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; AND DAVID KENNER,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents believe that the doctrine of qualified immunity empowers a police officer to barge onto the scene and (without warning) repeatedly shoot an unarmed, non-threatening, surrendering man in the back. That position is profoundly mistaken: it contravenes this Court's precedent, it defies common sense, and it gives reckless police officers like Officer Thompson free rein to kill people with impunity. No court should endorse that dangerous view. But the Eighth Circuit did in this case. This Court should review that erroneous decision for three independent reasons.

First, this case presents an ideal vehicle for this Court to recalibrate or abolish its qualified immunity jurisprudence. Respondents offer no convincing reason to turn down that valuable opportunity.

Second, the decision below further entrenches an acknowledged Circuit split over the level of factual similarity necessary to satisfy the clearly established requirement. Respondents' efforts to alleviate that Circuit conflict backfire. Rather than resolve the split, the cases cited by Respondents show that the clearly established test is so indecipherable that there is disagreement *within* Circuits on the proper standard. Unless this Court intervenes, the lower courts will remain "divided—intractably—over precisely what degree of factual similarity must exist" to defeat qualified immunity. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part).

Finally, the Court should summarily reverse the decision below. Respondents try to shore up the Eighth Circuit's feeble reasoning. But they make the same mistakes as the decision below: they draw inferences in the wrong direction, they apply a heightened version of the clearly established test, and they misconstrue governing precedent. All of this is wrong. The Court should grant certiorari and say so.

ARGUMENT

I. THIS CASE PRESENTS AN IDEAL VEHICLE TO RECONSIDER QUALIFIED IMMUNITY

As Petitioners have explained, qualified immunity is a broken doctrine in need of repair. Pet.29-35; Amicus Br. of Fourth Amendment Alliance. The Court should fix the doctrine or get rid of it altogether.

Respondents offer no persuasive reason to reject this invitation. They do not dispute that qualified immunity is a judge-made invention that finds no support in the text of Section 1983 or in the common law. They do not dispute that qualified immunity fails to achieve its putative goals. And they do not dispute that qualified immunity frustrates efforts to hold government officials accountable. Instead, Respondents recite a familiar refrain: Qualified immunity is "critical" to ensure that officers are not punished for making "split-second" decisions. Opp.34-35. That argument is incorrect, many times over.

First, Respondents' policy argument cannot override the plain terms of the statute, which supplies no

textual basis for qualified immunity. Pet.30-31; *Badgerow v. Walters*, 142 S. Ct. 1310, 1321 (2022).

Second, Respondents' contention rests on assumptions that have been empirically disproven. Data-driven studies have shown that, because of the widespread practice of indemnification, "officers are virtually never required to pay anything toward settlements and judgments against them." *E.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1805-06 (2018); Pet.32-33.

Third, even if qualified immunity were abolished or narrowed, the sky would not fall, since police officers would still escape liability for *objectively reasonable* "split-second" decisions. *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Respondents are therefore wrong in asserting that qualified immunity is necessary to protect officers from being "mulcted in damages." Opp.35.

Unable to defend qualified immunity on the merits, Respondents claim that this case is a poor vehicle because Petitioners did not undertake the pointless gesture of asking the Eighth Circuit to overrule this Court's jurisprudence. Opp.23. That argument refutes itself. It is well settled that "a party who forgoes an obviously futile task will not ordinarily be held … to have waived substantial rights." *E.g.*, *In re Two Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.*, 994 F.2d 956, 961 (1st Cir. 1993).

To be sure, this Court has sometimes declined to review questions that were not pressed or passed upon below. *Hormel v. Helvering*, 312 U.S. 552, 557-

58 (1941). But that practice is neither absolute nor appropriate here. *See id.* Petitioners ask this Court to answer a purely legal question that is squarely presented and outcome-determinative. Further factual development or percolation would not aid this Court's evaluation of the question presented—particularly since many judges on many courts have fully ventilated the arguments for and against qualified immunity. Pet.29-30.

At any rate, this Court has previously reconsidered its own precedent in cases where the parties had not briefed or argued the relevant issues in the lower courts. *See, e.g.*, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 79-80 (1938) (overruling *Swift v. Tyson*, 41 U.S. 1 (1842) even though its validity was not challenged below or in the petition). The Court should not hesitate to do the same here.

