No.

IN THE

# Supreme Court of the United States

CASEY BENTON,

*Petitioner,*

v.

MARY JO BRADLEY, AS ADMINISTRATOR OF THE ESTATE OF TROY ROBINSON, ET AL.,

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI


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*November 23, 2021*

## QUESTIONS PRESENTED

The issue in this case is whether a police officer who deployed a taser to stop a fleeing person on top of an eight-foot wall is entitled to qualified immunity. The fleeing person, who the officer had reason to believe might have a weapon and who was about to escape into a residential community, died when he fell off the wall. Relying on *Tennessee v. Garner*, 471 U.S. 1 (1985), which held that a police officer violated the Fourth Amendment when he shot in the head a person he was "reasonably sure" was not armed, the Eleventh Circuit held that the officer was not entitled to qualified immunity because, under clearly established law, the officer unlawfully used deadly force by deploying the taser. In the alternative, the Eleventh Circuit held that, even disregarding *Garner*, qualified immunity was unavailable because the use of the taser was obviously unlawful. The questions presented are:

1. Did the Eleventh Circuit define clearly established law at too high a level of generality in assessing whether any reasonable officer would have known that deploying the taser constituted use of excessive force?

2. Did the Eleventh Circuit err in holding that under clearly established law any reasonable officer would have known that deploying the taser constituted use of excessive force?

3. Did the Eleventh Circuit err in its alternative holding that the officer was not entitled to qualified immunity because his use of force was so obviously unconstitutional that any reasonable officer would have known it was unlawful?

## RULE 14(B) STATEMENT

The parties in the Eleventh Circuit Court of Appeals were appellant Officer Casey Benton, who is a police officer with the DeKalb County Police Department, appellee Mary Jo Bradley, in her capacity as administrator of Troy Robinson's estate, and R.B., T.B., J.B. and G.B., Robinson's minor children. The following is a list of all directly related proceedings:

- *Bradley v. Benton*, No. 20-11509 (11th Cir.) (opinion issued and judgment entered August 26, 2021).
- *Bradley v. Benton*, No. 1:18-CV-1518-CAP (N.D. Ga.) (opinion issued and judgment entered April 13, 2020).
- *Bradley v. Benton*, No. 1:18-CV-01518-CAP (N.D. Ga.) (opinion issued and judgment entered October 20, 2018).

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## PETITION FOR A WRIT OF CERTIORARI

Officer Casey Benton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Police officers often must make split-second decisions regarding what level of force to use in a wide variety of circumstances, including when pursuing fleeing persons. This Court has recognized that tasers provide police officers with a valuable less lethal alternative to guns. Here, Officer Benton deployed his taser to stop a fleeing person, who he had reason to believe might have a weapon, from escaping over an eight-foot wall into a residential area. The Eleventh Circuit held that Officer Benton violated clearly established law by deploying his taser in these circumstances. In reaching that conclusion, the Eleventh Circuit did not cite any case with remotely comparable facts to demonstrate that the law was so well established that no reasonable officer could think it was lawful to deploy the taser. Instead, it relied on the broad general principle that deadly force may not be used to stop a fleeing person who did not commit a violent crime.

The manner in which the Eleventh Circuit decided the qualified immunity issue directly violates this Court's repeated instructions that whether the law is well established must be decided "not as a broad general proposition, but in a particularized sense." *Reichle v. Howards*, 566 U.S. 658, 666 (2012) (citation

and internal quotation marks omitted). Moreover, on the merits, the Eleventh Circuit's decision is wrong. Especially considering the widespread use of tasers as an alternative to guns and other more lethal forms of force, the issue presented is an important and recurring one.

Accordingly, Officer Benton asks that this Court summarily reverse the Eleventh Circuit's judgment denying qualified immunity or, alternatively, grant the petition to review that judgment.

## OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals, reported at 10 F.4th 1232, is reprinted in the Appendix (Pet. App.) at 1a–21a. There have been two opinions of the Northern District of Georgia. The first was not reported in the Federal Supplement but is available at 2018 WL 8949775. Pet. App. at 78a–96a. The second has not been published in the Federal Supplement but is available at 2020 WL 10867981. Pet. App. at 22a–77a.

## JURISDICTION

Officer Benton invokes this Court's jurisdiction under 28 U.S.C. § 1254, having timely filed this petition for writ of certiorari within ninety days of the

Eleventh Circuit's judgment, which was entered on August 26, 2021.

## PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent brought a civil action for damages under 42 U.S.C. § 1983 for an alleged violation of the decedent's Fourth Amendment rights.

The Fourth Amendment to the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

Section 1983 provides, in relevant part: "Every person who, under color of any statute . . . 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 . . . ."

## STATEMENT OF THE CASE

On August 6, 2015, Troy Robinson fled on foot from a police traffic stop. Officer Benton, one of the officers at the scene, pursued Robinson as he headed toward an apartment complex. Officer Benton had reason to believe that Robinson might be armed. After

Robinson climbed onto an eight-foot wall to avoid apprehension by attempting to escape into the apartment complex on the other side, Officer Benton deployed his taser on Robinson, who fell from the wall and died.

Robinson's estate brought a § 1983 claim against Officer Benton, alleging use of excessive force in violation of the Fourth Amendment. Despite acknowledging that Officer Benton had a reasonable basis to pursue and apprehend Robinson, and despite Officer Benton's effort to use nonlethal force by deploying a taser rather using a gun, the Eleventh Circuit held that Officer Benton was not entitled to qualified immunity. It reasoned that, under clearly established law, Officer Benton improperly used deadly force by deploying a taser to prevent Robinson from escaping over an eight-foot wall.

### A. Factual Background

Because this case is on review from summary judgment, the facts are stated in the light most favorable to the Respondent.[1]

On August 6, 2015, police officer Casey Benton was patrolling near the Highlands of East Atlanta Apartments. Doc. 50, pp. 5–6; Doc. 51, pp. 6–7. The DeKalb County Police Department wanted to increase

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[1] Officer Benton's account differs in some respects from this version of the facts stated in the light most favorable to Respondent.

police visibility in that area due to a high volume of gang-related and violent crime, including several shootings at both the Highlands and a neighboring apartment complex. Doc. 50, pp. 5–6; Doc. 51, pp. 4–5; Doc. 52, pp. 6–7.

Around 7:00 p.m., Officer Benton observed a white SUV enter the apartment complex and then leave shortly thereafter. Doc. 50, p. 6. When the SUV passed Officer Benton at the exit gate, he saw that the car had a temporary tag but did not see the required expiration date on the tag. Officer Benton accordingly initiated a traffic stop. Doc. 50, pp. 6, 15.

The driver of the SUV was Wilford Sims, who provided his license upon request; Robinson was the sole passenger. Doc. 57, pp. 6–7; Doc. 50, pp. 7–8. In response to Officer Benton's question if there were any weapons in the car, Sims disclosed that he had a handgun. Doc. 57, p. 7; Doc. 50, pp. 7–8. Officer Benton asked Sims to step out of the car. Doc. 50, p. 7; Doc. 57, p. 7. After Sims did so, Officer Benton retrieved the loaded handgun. Doc. 50, p. 7; Doc. 57, p. 7. He then asked Sims to get back in the car. Doc. 57, pp. 14–15; Doc. 50, pp. 7–9.

Next, Officer Benton asked Robinson if he had any identification. Doc. 50, p. 8. Robinson responded that he did not, prompting Officer Benton to ask one of the other officers at the scene to run Robinson's name. Doc. 57, p. 7. At that point, Robinson abruptly exited the vehicle and fled the scene on foot, across a road

and toward a Family Dollar Store. Doc. 50, p. 9; Doc. 57, p. 7; Doc. 51, p. 11. Officer Benton pursued Robinson on foot. Doc. 50, p. 9.

