.

In concluding the violation asserted by petitioners was not clearly established, the court of appeals explained that its most factually analogous precedent held that conduct substantially similar to Officer Thompson's was within the bounds of the Fourth Amendment. *See* Pet.App. 5-7 (discussing *Hubbard*, 257 F.3d at 898-99). Even though the court of appeals recognized some minor factual distinctions between the two cases, *Hubbard*—at the very least—made the state of the law uncertain in the circumstances Officer Thompson encountered, thereby compelling qualified immunity.

The court of appeals then dispensed with the three cases petitioners offered to show clearly established authority. Each was substantially different from this case—in constitutionally significant ways—and came nowhere near the

particularity required, especially in the Fourth Amendment context. Pet.App. 7-8. None did anything more than "create uncertainty for someone in Officer Thompson's shoes," well short of what this Court's precedents require. Pet.App. 7.

In petitioners' extended discussion seeking to upend the court of appeals' careful analysis, they make (at least) two critical analytical errors—one with respect to how they form the relevant factual record, and one with respect to how they analyze the law.

1. On the factual record, petitioners improperly use facts from the perspective of *other officers* with a different vantage point than Officer Thompson. This misstep permeates petitioners' discussion of the incident, with petitioners frequently referencing Officer Straub's subjective belief that Stokes was surrendering. But Officer Straub had an entirely different perspective on the incident than did Officer Thompson. Most critically, Officer Straub could see both of Stokes' hands as he raised them; it is undisputed that from the time Stokes accessed the vehicle, Officer Thompson never saw, and could not see, Stokes' right hand.

This Court's precedents confirm petitioners' tactic is wrong. Because actions under § 1983 (and in turn qualified immunity) evaluate individual actions of individual officers, this Court has "stressed" that the reasonableness of force used must be evaluated "from the perspective and with the knowledge of the defendant officer." *Kingsley*, 576 U.S. at 399. Equally problematic is petitioners' refrain that Officer Thompson should have known Stokes was "unarmed" after he accessed the vehicle. While that

turned out to be true, it is irrelevant to the qualified immunity inquiry; it is undisputed that Officer Thompson could not see Stokes' right hand at any time after he accessed the vehicle. It is only *after the fact* that Officer Thompson learned Stokes was unarmed after Stokes left the car, and "[f]acts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant." *Hernandez*, 137 S. Ct. at 2007.

Not surprisingly, with this Court's precedents faithfully applied, the applicable record is quite different. Stokes matched the description of a suspect fleeing from a theft. He ran into the parking lot where Officer Thompson was on patrol, and he made eye contact with Officer Thompson as he ran by him, with Officer Thompson dressed in full police uniform and pointing his service weapon at Stokes. Instead of surrendering, Stokes ran past Officer Thompson, to a car door and opened it. He then shut the door, turned in the direction of Officer Straub—from whom he had been fleeing for several city blocks—and began running toward him. Once Stokes began to run away from the vehicle, Officer Thompson could never see his right hand. As Stokes raised his hands to his waist while moving toward Officer Straub, Officer Thompson thought Stokes was about to ambush his fellow officer, and he fired his service weapon three times, striking Stokes twice.

Also lost in petitioners' discussion is that this entire incident—from the time Officer Thompson first saw Stokes, to the time Officer Thompson fired—occurred in seven to ten seconds. By the time Stokes reached the car, opened then closed the door, and began running back toward the officer from

whom he was fleeing, Officer Thompson had a split second to decide how to react when he saw Stokes raising his right arm in a manner consistent with raising a weapon. The qualified-immunity inquiry provides for just this circumstance, recognizing "that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Kisela*, 138 S. Ct. at 1152 (quoting *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)).

This proper factual record, evaluated alongside relevant precedent, illustrates the law is not clearly established here.

Before proceeding to the legal analysis, it is important to address petitioners' suggestion that this Court should summarily reverse the court of appeals' decision because it supposedly resolved factual issues in favor of respondents. *See* Pet. 28-29. Nothing could be further from the truth. The first time this case came to the court of appeals, it remanded for the *express purpose* of identifying the plaintiff-friendly version of the facts. Pet.App. 38-39. Then, once the case returned, the court meticulously recited the plaintiff-friendly facts, being careful to limit its analysis accordingly. *See, e.g.*, Pet.App. 5 ("Applying these plaintiff-friendly facts, our task is now to evaluate the family's excessive-force claim against Officer Thompson.").