In a last-ditch effort to evade review, Respondents insist that there "is no shortage of opportunities" for this Court to reconsider qualified immunity. Opp.24-25. But that contention cuts in favor of certiorari. The large volume of qualified immunity decisions confirms that the question presented raises a recurring issue of national importance deserving of this Court's attention.

II. THE COURT SHOULD RESOLVE THE ACKNOWLEDGED CIRCUIT SPLIT ON THE PROPER APPLICATION OF THE "CLEARLY ESTABLISHED" TEST

Even if this Court passes on the opportunity to reconsider qualified immunity, it should grant

certiorari to ensure that courts apply the doctrine consistently.

A. The Circuit Split Is Genuine and Deep

Respondents rightly concede that six Circuits—the First, Third, Fourth, Seventh, Ninth, and Eleventh—consistently hold that the law can be clearly established even if prior case law is not an exact match. Opp.18-19; Pet.15-18. But they argue that Petitioners' split is "illusory" because the Fifth, Sixth, and Eighth Circuits apply the same rule. Opp.19-20.

That is demonstrably incorrect. Those three Circuits have issued numerous decisions demanding a heightened showing of factual similarity to satisfy the clearly established requirement. Pet.12-14.

Eighth Circuit: The Eighth Circuit routinely requires plaintiffs to identify existing precedent with indistinguishable (or close-to indistinguishable) facts. For example, in *Kelsay v. Ernst*, the Eighth Circuit reversed the district court's denial of qualified immunity because prior decisions did not exactly match the case at hand, which "involved a suspect who ignored an officer's command and walked away." 933 F.3d 975, 980 (8th Cir. 2019) (en banc); *see Hamner v. Burls*, 937 F.3d 1171, 1180 (8th Cir. 2019) (granting qualified immunity because no prior identical case involved "a prisoner with [plaintiff's] particular medical condition for 203 days under the conditions alleged"). And in *Goffin v. Ashcraft*, the Eighth Circuit faulted the plaintiff for failing to point to a prior case arising from the same precise factual scenario. 977 F.3d 687, 691-92 (8th Cir. 2020). Contrary to Re-

spondents' mischaracterization, Opp.13, Judge Kelly dissented in *Goffin* because the majority wrongly applied a heightened legal standard by requiring precedent "on the precise scenario of a suspect fleeing after a pat down that revealed no weapons to conclude that Ashcraft violated no clearly established law," 977 F.3d at 696.

The decision below follows the same pattern. The Eighth Circuit held that Officer Thompson did not violate clearly established law because prior cases from this Court and the Eighth Circuit did not precisely match the facts of this case. Pet.App.7-8.

Fifth Circuit: The Fifth Circuit, too, has issued several decisions applying this hairsplitting approach. *Morrow v. Meachum* is emblematic. 917 F.3d 870 (5th Cir. 2019). In *Morrow*, the Fifth Circuit held that a Section 1983 plaintiff must identify clearly established law with "specificity and granularity" to make the "extraordinary showing" required under the clearly established test. *Id.* at 874-76.

Respondents dismiss this formulation of the legal test as "cherry-pick[ed]" language. Opp.14. But the Fifth Circuit's own case law tells a different story. Many recent decisions have relied on *Morrow*'s rigid articulation of the clearly established test to grant qualified immunity to officers.

For example, in *Ramirez v. Escajeda*, the Fifth Circuit emphasized that the clearly established inquiry is "demanding" and requires courts to "'frame the constitutional question with specificity and granularity.'" 44 F.4th 287, 292-93 (5th Cir. 2022)

(quoting *Morrow*). Applying that rigorous standard, the court concluded that prior Circuit decisions involving similar facts were not "similar enough" to the officer's "use of a taser under these unique circumstances" to satisfy the clearly established requirement. *Id.* at 293-94; *see Salazar v. Molina*, 37 F.4th 278, 286-88 (5th Cir. 2022) (citing *Morrow* in support of conclusion that "none of [plaintiff's] cases is a close enough fit"). These decisions confirm what Judge Willett cogently observed: in the Fifth Circuit, a plaintiff "loses [if] no previous panel has ever held th[e] exact sort of [conduct] unconstitutional." 928 F.3d at 479 (op. of Willett, J.).