During the chase, one of the other officers noticed that Robinson was running with one arm swinging free and one hand on the waistband of his pants, from which he inferred Robinson might be holding something there. Doc. 50, p. 9; Doc. 51, pp. 11–12. The officer radioed Officer Benton, telling him to use caution just in case Robinson had something in his waistband. Doc. 51, p. 12. Officer Benton also observed that Robinson was holding his waistband with his left hand.[2] Doc. 50, p. 9. Based on how Robinson was running combined with the fact that a gun had been found in the car, Officer Benton thought "there was a pretty good chance [Robinson] may also be armed." Doc. 50, p. 10. Officer Benton believed that Robinson could be a threat to others because he

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[2] The deposition testimony of Officer Benton and the other officer on this point was uncontradicted. Under Federal Rule of Civil Procedure 56, the obligation to view the facts in the nonmoving party's favor extends only to disputed facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "A genuine dispute as to a material fact cannot be created by relying on the hope that the jury will not trust the credibility of the witness." *McGrath v. Tavares*, 757 F.3d 20, 28 n.13 (1st Cir. 2014) (internal quotation marks omitted). The officers' testimony on this point therefore may be considered as true for the purposes of the summary judgment motion on review.

was "running back into a residential area, possibly with a weapon . . . ." Doc. 50, p. 10.

Officer Benton continued to pursue Robinson behind the Family Dollar Store and through a wooded area that abuts the Highlands of East Atlanta apartment complex. Doc. 50, pp. 9–10. Robinson then reached a chain link fence, behind which was a concrete wall that Officer Benton estimated to be "maybe six feet or so . . . something like that." Doc. 50, pp. 9–10, 12–13. It is undisputed that the wall is eight feet high. Officer Benton recognized that Robinson was going to continue towards the apartment complex by climbing the fence and then over the wall. Doc. 50, p. 9.

To prevent Robinson from escaping, Officer Benton fired his taser at Robinson. Doc. 50, pp. 9, 12; Doc. 55, p. 18. Robinson was found unconscious on the other side of the wall and subsequently died from head trauma. Doc. 50, p. 14; Doc. 48-13, p. 25.

### B. Procedural Background

Robinson's family filed suit against Officer Benton in federal district court. Pet. App. at 22a. The complaint asserted state law claims and a claim under 42 U.S.C. § 1983, alleging that Officer Benton violated the Fourth Amendment by using excessive force.[3] Pet.

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[3] Only Robinson's mother, in her capacity as administrator of Robinson's estate, alleged the § 1983 claim.

App. at 6a, 23a. Officer Benton moved for summary judgment, arguing that the federal law claims were barred by qualified immunity and the state law claims were barred by official immunity. Pet. App. at 6a, 23a. The district court granted the motion with respect to the state law claims but denied it with respect to the § 1983 claim, concluding that Officer Benton was not entitled to qualified immunity because, under clearly established law, the initial stop, the pursuit of Robinson, and Officer Benton's use of the taser were all unconstitutional. Pet. App. at 7a, 77a.

The Eleventh Circuit affirmed the denial of Officer Benton's motion for summary judgment as to qualified immunity. Pet. App. at 21a. Unlike the district court, the Eleventh Circuit held that both the initial stop and Officer Benton's subsequent pursuit of Robinson were lawful. Pet. App. at 21a. Nonetheless, it held that Officer Benton was not entitled to qualified immunity because he had violated a clearly established right by using deadly force when he deployed his taser to restrain Robinson.

In reaching that conclusion, the court of appeals stated that this Court's decision in *Tennessee v. Garner*, 471 U.S. 1 (1985), "clearly established that an officer cannot use deadly force to stop an unarmed man who is not suspected of committing a violent crime from fleeing on foot." Pet. App. at 19a. The court of appeals stated that it was not simply applying "*Garner*'s high-level holding," but instead was "concerned with *Garner*'s analogous facts,"

asserting that those facts clearly established the unlawfulness of Officer Benton's actions. Pet. App. at 19a. It characterized the fact that Officer Benton used a taser, instead of a gun as in *Garner*, "a distinction without a difference" because Officer Benton "knew" that tasing Robinson while he was on an eight-foot wall would "create a substantial risk of causing death or serious bodily harm." Pet. App. at 19a (quoting *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985)).

