No. _____

IN THE

Supreme Court of the United States

Jose Vega-Colon, individually and as administrator of the Estate of Anthony Vega-Cruz, Anthony Colon, Individually and as administrator of the Estate of Anthony Vega-Cruz
Plaintiffs-Respondent,

v.

Layau Eulizier, Officer, in his official and individual capacity,
Defendant-Petitioner,

Town of Wethersfield, John Does, I-XX, whose names and identities are not currently known.,
Defendants.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a court can deny qualified immunity when there are no material disputed issues of fact and all the United States Supreme Court and Circuit Court decisions containing similar factual circumstances have found no constitutional violations or have found the official to be entitled to qualified immunity?

2. Whether the Second Circuit erred by departing from this Court's qualified immunity precedent requiring consideration of all material undisputed facts and viewing the constitutionality of the officer's action from the perspective of an objectively reasonable officer?

LIST OF ALL PARTIES TO THE COURT OF APPEALS DECISION

Defendant/Appellant:
Officer Layau Eulizier

Plaintiffs/Appellees:
Jose Vega-Colon and Anthony Colon as
administrator of the Estate of Anthony Vega-Cruz

RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are directly related to this case:

- *Jose Vega-Colon, individually and as administrator of the Estate of Anthony Vega-Cruz, Anthony Colon, individually and as administrator of the Estate of Anthony Vega Cruz v. Layau Eulizier, in his official and individual capacity, Town of Wethersfield, John Does, I-XX, whose names are not currently known,* No. 23-1211-cv (2d Cir.) (order issued July 29, 2024)
- *Anthony Colon, individually and as administrator of the Estate of Anthony Vega-Cruz v. Layau Eulizier et al,* No. 3:21-CV-00175 (KAD) (CT Dist.) (opinion issued August 11, 2023)

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit affirming the District Court's ruling denying the motions for summary judgment based on qualified immunity on the Fourth Amendment excessive force claims against Officer Layau Eulizier.

OPINIONS BELOW

The Second Circuit Court of Appeals mandate denying Layau Eulizier's appeal is not reported. The Connecticut District Court' order denying Layau Eulizier's motion for summary judgment is not reported. Both are reproduced in the Appendix.

JURISDICTION

The Second Circuit Court of Appeals affirmed the Connecticut District Court's order denying Layau Eulizier's motion for summary judgement on July 29, 2024. The Connecticut District Court's order denying Layau Eulizier's motion for summary judgment was entered on August 11, 2023. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part: "The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizers shall not be violated . . . ." 42 U.S.C. Sec. 1983 provides, in part:

> Every person who, under color of any statute, ordinance, regulations, custom, or usage of any State ..., subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

42 U.S.C. § 1983.

STATEMENT OF FACTS

The statement of facts is taken from the District Court's ruling on the motion for summary judgment. On April 20, 2019, Plaintiffs decedent, Vega-Cruz, was operating his Infiniti G35 on or near the Silas Deane Highway in Wethersfield, Connecticut. At approximately 5:45 p.m., Officer Salvatore of the Wethersfield Police Department ("WPD") observed heavily tinted windows on Vega-Cruz's vehicle and observed the vehicle making a right turn while activating its left turn signal. While the vehicle was parked in a parking lot, Officer Salvatore checked the COLLECT system for the vehicle's license plates, which revealed that the plates were tied to the suspended registration of a Hyundai, thus indicating a misuse of Connecticut license plates. Officer Salvatore decided to conduct a motor vehicle stop, advising WPD dispatch of his decision. When Officer Salvatore activated his lights to conduct the stop, Vega-Cruz did not immediately stop, and instead drove off at a high rate of speed. Officer Salvatore advised dispatch that the driver had sped off and requested back up. Officer Salvatore promptly caught up with Vega-Cruz, who pulled over by 1078 Silas Deane Highway, where a Goodyear Auto Service store is located.