Sixth Circuit: Numerous decisions in the Sixth Circuit apply the same onerous rule. The petition features some of those cases. Pet.14. But there are more. For instance, in *Latits v. Phillips*, the Sixth Circuit acknowledged that the case was a "close call" in light of analogous Circuit precedent. 878 F.3d 541, 552-53 (6th Cir. 2017). But because those cases did not arise from the same set of facts, the majority determined that the law was not clearly established. *Id.* Judge Clay dissented. In his view, the majority "markedly raise[d] the legal barrier posed by the qualified immunity defense beyond any existing legal standard, making it virtually impossible for plaintiffs to overcome the defense." *Id.* at 556 (Clay, J., dissenting in part). More recently, in *Cunningham v. Shelby County*, the Sixth Circuit reversed the denial of qualified immunity because prior case law did not involve the same factual circumstances confronting the defendant officers. 994 F.3d 761, 766 (6th Cir. 2021).

Attempting to downplay this entrenched Circuit conflict, Respondents point to a handful of cases in which the Fifth, Sixth, and Eighth Circuits purportedly apply the more forgiving rule adopted by most Circuits. Opp.11-18. Even assuming those decisions state the majority rule, that does not alter the fact that, in practice, those Circuits repeatedly apply a supercharged clearly established test requiring plaintiffs to engage in a "scavenger hunt for prior cases with precisely the same facts." *Est. of Smart v. City of Wichita*, 951 F.3d 1161, 1168 (10th Cir. 2020). If anything, the cases cherry-picked by Respondents demonstrate that the clearly established standard has proven so unworkable that it has defied consistent application even *within* Circuits.[1] This Court should grant review to sort out these inter- and intra-Circuit conflicts.

B. This Is a Clean Vehicle to Resolve the Split

Respondents warn that there are several obstacles that would impede this Court's review of this question presented. Opp.21-25. Those warnings are misplaced.

First, Respondents claim that this Court would have to resolve a waiver issue before addressing the

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[1] *Banks v. Hawkins*, 999 F.3d 521 (8th Cir. 2021) proves this point. In *Banks*, Judge Kelly (joined by Judge Wollman) recognized that a plaintiff "does not have to point to a nearly identical case for the right to be clearly established." *Id.* at 528. But Judge Stras—the author of the decision below—dissented, complaining that the majority applied too lax of a standard. *Id.* at 531-33. Far from resolving the split, *Banks* demonstrates that the rule applied in the Eighth Circuit is panel-dependent.

question presented. Opp.21-22. Respondents are mistaken. This Court need not adjudicate any waiver dispute to answer whether the clearly established inquiry requires a Section 1983 plaintiff to locate prior case law with identical facts. But even if this Court felt inclined to resolve that issue before addressing the question presented, it could do so without much trouble. Even a cursory review of the District Court record confirms that Petitioners disputed the fact that Mr. Stokes opened the car door. Pet.27.

Second, Respondents contend that the decision below does not implicate the split, since the Eighth Circuit does not require plaintiffs to identify precedent involving the same facts. Opp.22-23. But, as explained above (and in the petition), that misunderstands the Eighth Circuit's typical methodology. Indeed, the decision below reflects the overly stringent clearly established test usually applied by the Eighth Circuit.

Third, Respondents argue that this case is a messy vehicle because the Eighth Circuit skipped to the second prong of the qualified immunity analysis. Opp.23-24. But that is a virtue, not a vice, given that Petitioners ask this Court to clarify the clearly established requirement at step two of the qualified immunity framework. If the Court concludes that the Eighth Circuit applied the wrong clearly established standard (as it should), the Eighth Circuit can address the first prong of the qualified immunity analysis on remand.

III. THE DECISION BELOW IS GRAVELY WRONG AND SHOULD BE SUMMARILY REVERSED

Even if the Court denies plenary review on the questions presented, it should summarily reverse the Eighth Circuit's decision. Existing precedent put Officer Thompson on fair notice that it was patently unconstitutional to repeatedly shoot an unarmed, non-threatening, surrendering man in the back without warning. Pet.19-29.

In resisting that conclusion, Respondents accuse Petitioners of making two errors: (1) misstating the facts, and (2) misconstruing the law. Opp.26. Respondents are wrong on both counts.

First, it is Respondents who badly misdescribe the facts. At multiple points in their brief, Respondents commit the cardinal sin of summary judgment: they view the evidence and draw multiple inferences in favor of Officer Thompson. *Contra Tolan v. Cotton*, 572 U.S. 650, 657-60 (2014) (per curiam).