The court of appeals held in the alternative that Officer Benton was not entitled to qualified immunity because his conduct was obviously unconstitutional, even absent a prior case with similar facts. Pet. App. at 20a.

## REASONS FOR GRANTING THE WRIT

Under the doctrine of qualified immunity, an officer who violates a citizen's constitutional rights is entitled to immunity from liability unless precedent has clearly established a rule "so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). This Court has repeatedly instructed courts to assess whether a right is clearly established "not as a broad general proposition, but in a particularized sense." *Reichle v. Howards*, 566 U.S. 658, 665 (2012) (citation and internal quotation marks omitted).

The Court reiterated that admonition just last month in *City of Tahlequah v. Bond*, No. 20-1668, 2021 WL 4822664, (U.S. Oct. 18, 2021) (*per curiam*), reminding courts that they should not "define clearly established law at too high a level of generality." *Id.* at *2 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)) A "high degree of specificity" is particularly important in Fourth Amendment excessive-force cases because they are necessarily fact-dependent, making it "difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (*per curiam*).

The Eleventh Circuit's decision denying qualified immunity in this case directly violates those fundamental principles. Officer Benton made a split-second decision to deploy his taser to stop a fleeing person he had reason to believe might be armed and who was climbing over an eight-foot wall to escape into a residential community. In holding that Officer Benton was not entitled to qualified immunity, the Eleventh Circuit did not point to any case with remotely similar facts. Instead, it relied on this Court's decision in *Tennessee v. Garner*, 471 U.S. 1 (1985), which it held "clearly established that an officer cannot use deadly force to stop an unarmed

man who is not suspected of committing a violent crime from fleeing on foot."[4] Pet. App. at 19a.

The Eleventh Circuit's reasoning in this case could be the paradigm for how this Court has instructed lower courts *not* to evaluate whether an officer is entitled to qualified immunity. *Garner* may create a general rule against using deadly force to stop an unarmed person who is not suspected of committing a violent crime (and who is not an immediate threat to the officer or a threat to others) from fleeing on foot. It does not, however, provide an appropriate framework for assessing whether it is clearly established that using a taser in a particular circumstance constitutes deadly force.

Likewise, even assuming that deploying the taser could be said to cross what this Court has recognized is often a fuzzy line between less lethal force and deadly force, *Garner* does not speak to whether any reasonable officer would know that deploying a taser as Officer Benton did here would constitute excessive use of force where the officer has reason to believe the

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[4] The Eleventh Circuit's characterization of *Garner*—that it prohibits the use of deadly force against an unarmed person who has not committed a violent crime—is incomplete. *Garner* holds that deadly force cannot be used against an unarmed person who "poses no immediate threat to the officer and no threat to others." 471 U.S. at 11. Needless to say, a person who has not committed a violent felony may still pose a threat to the officer or others.

fleeing person may have a weapon and is heading into a residential community.

The proper threshold inquiry is the particularized question whether existing precedent would have put all reasonable officers on notice that deploying a taser to stop a person on top of an eight-foot wall constitutes deadly force. Beyond that, the label put on the level of force used should not be controlling where, as here, the line between deadly force and less lethal force is fuzzy. Rather, the proper analysis requires consideration of the more particularized question whether all reasonable officers would have known that it would be unlawful to deploy a taser to stop a fleeing suspect who was on an eight-foot wall and who the officer had reason to believe was carrying a weapon and about to enter a residential community. In relying on *Garner*, a case in which the officer shot in the head a fleeing suspect the officer was reasonably sure was unarmed, the Eleventh Circuit directly violated this Court's repeated holdings that courts must determine what constitutes clearly established law with a high degree of specificity.