The court of appeals actually went above and beyond in this respect. For example, Officer Thompson testified that he gave verbal commands to Stokes, saying "drop the gun" and "show me your hands." C.A. App. 2109. Officer Thompson's partner

likewise testified that she heard him give commands, which she remembered as "get on the ground." C.A. App. 0125. Petitioners argued, however, that because Officer Straub—who was in a foot chase with Stokes and hadn't yet arrived from around the building when Officer Thompson began his interaction with Stokes—testified that he did not *hear* any commands, they should be entitled to the inference that no commands whatsoever were given. Although it is far from clear that such an inference is warranted, the court of appeals assumed Officer Thompson gave no verbal warnings. Pet.App. 4.

Similarly, Officer Thompson testified he saw a gun in Stokes' right hand when he entered the parking lot. C.A. App. 0095, 2104. Petitioners claimed this was controverted by the testimony of two other officers who testified that they did not see Stokes with a weapon; but *both* also testified that they *could not see Stokes' hands* in the parking lot. Pet.App. 19-20. Despite the lack of specific evidence controverting Officer Thompson's testimony, the court of appeals explained that "even if Officer Thompson insists that he saw a gun in Stokes's hand during the chase, we must assume that he did not have one." Pet.App. 5.[3]

At every juncture, the court of appeals deferred to petitioners' factual narrative. The *only* concrete example petitioners allege of a "defendant-friendly" fact is that Stokes opened and closed the car door. But as discussed (*supra* at 21-22), petitioners

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[3] These two inferences also render this case ill-suited for review, as this Court would also have to determine if such inferences were proper.

conceded this fact in their appellate briefing and waived the ability to argue otherwise. *See also* Pet.App. 4 n.2. There is no basis for this Court to summarily reverse.

2. Petitioners also make a significant error in their legal analysis, flipping the clearly-established burden on its head. Specifically, petitioners claim the court of appeals relied on a case that was not factually similar enough to illustrate that Officer Thompson's conduct was *not* a clearly established constitutional violation. But that has it backwards—it is the *plaintiff's* burden to show the specific violation *is* clearly established. *Rivas-Villegas*, 142 S. Ct. at 8 ("Thus, to show a violation of clearly established law, [the plaintiff] must identify a case that put [the officer] on notice that his specific conduct was unlawful.").

As the court of appeals correctly described, its closest prior authority suggested that Officer Thompson's conduct was constitutional; but, at the very least, even with some minor factual distinctions, it created uncertainty. Pet.App. 5-7. And the three cases petitioners offered to show otherwise came nowhere near the level of specificity required, especially in Fourth Amendment cases. Pet.App. 7-8. These conclusions are correct.

The court of appeals relied primarily on *Hubbard*, where officers chased a suspect who fell over a fence. 257 F.3d at 898. While getting up, he looked over his shoulder at an officer, "and moved his arms as though reaching for a weapon at waist level." *Ibid.* The officer ordered the suspect to stop, then fired, killing the suspect; no weapon was found. *Ibid.* The Eighth Circuit found the officer's conduct

constitutional, explaining that a police officer "is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun." *Id.* at 899. Here, the court of appeals described the similarity in Stokes' body movements, as well as the similarity of the officers' obstructed views, unable to see the suspects' hands. Pet.App. 6. Thus, even though there were some factual distinctions, *Hubbard* at least created substantial uncertainty.[4]

Petitioners' efforts to revive the three citations they offered the court of appeals fare no better. Each has fundamental and constitutionally significant distinctions that render them incapable of serving as clearly established authority. Petitioners begin with *Tennessee v. Garner*, 471 U.S. 1 (1985), but this Court has already described that "the general rules set forth in *Garner* and *Graham* do not by themselves create clearly established law outside an

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[4] Moreover, the court of appeals did not need to reach the additional Eighth Circuit cases respondents cited in their briefing, which reinforced *Hubbard*. *See, e.g.*, *Billingsley v. City of Omaha*, 277 F.3d 990 (8th Cir. 2002) (upholding qualified immunity for off-duty officer who never saw a home-invasion suspect with a weapon, chased the suspect out of the house causing him to jump off a deck, then fatally shot the suspect in the back when he turned his shoulder because the officer could not see the suspect's hand); *Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012) (affirming summary judgment on qualified immunity for officer who never saw the unarmed suspect with a weapon despite prior reports he had one, heard several witnesses shouting that the suspect was unarmed as the officer approached, yet fired at the suspect while the suspect's arms were raised).

obvious case." *Kisela*, 138 S. Ct. at 1153 (citation omitted).[5] And to see how different the actual facts in *Garner* are from the facts here, this Court should look no further than petitioners' *own description* of *Garner* in their court of appeals brief: "The officer saw Garner's hands, saw his face and saw no weapon and did not believe Garner to be armed." C.A. Appellants Br. 44. The record here is precisely the opposite.

