No. 24-998

In The

Supreme Court of the United States

OFFICER EDDIE BOYD III AND THE CITY OF FERGUSON, MISSOURI,

Petitioners,

v.

FRED WATSON,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF OF PETITIONERS

ARGUMENT[1]

Contrary to Respondent Watson's disingenuous protestations and distortions as identified more fully below, Petitioners have properly presented to this Court purely legal questions—questions that go to the very heart of this Court's repeated declarations on what constitutes clearly established law in the context of a qualified immunity defense. Accordingly, review by this Court is fully justified.

Unlike the Tenth Circuit's correct decision in *Hoskins v. Withers*, 92 F.4th 1279 (10th Cir. 2024), wherein the court held that to defeat qualified immunity, a plaintiff must identify factually analogous case law that would have placed a reasonable officer on notice that his or her conduct was unlawful, the Eighth Circuit deviated from this Court's well-established precedent in this case. Instead, it denied Officer Boyd qualified immunity in reliance on a generalized statement of law, namely that "[i]t was clearly established at the time of the event that 'the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.'" *Watson v. Boyd*, 119 F.4th 539, 550 (8th Cir. 2024) ("*Watson II*")

[1] Watson has filed his Brief in Opposition in redacted form, along with a motion to file an unredacted version under seal. Petitioners have no objection to this motion.

(quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). (Pet. App. 20a).

This Court has expressly rejected such generalized statements of law by concluding that they do not satisfy the clearly established law mandate. As this Court squarely ruled in *Reichle v. Howards*, 566 U.S. 658 (2012), and repeated on many other occasions, "the right allegedly violated must be established, 'not as a broad general proposition,' but in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Id.* at 665 (internal quotations removed); s*ee also Dist. of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) ("The 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. . . . This requires a high 'degree of specificity.'") (quoting *Mullenix v. Luna*, 577 U.S. 7, 13 (2015)); *Kisela v. Hughes*, 584 U.S. 100, 104–05 (2018) ("Although 'this Court's caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.' . . . This Court has 'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'") (citations omitted).

Watson suggests that such a generalized statement of the right should be permitted here because Officer Boyd's conduct was purportedly "obviously unconstitutional." In so arguing, Watson completely ignores the fact that the district court already found that Officer Boyd had an objectively reasonable concern for officer safety or suspicion of

danger" when he pulled his firearm. *Watson II*, 119 F.4th at 548. (Pet. App. 17a). And, more problematically, defining the right so broadly would open officers up to the very kind of questionable First Amendment retaliation claims that this Court found highly troublesome in *Hartman*, *Reichle,* and *Nieves*. *See Reichle*, 566 U.S. at 664 ("This 'clearly established' standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can 'reasonably . . . anticipate when their conduct may give rise to liability for damages.'"); *see also Nieves v. Bartlett*, 587 U.S. 391, 401, 403 (2019) ("Like retaliatory prosecution cases, 'retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury.' . . . To ensure that officers may go about their work without undue apprehension of being sued, we generally review their conduct under objective standards of reasonableness.") (citations omitted). The clear divergence between the Tenth Circuit in *Hoskins* and the Eighth Circuit here—which reach totally different outcomes on what constitutes clearly established law—is the very kind of circuit split that only this Court can resolve.[2]

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[2] Watson incorrectly claims that no split has been presented, despite the ruling in *Hoskins* and those of other appellate courts that interpret this Court's precedent as requiring that factually analogous cases be identified to defeat qualified immunity (*see Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 683 (4th Cir. 2023), *cert. denied*, 144 S. Ct. 488 (2023); *Puente v. City of Phoenix*, 123 F.4th 1035, 1063 (9th Cir. 2024)). As noted in their Petition and elaborated on more fully below, the ruling in *Watson II* not only directly conflicts with *Hoskins* and various other appellate court rulings (Petition, pp. 18-22), it also is diametrically opposed to the Eighth Circuit's own ruling

As this Court recognized and required in *Reichle* and *Hartman,* a court must identify cases that establish the precise right in question with a high degree of specificity, via factually analogous precedents that place the constitutional question beyond debate, to defeat an officer's qualified immunity defense. The Eighth Circuit failed to do so. This Court should grant certiorari to resolve the circuit conflict created by the Eighth Circuit's ruling.