Defendant was in the same vicinity, received the request for back up, and decided to assist Officer Salvatore. As Officer Salvatore approached the vehicle on foot, Vega-Cruz sped off again, traveling north on the Silas Deane Highway. The road was wet, and the traffic was moderate. At this point in the timeline, the parties diverge as to what Defendant did, each citing the DashCam videos from both police cruisers. Ultimately, the parties agree that Vega-Cruz lost control of the vehicle, spun out, and came to a

stop, facing southbound in front of a parking lot servicing business at 943-957 Silas Dean Highway. After Vega-Cruz passed Defendant, Defendant performed a U-turn and accelerated toward Vega-Cruz's vehicle, hitting the front end of the vehicle before coming to a stop. Defendant's vehicle blocked Vega-Cruz's Infiniti from proceeding southbound. Defendant exited his vehicle with his firearm drawn. Vega-Cruz then began to drive in reverse. At this point, Officer Salvatore arrived at the scene. As Vega-Cruz backed up into the southbound lanes of the Silas Deane Highway, Officer Salvatore's vehicle collided with the Infiniti. It nonetheless continued in reverse, attempting to align the front of the vehicle in a northbound direction in the southbound lanes. Defendant then came around the front of Officer Salvatore's vehicle with his weapon drawn and yelled at the driver to "show me your hands." As the Infiniti began to move forward, Defendant fired two shots into the windshield, the first of which struck Vega-Cruz in the head. Sixty seconds elapsed from the time that Defendant began on an intercept course with the Infiniti to the time the shots were fired.

Additional facts taken from Plaintiffs Rule 56(a)2 Statement of Facts put the lower court's reliance on the speed and direction of travel of the suspect vehicle in context.

Plaintiff admits that 12 seconds elapsed from the time Officer Eulizier exited his cruiser to when the shots were fired. During this time, Plaintiffs vehicle reversed into the southbound lanes and Eulizier ran toward the front of the car. Plaintiff admits that the first shot was fired from Eulizier's gun from 4 feet 1 inch in front of the Infiniti, confirming the distance and position of the Defendant. It is unrefuted and the videos show that Eulizier was near the front of the

vehicle for about 2 seconds and fired the shots about one second after Vega-Cruz began to roll forward.

Plaintiff further admits that in the prior moments, Vega-Cruz was trying to flee the entire time, that he was driving at a high speed, the road was wet, the traffic was moderate and that his passenger said she was scared, thought she would die, thought of jumping out of the car, and asked him to stop but that he wouldn't.

REASONS FOR GRANTING THE PETITION

Police Officers must have clear standards guiding their actions within constitutional limits. They should be able to rely on clearly established law. This is especially true when they are faced with life-or-death decisions that must be made within seconds. When courts fail to apply clearly established law denying officers the fundamental right to qualified immunity before trial, officers are subjected to the risks and burdens of litigation, thereby inhibiting them in the performance of their duties and creating confusion as to the state of the law. "Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions." *Pearson v. Callahan,* 555 U.S. 223, 244-45 (2009).

Here, the Petitioner was forced to decide between abandoning both his right to self-defense and his duty to protect others and employing deadly force to stop the person creating the risk. The decision had to be made in literally a split second as the Petitioner was positioned less than 5 feet from the front of the suspect vehicle when the suspect ignored his orders and began to drive forward. When, as here, the Petitioner accepted the alleged disputed facts he should be afforded a full and fair analysis of clearly established law and qualified immunity.

1. THIS PANEL'S FAILURE TO CONSIDER CLEARLY ESTABLISHED LAW IS INCONSISTENT WITH OTHER CIRCUITS, SUPREME COURT AND EVEN PRIOR SECOND CIRCUIT PRECEDENT. THE RESULT IS THE DENIAL OF QUALIFIED IMMUNITY WHERE OFFICERS UNDER SIMILAR CIRCUMSTANCES HAVE NOT BEEN DENIED THE FUNDAMENTAL RIGHT TO HAVE QUALIFIED IMMUNITY DECIDED BEFORE TRIAL.

The Summary Order correctly found that "Eulizier accepts Plaintiff's version of the facts for purposes of this appeal; accordingly, we have jurisdiction to determine whether he is entitled to qualified immunity under those facts." At page 4. In fact, Petitioner in his brief and at oral argument did not challenge the alleged disputed facts and did not assert any disputed issues of fact. The Petitioner did ask the Court to consider the totality of undisputed facts and apply them to factually similar cases decided by this Court, the Second Circuit and other Circuit court decisions that contained similar facts pertaining to whether an officer in Petitioner's position could have objectively believed there was a threat of serious bodily injury to the Petitioner or others at the time of the use of deadly force.