Ngo v. Storlie, 495 F.3d 597 (8th Cir. 2007) does not help petitioners either, because the victim's hands were visible the entire time. Further, the victim (a plain-clothes police officer) did not match the description of the suspect and was kneeling in the street with his unarmed hands waving above his head. *Id.* at 603. In that circumstance, it is unsurprising the officer was not entitled to qualified immunity when he opened fire on the victim with a semiautomatic weapon. *Ibid.*

Nor does *Nance v. Sammis*, 586 F.3d 604 (8th Cir. 2009) provide clearly established law. Once again, the officers there could see the suspect's hands the entire time. *Id.* at 610-11. The suspect, a 12-year-old boy, had a toy gun that remained in his waistband. *Ibid.* At least one witness testified that the boy raised both arms above his head before being shot. *Ibid.* Although the officers disputed what he did with his hands, the court affirmed the denial of summary judgment. *Ibid.* Here, of course, there is no suggestion that Stokes *ever* had his hands raised over his head, nor is there any suggestion that

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[5] As the discussion of then-existing Eighth Circuit precedent shows, this is far from the "rare, obvious case."

Officer Thompson could see Stokes' right hand after he closed the car door.

Petitioners' cases are insufficient to show clearly established law, *especially* considering contrary Eighth Circuit authority involving much more similar facts. Most critically, Officer Thompson could never see Stokes' right hand after he opened and shut the car door. The court of appeals correctly explained that governing authority *at least* created uncertainty for Officer Thompson, justifying qualified immunity.[6]

The court of appeals' decision is correct in all respects.

B. This Court should not abandon qualified immunity.

This Court has consistently applied qualified immunity for decades. "The Court's embrace of qualified immunity has . . . been emphatic, frequent, longstanding, and nonideological." Aaron J. Nielson & Christopher J. Walker, *A Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1858 (2018). Indeed, just last term, this Court unanimously reversed two denials of qualified immunity due to the absence of particularized authority to show clearly

[6] Petitioners also cite to cases from other circuits, claiming they show a "robust consensus" that could separately form clearly established law. Pet. 25-26. First, that is not accurate when factually analogous cases *within the governing circuit* illustrate the law is *not* clearly established. Second, in any event, petitioners did not make this argument, or cite these cases, to the court of appeals. *See OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 38 (2015) ("Absent unusual circumstances—none of which is present here—we will not entertain arguments not made below.").

established law. *Bond*, 142 S. Ct. at 11-12; *Rivas-Villegas*, 142 S. Ct. at 7-8.

The doctrine is especially critical for law enforcement. Unlike many other types of public office, the use of physical force—and the attendant risk of physical harm—is an inherent part of the job. And situations where force may be required often do not present an adequate opportunity to determine whether the force contemplated would be considered "reasonable" for purposes of the Fourth Amendment. The problem is two-fold; what constitutes an "unreasonable" search or seizure under the Fourth Amendment is a necessarily fact-specific inquiry, and thus "it may be difficult for an officer to know whether a search or seizure will be deemed reasonable given the precise situation encountered." *Ziglar*, 137 S. Ct. at 1866. Aggravating this problem, "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

As a result of these complexities, "reasonable mistakes can be made as to the legal constraints on particular police conduct" and it "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." *Saucier*, 533 U.S. at 205. But rather than holding an officer to the "20/20 vision of hindsight" by requiring law enforcement to be their own on-the-spot lawyer, conducting fact-intensive analyses in seconds, qualified immunity reflects a policy choice to "defer[]

to the judgment of reasonable officers on the scene." *Id.* at 204-05.[7]

As is the case with any immunity, controversy is unavoidable, as "the resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative." *Harlow*, 457 U.S. at 813-14. But because of the "limitless factual circumstances" in which the use of force may be used, there is not always "a clear answer as to whether a particular application of force will be deemed excessive by the courts." *Saucier*, 533 U.S. at 205-06. Consequently, qualified immunity is the "best attainable accommodation of competing values." *Harlow*, 457 U.S. at 814.

As then-Chief Justice Warren put it: "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not [use force], and being mulcted in damages if he does." *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

CONCLUSION

This Court should deny the petition.

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[7] Due to the policy-oriented nature of qualified immunity, this Court should also defer to current debate about the scope of qualified immunity occurring within the politically accountable branches. They legislate and govern against the backdrop of this Court's qualified-immunity doctrine, and they are empowered to change it should they wish to do so.

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