I. Watson fails to articulate adequate justification for the Eighth Circuit's failure to follow established Supreme Court precedent, ignores the clear conflict with Tenth Circuit and other circuit rulings, and disingenuously distorts the record. (Question 1)

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in *Watson I* wherein a different panel rejected the suggestion that such a general right would suffice: "Although there need not be 'a case directly on point for a right to be clearly established, existing precedent must have placed the . . . constitutional question *beyond debate*[ ]' . . . ." *Watson v. Boyd,* 2 F.4th 1106, 1113 (8th Cir. 2021) (*affirmed in part, reversed in part*) (*petition for rehearing by panel and by court en banc denied on Nov. 26, 2024*) ("*Watson I*") (citation omitted) (emphasis original). The law must be sufficiently clear such that "*every* 'reasonable [officer] would understand what he is doing is unlawful.'" *Id. (*quoting *Wesby*, 583 U.S. at 63). Reconciliation of what squarely amounts to a conflict amongst those circuits and gross deviation from qualified immunity precedent is indeed necessary and, if review is granted, would add greater predictability for law enforcement officers required to make split-second determinations in the interest of personal and public safety.

In purporting to address the legal justifications making certiorari appropriate, Watson wrongly claims that no circuit split exists, weakly suggests that this Court apply a "glaringly obvious" exception to the "clearly established" law standard, and disingenuously launches personal attacks on Officer Boyd, all while ignoring the fact that all of Officer Boyd's actions, including the drawing of his firearm during the stop, have been upheld as objectively reasonable. (Br. in Opp., p. 15). For good measure, and in a desperate attempt at misdirection, Watson also cites to a Department of Justice Report that the district court ruled was inadmissible because the report lacked the proper indicium of reliability and is replete with hearsay and other inadmissible recantations. (Br. in Opp., p. 4).[3]

In incorrectly claiming no split exists (and ignoring this Court's precedents regarding the

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[3] More precisely, the district court ruled as follows:

> The Court finds that the DOJ Report lacks a proper indicium of reliability to be used in support of summary judgment and contains inadmissible hearsay. The Court finds that the DOJ Report was clearly prepared in anticipation of litigation and by a biased preparer. Further, the Court holds that the DOJ Report contains inadmissible legal conclusions. Therefore, the Court strikes the DOJ Report from consideration as part of the summary judgment motion briefing.

Watson v. Boyd, 447 F. Supp. 3d 924, 935 (E.D. Mo. 2020), *vacated in part, appeal dismissed in part*, 2 F.4th 1106 (8th Cir. 2021). Watson did not challenge this ruling on appeal.

"clearly established" law prong of the qualified immunity analysis), Watson either misreads or intentionally misinterprets the Tenth Circuit's ruling in *Hoskins*.[4] *Hoskins* involved the question of whether it had been clearly established that pulling a firearm on a suspect for "roughly eight seconds" in response to the suspect cursing at the officer constituted First Amendment retaliation. 92 F.4th at 1294–95. In upholding the dismissal of the claim and finding there was no clearly established First Amendment protection against the retaliatory drawing of a firearm, the Tenth Circuit concluded:

> [W]e had no precedents finding a First Amendment violation when an officer points a gun at a suspect to retaliate for protected speech. Even if [the officer in question] had scoured the case law, he might reasonably have concluded that the First Amendment wouldn't prevent him from pointing his gun at [the plaintiff] in the face of his cursing and complaints.

Id. at 1294. This holding, of course, is in conflict with the Eighth Circuit's decision here wherein it reversed

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[4] Watson reads into this Court's denial of certiorari in *Hoskins* an indication that the Court determined that "there is no actual conflict." (Br. in Opp., p. 19). However, an alternative (and more reasonable) justification for the Court's denial of certiorari in that case is that the Tenth Circuit got it right by concluding that there was no clearly established protection against a retaliatory use of force and by requiring factually analogous cases to defeat qualified immunity.

summary judgment on the First Amendment use-of-force claim by relying on the generalized statement that "[i]t was clearly established at the time of the event that 'the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.'" *Watson II*, 119 F.4th at 550 (quoting *Hartman*, 577 U.S. at 256). (Pet. App. 20a).

It is not surprising that Watson now bases his entire argument on an alleged "glaringly obvious" exception to the typical qualified immunity analysis—it is the only argument he has available. In fact, (1) this Court has never held that there is a clearly established right to be free from a retaliatory use of force that is otherwise objectively reasonable and (2) there are no factually analogous cases wherein an officer who briefly points a firearm at a non-compliant suspect for legitimate safety reasons, and wherein such use-of-force was found to be objectively reasonable, was held to have violated the First Amendment. Watson has effectively conceded as much in his Brief. (*See* Br. in Opp. p. 16 ("It would be perverse to conclude that because there is no decision in which an officer has done what Boyd is claimed to have done here, that he deserves immunity") and p. 17 ("Given Boyd's conduct here, one of the many disturbing examples littered throughout his career, it is unsurprising that this precise factual scenario has not reached this Court")).

Given this concession and given the absence of any clearly established right or factually analogous cases recognizing such a right, Officer Boyd should be entitled to qualified immunity. Such a determination

would not only be consistent with this Court's established precedents, it would also be consistent with the Tenth Circuit's holding in *Hoskins* and other circuits interpreting this Court's precedents.