The Appellate Court also correctly stated that the appeal "challenges the denial of summary judgment on qualified immunity grounds, arguing that the district court failed to properly analyze whether it was clearly established that his use of force violated the Fourth Amendment under the circumstances presented in this case." At page 3. This

purely legal question did not depend on a resolution of disputed facts.

Qualified immunity is a fundamental entitlement not to stand trial. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). This Court has identified qualified immunity as a threshold question. *Seigert v. Gilley,* 500 U.S. 226 (1991). Deciding qualified immunity is the core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden. *Plumhoff v. Rickard,* 572 U.S. 765, 772 (2014). *Pearson v. Callahan,* 555 U.S. 223 (2009), allowed courts to exercise discretion and skip to the clearly established prong of qualified immunity. Although the Court allowed discretion to skip the constitutional question, it has always mandated a decision on the clearly established law prong of qualified immunity. No discretion has ever been allowed to ignore this second prong.

To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be "settled law," *Hunter v. Bryant,* 502 U. S. 224, 228 (1991) (per curiam), which means it is dictated by "controlling authority" or "a robust `consensus of cases of persuasive authority," *Ashcroft v. al-Kidd,* 563 U.S. 731, 741-742 (2011) (quoting *Wilson v. Layne,* 526 U. S. 603, 617 (1999)). The "clearly established" standard also requires that the legal principle clearly prohibits the officer's conduct in the particular circumstances before him. The 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." *Saucier v. Katz,* 533 U. S. 194, 202 (2001). This requires a high "degree of specificity." *Mullenix v. Luna,* 577 U. S. 7, 11 (2015) (per curiam).

The United States Supreme Court has repeatedly stressed that courts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard,* 572 U.S. 765, 779 (2014). A rule is too general if the unlawfulness of the officer's conduct "does not follow immediately from the conclusion that [the rule] was firmly established." *Anderson v. Creighton,* 483 U.S. 635, 641 (1987). Specificity requires that courts "identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." *White v. Pauly,* 580 U. S. 73, 79 (2017) (per curiam); e.g., *Plumhoff,* supra, at 779.

As to whether Officer Eulizier could have reasonably believed there was a risk of serious injury or death, the core undisputed facts are: his position less than 5 feet directly in front of the escaping vehicle at the time the fatal shot was fired; the presence of innocent persons who were in the immediate area; the speed of the vehicle and direction of travel, which were not disputed on appeal. Viewing these facts in the undisputed context, a crucial factor in determining qualified immunity is whether a reasonably objective officer could have analyzed the suspect vehicle's speed and direction of travel within the single second between the time the vehicle began to move forward and when the fatal shot was fired, and whether a reasonably competent officer could have predicted the speed and direction within the subsequent seconds. In other words, could an officer within the single second the suspect vehicle drove forward have objectively believed his life may have been in danger and could an objectively reasonable officer believe that if the suspect vehicle again began to flee at a high speed in

those subsequent moments that it may cause serious injury to others in the area?

The Petitioner's knowledge of the actions of the Respondent immediately prior to the use of force is also relevant to the potential risk issue. It is undisputed that during the 60 seconds prior to the shooting, Respondent was trying to flee the entire time, drove at a high speed on wet roads in moderate traffic, and only after losing control of his vehicle and spinning, came to a stop. Within the 12 seconds after the Petitioner exited his cruiser the Respondent ignored orders and backed into occupied traffic lanes, stopped, and again ignored Petitioner's orders during the approximate 2 seconds the Petitioner was in front of the suspect's vehicle. Approximately one second elapsed from when the suspect decided to drive forward, and Petitioner's shots were fired through the front windshield. The undisputed facts must be taken in context, applying the totality of the circumstances. *District of Columbia v. Wesby,* 583 U.S. 48 (2018).

Cases involving similar circumstances would inform Petitioner that the use of deadly force was reasonable or at least that he would be entitled to qualified immunity. The Circuit Court's summary order acknowledged that the Defendant accepted the Plaintiffs version of the facts for the purpose of the appeal. The Court cited the Plaintiffs assertion that the car was moving slowly and was turning away from the Defendant as the Plaintiff fled and that the Defendant could have stepped out of the way of the vehicle. Rather than considering these undisputed facts in the context of clearly established law, the Court determined that these disputed facts precluded summary judgment.