- Respondents say that Mr. Stokes was not surrendering. Opp.3, 27. But the record shows that Mr. Stokes was trying to surrender and was following officer commands. Pet.App.4 (noting that Mr. Stokes "was trying to surrender" when he was shot); J.A. 2052-54, 2064.
- Respondents say Mr. Stokes ran past Officer Thompson and opened and closed the car door. Opp.27. But the evidence shows that Mr. Stokes "did not open the car door," that he never entered the car or retrieved anything from inside, and that he was facing Officer Straub with his hands up

when Officer Thompson opened fire. Pet.6, 27; J.A. 317, 326, 2052-55, 2064.

- Respondents say Officer Thompson could "never" see Mr. Stokes's right hand. Opp.27. But even the Eighth Circuit acknowledged that Officer Thompson "saw [Mr. Stokes] raise his hands to his waist." Pet.App.4. Curiously, Respondents elsewhere claim, inaccurately, that Officer Thompson saw a gun in Mr. Stokes's right hand. Opp.29. So, which is it?
- Respondents say Officer Thompson gave verbal commands to Mr. Stokes. Opp.28-29. But the record shows the opposite. J.A. 325-27, 2055-56, 2171, 2178.

Properly construed, the record establishes that Mr. Stokes was unarmed, non-threatening, and trying to surrender to officers by raising his hands above his waist, and that Officer Thompson failed to give Mr. Stokes an admittedly feasible warning or de-escalate the situation before resorting to deadly force. Under these circumstances, any officer—except a "plainly incompetent" one like Officer Thompson—would have known (and found it obvious) that it was unreasonable to repeatedly shoot Mr. Stokes in the back. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

Second, Respondents try to rehabilitate the Eighth Circuit's faulty legal analysis. Opp.30-33. But their efforts—which parrot the Eighth Circuit's nit-picky application of the clearly established test—fall short.

Respondents first contend that *Tennessee v. Garner*, 471 U.S. 1 (1985) is distinguishable because,

there, the police officer knew the suspect was unarmed. Opp.31-32. But Mr. Stokes was also unarmed. To be clear, there *are* some differences between *Garner* and this case. But those distinctions favor summary reversal. Unlike in *Garner*, where the officer announced himself and the felony suspect disobeyed the officer's order and tried to flee, 471 U.S. at 3-4, Officer Thompson failed to announce his presence or give any commands, and Mr. Stokes was surrendering with his hands up (not trying to escape), Pet.6.

Respondents also assert that *Ngo v. Storlie*, 495 F.3d 597 (8th Cir. 2007) is different because the victim there was a plain-clothes officer whose "hands were visible the entire time." Opp.32. What Respondents conveniently omit is that, in *Ngo*, the victim's hands were visible *next to a gun*. 495 F.3d at 601. Thus, this case is a much easier call than *Ngo*, since Mr. Stokes was raising his empty hands above his waist to surrender when Officer Thompson repeatedly shot him in the back without warning.

Respondents say *Nance v. Sammis*, 586 F.3d 604 (8th Cir. 2009) is inapposite because the suspect there (who had a toy gun) raised his hands "above his head." Opp.32. But the exact placement of the suspect's hands was not determinative (or relevant) in *Nance*; in its analysis, the Eighth Circuit simply observed that, as in this case, the suspect "may have raised his hand or hands" (without mentioning that they were over his head). *Nance*, 586 F.3d at 611.

Ultimately, *Garner*, *Ngo*, *Nance*, and the many other authorities cited in the petition (which Respondents do not address) clearly establish that Officer Thompson violated the Fourth Amendment

when he immediately resorted to deadly violence without giving a warning and shot an unarmed, surrendering man from behind. In fact, Respondents' own authority supports this result. In *Banks*, the Eighth Circuit held that its precedent (including *Nance*) clearly established that an officer "may not use deadly force against a suspect who did not present an imminent threat of death or serious injury, even if the officer felt attacked earlier and even if he believed the suspect had previously posed a threat." 999 F.3d at 529-31. So too here.

Against all this, Respondents hang their hat on *Thompson v. Hubbard*, 257 F.3d 896, 898 (8th Cir. 2001). Opp.30-31. But Respondents' regurgitation of the Eighth Circuit's reasoning is unavailing. As the petition explains, and as Respondents tacitly concede, *Hubbard* is inapposite. In *Hubbard*, the officer was responding to the scene of an armed robbery where shots were fired, chased the suspect through the city, and gave a command (which the suspect disobeyed). 257 F.3d at 898. None of that happened here.

This Court should summarily reverse the Eighth Circuit's decision.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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