II. Contrary to Watson's argument, Petitioners did, in fact, present their second question below. (Question 2)

In a further disingenuous attempt to avoid certiorari review, Watson asserts that certiorari should be denied because "Petitioners did not make this 'extension' request below." (Br. in Opp., p. 20). While the Eighth Circuit intimated that the district court did not address the retaliatory use-of-force theory baked into Count II, the district court, relying on *Nieves,* agreed with Petitioners that because probable cause existed to justify both the arrest and the charges, summary judgment should be entered in Officer Boyd's favor as to Watson's Count II First Amendment retaliation claim in its entirety (which claim included the theories for retaliatory arrest, retaliatory charges and retaliatory use-of-force) (*See* Pet. App. p. 18a).[5]

[5] Even if the district court did not rely on or address Petitioners' argument that the existence of probable cause for Fourth Amendment purposes precludes any First Amendment retaliation claim, this Court has consistently held that an appellate court may affirm the entry of judgment on any grounds supported by the record. *Smith v. Phillips*, 455 U.S. 209, 215 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted"); *Bennett v. Spear*, 520 U.S. 154, 166 (1997) ("A

Moreover, that the *Nieves* threshold unreasonableness requirement should be recognized in the context of a First Amendment retaliatory use-of-force claim was clearly before the Eighth Circuit. Indeed, the Eighth Circuit's opinion recognized that Petitioners "argue that Watson has failed to prove that the law was clearly established at the time of the event 'because this [c]ourt has never recognized a First Amendment right to be free from retaliatory use of force when the use of force is objectively reasonable under the circumstances'." *Watson II*, 119 F.4th at 558. (Pet. App. 38a). Of course, it is this Court's decisions in *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (holding a First Amendment retaliatory prosecution claim is precluded by probable cause), *Reichle v. Howards,* 566 U.S. at 664–65 *(*holding no clearly established First Amendment right to be free from retaliatory arrest otherwise supported by probable cause), and *Nieves v. Bartlett,* 587 U.S. at 400, 402–04, 408 (holding that before a court may analyze whether an arrest is retaliatory, the plaintiff must first plead and prove that the conduct was objectively *un*reasonable under the circumstances) that supply the legal precedent for this argument.

The Eighth Circuit declined the invitation to extend *Nieves'* threshold unreasonableness requirement to the retaliatory use-of-force context by concluding: "But if there is an argument for extending the *Nieves* no-probable cause requirement

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respondent is entitled, however, to defend the judgment on any ground supported by the record.").

beyond a claim of retaliatory Fourth Amendment seizure, … then [the defendants] ha[ve] not presented it." (Pet. App. 40a). Thus, the issue of whether the objective reasonableness of a use-of-force should likewise bar a retaliatory use-of-force claim was clearly raised by Petitioners in the Eighth Circuit.

Accordingly, this Court can and should accept the invitation to address the issue here via certiorari.

III. The Eighth Circuit's ruling does not comport with this Court's "but-for" causation requirement. (Question 3)

Watson claims that Petitioners' third question (seeking review to resolve various conflicts among the circuits and conformity with this Court's requirement that there must be "but-for" causation) merely seeks "pure error correction" that rests on "a dispute over the best view of the record" where there purportedly was "no error." (Br. in Opp., pp. 22-23).

But in making this argument, Watson wholly ignores the Eighth Circuit's failure to address whether, given the fact that Officer Boyd was fully justified for safety reasons in drawing his firearm for safety reasons, but-for causation was lacking because the action would have been taken anyway. Instead, it reversed based on its determination that "the district court erred in failing to address Watson's retaliatory use of force claim" and its conclusion that a fact question is presented. *Watson II,* 119 F.4th at 559. (Pet. App. 40a-41a).

Contrary to the Eighth Circuit's approach, this Court has firmly held that "but-for" causation for First Amendment retaliation purposes cannot be proven if the record establishes that the claimed retaliatory action would have been taken anyway. *See Hartman*, 547 U.S. at 260; *see also Clark v. Clark*, 926 F.3d 972, 980 (8th Cir. 2019) ("In light of Deputy Clark's legitimate motive to investigate [wherein guns were drawn], Clark has failed to draw the requisite causal connection to state a First Amendment retaliation claim."). Here, Officer Boyd's alleged pulling of his firearm for ten seconds was already upheld as a justifiable use of force for Fourth Amendment purposes; this finding defeats any First Amendment but-for causation as a matter of law.[6]

CONCLUSION

For these reasons and those set forth in the Petition, this Court should grant the Petition for Writ of Certiorari.

[6] Watson also ignores the fact that Supreme Court Rule 10(c) expressly states that certiorari is fully permissible where an appellate court has decided "an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Respectfully submitted,

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