Contrary to *District of Columbia v. Wesby,* the Court viewed these undisputed facts in isolation. The most closely analogous Supreme Court case

considering the speed of an escaping vehicle and the position of others in the path of the vehicle is *Brosseau v. Haugen,* 543 U.S. 194 (2004) (per curium). In *Brosseau,* there was no prior dangerous motor vehicle flight; the suspect was slowly starting to drive away from the officer who stood behind Brousseau on the side of the car. There were only 4 people in two parked cars in the area, including one vehicle 4 feet to the side and the other 20 to 30 feet away when the officer shot the suspect in the back. Comparing the risk factors in *Brousseau* with the present case, a reasonably competent officer would not believe he was violating clearly established law when the suspect drove directly toward him and innocent people were in the immediate area.

In *Plumhoff v. Rickard,* 572 U.S. 765 (2014), this Court reversed the denial of qualified immunity to police officers who used deadly force against a motorist who had endeavored to flee but was at a "near standstill" at the time the shooting occurred. This Court held that the officers' use of deadly force comported with the Fourth Amendment as the vehicle driving away from the officers posed a risk to others in the area.

The Circuit Court rejected Petitioner's reliance on these Supreme Court cases and *Scott v. Harris,* 550 U.S. 372 (2007) and *Mullenix v. Luna,* 577 U.S. 7 (2015), also involving the use of deadly force against operators of vehicles fleeing apprehension. The Circuit Court identified facts allegedly distinguishing the level of potential danger showing a presence of a significant threat of serious bodily injury to officers or innocent bystanders. The distinguishing factor in three of these cases involved long high-speed highway chases.

This Court in *Scott v. Harris* articulated the difficult choice officers must make when weighing the

probability of injuring or killing one person against the lesser probability of numerous innocent bystanders being injured or killed. The Court then addressed the balancing of culpabilities between the innocent bystanders and the respondent who intentionally placed himself and the public in danger.

In denying qualified immunity, the Second Circuit is essentially holding that only a plainly incompetent officer in the Petitioner's position could not differentiate the existing danger between high-speed highway pursuits and this high-speed escape on a wet inner-city commercial road with many intersections, traffic controls and commercial driveways, where travelers cross at intersections, and enter and exit businesses. Simply put, the potential danger of a highway chase justifies deadly force, but an inner-city chase poses "no risk." The qualified immunity question is, would an officer relying on Supreme Court precedent recognizing the responsibility of officers to protect the lives of innocent persons know that the constitutional question here was beyond debate?

Simply stated, the Second Circuit has determined that an objectively reasonable officer would discern within a second that a fleeing suspect starting to drive directly toward him from 5 feet away would know that the suspect poses no risk of harm to him and, furthermore, would know that the suspect would not accelerate as he had done repeatedly within the prior minutes, therefore posing no potential danger to others in the area.

Within that second of decision time, could an officer misapprehend the law governing the circumstances confronting him, thus, shielding him from suit even if his decision is deemed

constitutionally deficient? *Saucier v. Katz,* 533 U.S. 194, 206 (2001).

Factually similar cases decided by the Second Circuit demonstrate that Petitioner's use of force did not violate clearly established law. In *O'Brien v. Barrows,* 556 Fed. Appx. 2 (2d Cir. 2014) the Second Circuit held that qualified immunity shielded a police officer who shot a motorist, even though the motorist was not near pedestrians and was driving away from the only police officer in the vicinity. Adopting the district court's reasoning, the Second Circuit recognized that *O'Brien* had been driving erratically, "back[ed] away" upon seeing police cruisers, came within "five feet" of hitting an officer, and then "took off' toward a "busy road." In the Second Circuit's view, no clearly established law made the unlawfulness of the officer's conduct apparent." Id at 4.

In *Martinez v. Hasper,* 2023 U.S. App. LEXIS 17287, the Second Circuit ruled that in July 2014, it was not clearly established that shooting a fleeing motorist endeavoring to evade capture during a car chase that endangered officers and pedestrians nearby amounted to excessive force. The Court stated that "prior to the shooting, the Supreme Court had never "found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment let alone to be a basis for denying qualified immunity." *Id.* at 5-6 (quoting *Mullenix v. Luna,* 577 U.S. 7, 15 (2015)).

Plaintiff in *Hasper* claims the suspect vehicle was stationary when Hasper pulled the trigger, but the Court stated there was no indication that Ortiz would have remained stopped based on the aggressive, evasive action he had taken seconds before. Ortiz also argued against qualified immunity claiming no officers or pedestrians were in front or to the rear of his vehicle which was pinned in. In the

present case, plaintiff had taken evasive, aggressive actions seconds earlier, ignored police orders, drove from a stationary position toward an officer 5 feet from the front of his vehicle, all with innocent travelers nearby.

Other Circuit decisions indicate there may be a consensus of appellate cases supporting the objective reasonableness of Petitioner's use of fore. *Tousis v. Billot,* 2023 U.S. App. LEXIS 27699 (7^{tn} Cir. 2023) includes a number of similar claims under factually similar circumstances. The Court relied on *Tolliver v. City of Chicago,* 820 F.3d 237 (7^{t} Cir. 2016) in which the facts were remarkably similar to the present case. Officers fired shots when Tolliver was on foot, fewer than two car lengths away when the suspect vehicle began to move forward allegedly at three miles per hour.

Petitioner cited 15 circuit court decisions with similar factual circumstances, none with cumulative facts involving officers closer, directly in front of the suspect vehicle, or having less time to react. The Second Circuit did not consider these cases or the factually similar Second Circuit cases. Instead, the Appellate Court relied on one case, *Cowen v. Breen,* 352 F.3d 756 (2d Cir. 2003) to support its conclusion of a violation of clearly established law. In *Cowan,* an innocent driver who had not committed as much as a motor vehicle infraction, was driving slowly from 44 feet away when the first shot was fired. The second fatal shot was fired through the driver's side window as she passed the officer who stood 11 feet from the side of the car and with no others were in the area. Indeed, the use of deadly force is unconstitutional against the driver of a vehicle who poses no potential risk to officers or others. However, as the *Cowan* court stated, an officer would be entitled to qualified immunity if he reasonably believed the subject posed

a significant threat of death or serious physical harm to him or others.

The Court erred in relying on a single materially distinguishable motor vehicle shooting case. The Court erred in ignoring the Supreme Court, Second Circuit, and other appellate cases containing many factual similarities, including prior dangerous driving while attempting to flee, prior unlawful acts, and, most importantly, an attempt to flee with officers or others in a zone of danger exposed to a risk of serious harm.

Considering the specific circumstances based on a totality of the undisputed facts, the qualified immunity question under the clearly established law prong is whether there is clearly established law putting an officer on notice that the use of deadly force under the circumstances has been found to be unconstitutional. The second question is whether any competent officer could have at least reasonably or mistakenly believed that deadly force was not unconstitutional. Existing precedent would not have put the constitutional question of whether Petitioner's use of force was within constitutional limits beyond debate. The Summary Order failed to address these questions.

The Second Circuit Court, as required in a qualified immunity analysis, did not "identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." *White v. Pauly,* 580 U. S. 73, 79 (2017). Neither did the District Court or the plaintiff, as there are no United States Supreme Court or Second Circuit Court of Appeals cases that would have put Officer Eulizier on notice that, under the specific circumstances at the time, his use of deadly force would be unconstitutional. The absence of clearly established law entitles Defendant to qualified immunity.

If the Court had considered all the similar circumstances presented in the factually analogous cases decided by this Court, the Second Circuit, and other Circuit Courts, it would have found that Officer Eulizier's use of force was not a violation of clearly established law. Expecting officers in Defendant's position to parse the relative potential risks makes the Fourth Amendment a suicide pact and encourages officers to abrogate their responsibility to protect others. This Court should grant certiorari to ensure that lower courts do not intentionally ignore controlling precedent articulating clearly established law in factually similar circumstances.

2. THE SECOND CIRCUIT FAILED TO CONSIDER THE DISPOSITIVE QUESTION IN A CLEARLY ESTABLISHED ANALYSIS OF WHETHER AN OBJECTIVELY REASONABLE OFFICER COULD HAVE BELIEVED THAT HIS ACTIONS WERE CONSTITUTIONALLY REASONABLE.

The Court of Appeals denied qualified immunity based on the district court's determination that there are disputed issues of fact that preclude summary judgment on the issue of whether there was a threat of serious bodily injury to Officer Eulizier or others at the time he used deadly force. But the Court acknowledged that "Eulizier accepts Plaintiffs' versions of the facts for the purposes of this appeal; accordingly, we have jurisdiction to determine whether he is entitled to qualified immunity under those facts." The Court then failed to properly analyze whether clearly established law barred Officer Eulizier from employing deadly force under the circumstances and not only ignored substantial precedent, but found that "a reasonable jury could find

that Eulizier used deadly force in violation of the Fourth Amendment..."

The Court failed to consider the essential question of whether, based on undisputed facts and clearly established law, an objectively reasonable officer could have believed his actions were constitutional. Rather, the Court inappropriately asked whether a reasonable jury could find a constitutional violation. This sole inquiry was insufficient as qualified immunity "depends on an inquiry distinct from whether an officer has committed a constitutional violation..." *Heien v. North Carolina,* 135 S.Ct. 530, 537 (2014).

The court did not ask the dispositive questions applicable to the clearly established prong of qualified immunity. These questions look to the perspective of the defendant officer. The "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz,* 533 U.S. 194, 202 (2001). Thus, the qualified immunity analysis is limited to "the facts that were knowable to the defendant officers" at the time they engaged in the conduct in question. *White v. Pauley,* 580 U.S. 73, 77 (2017).

The Court failed to view the totality of undisputed facts from the perspective of an officer in Officer Eulizier's position. An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard,* 572 U.S. 765, 778-779 (2014). That is a necessary part of the qualified immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way. *Kisela v. Hughes,* 584 U.S. 100, 105 (2018). The Court

failed to assess whether the law was sufficiently clear that every reasonable official would have understood that what he is doing violates that right *Mullenix v. Luna,* 577 U.S. 7, 11 (2015) or whether existing case law places the constitutional question beyond debate. *White,* 580 U.S., at 77.

Viewing the undisputed facts and considering existing law could only a plainly incompetent officer have made the decision to use deadly force? Did Officer Eulizier knowingly violate the law when he used deadly force? Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."' *District of Columbia v. Wesby,* 583 U.S. 48, 56 (2018); *City of Tahlequah v. Bond* 595 U.S. 9, 12 (2021) (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

None of the deadly use of force cases comprised of similar facts (including suspects who hadn't driven in a dangerous manner, were stationary, or moving slowly, and where officers and others were not in the direct path of the escaping vehicle that found officers' force to be reasonable or entitled to qualified immunity) would have put Officer Eulizier on notice that his use of deadly force was unconstitutional.

Precedent involving similar facts would not move this case beyond the otherwise hazy borders between excessive and acceptable force putting Officer Eulizier on notice that his use of force was unlawful. *Kisela v. Hughes,* 584 U.S. 100 (2018).

The Appellate Court's failure to ask these questions and apply the appropriate standards deprived Officer Eulizier of his fundamental right to qualified immunity.

CONCLUSION:

The Summary Order found that "...the district court has determined that there are disputed issues of fact that preclude summary judgment on the issue of whether there was a threat of serious bodily injury to Eulizier or others at the time he used deadly force. Accordingly, we discern no error in the district court's denial of summary judgment on qualified immunity grounds." Page 12-13.

This Court has ruled on numerous qualified immunity cases, but none have addressed a circuit court decision so bereft of this Court's mandates related to the analysis of qualified immunity.

The lower court applied facts in isolation rather than considering the totality of undisputed facts.

The lower court failed to apply the undisputed facts to factually similar cases decided by the Supreme Court, the Second Circuit, and a consensus of other circuits.

The lower court relied on one circuit decision that was materially distinguishable.

The lower court failed to apply the longstanding, clearly established standards applicable to qualified immunity and, particularly, to use of force cases.

By abrogating its responsibility to properly analyze qualified immunity, the circuit panel denied the Petitioner his fundamental right to have the issue of qualified immunity decided before trial. This may be a case of first impression in which a circuit court has failed to consider precedent from the Supreme Court, its own circuit and a consensus of other circuits and ignored clearly established standards in denying qualified immunity.

Respectfully submitted,

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