In addition to departing from this Court's instructions as to how to determine whether the law is clearly established for purposes of a qualified immunity analysis, the Eleventh Circuit erred in concluding that Officer Benton violated clearly established law. First, it was not clearly established that deploying a taser—typically a nonlethal device—on a fleeing person eight feet off the ground

constitutes use of deadly force. Although tasers can be deadly in some circumstances, the line between when the use of a taser is deadly or non-deadly force at a height like eight feet is a fuzzy one, and there was no established law putting every reasonable officer on notice that Officer Benton's use of the taser falls on the deadly force side of that line. Second, the Eleventh Circuit erred in focusing on the label put on the force used instead of considering whether it was clearly established that Officer Benton used excessive force on the specific facts of this case: deploying a taser to stop a fleeing person on an eight-foot wall who the officer had reason to believe might be armed and who was headed into a residential complex. In short, there was no clearly established law that would lead every reasonable officer to know that the Fourth Amendment prohibited use of a taser on the specific facts of this case.

The court of appeals also disregarded this Court's precedents by concluding, in the alternative, that Officer Benton is not entitled to qualified immunity because his conduct so obviously violated the Fourth Amendment that no prior decision with closely comparable facts is necessary. This Court has limited the obvious clarity doctrine to truly exceptional circumstances where an official's conduct is so egregious that it obviously and unquestionably violates the Constitution. *See, e.g.*, *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (*per curiam*); *see Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 377–78 (2009).

The facts of this case do not come close to meeting that standard.

The questions presented by this petition are important and recurring. Lower courts continue to misapply this Court's precedents by determining qualified immunity based on broad general propositions of law in the absence of a prior case with similar specific facts. The factual context here is particularly important because police officers often use tasers and other typically nonlethal means to restrain or apprehend suspects precisely to avoid using excessive force. Under the rationale of the Eleventh Circuit's decision, officers attempting to use what a reasonable officer could consider to be nonlethal force would be denied qualified immunity when that force results in unintended death or serious injury. The Eleventh Circuit's decision would expose police officers to personal liability for split-second decisions made in unique factual contexts and could deter police officers from using force even where doing so was justified. This Court accordingly should grant review and reverse the Eleventh Circuit's decision.

### A. The Eleventh Circuit's decision conflicts with this Court's holdings regarding how to determine what constitutes clearly established law.

Qualified immunity shields public officials from suit unless their actions violate "clearly established statutory or constitutional rights of which a

reasonable person would have known." *Hope v. Pelzer,* 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Put differently, an official's actions violate clearly established law only if "every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Although precedent with *identical* facts is not necessary to clearly establish the law, existing precedent must place the question "beyond debate" to satisfy the standard. *Id.* Thus, qualified immunity is a broad principle that "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

This Court has repeatedly held that clearly established law should not be defined "at too high a level of generality." *City of Tahlequah*, No. 20-1668, 2021 WL 4822664, at *2 (quoting *Ashcroft*, 563 U.S. at 742). Reference must be made to the particular circumstances of the case, not just general propositions abstracted from precedent. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (*per curiam*). The determination that law is clearly established necessarily requires a "high degree of specificity," *Wesby*, 138 S. Ct. at 590, particularly in the Fourth Amendment context, where it can be "difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *City of Tahlequah*, No. 20-1668,

2021 WL 4822664, at *3 (quoting *Mullenix*, 577 U.S. at 12).

*Brosseau* illustrates the rule against framing clearly established law "at too high a level of generality." There, the Ninth Circuit denied qualified immunity to an officer who shot a suspect in the back as he was fleeing in a vehicle. *Brosseau*, 543 U.S. at 196–97. In doing so, the Ninth Circuit relied on *Garner* in exactly the same way that the Eleventh Circuit did in this case. Specifically, the Ninth Circuit held that the officer was not entitled to immunity for the shooting because *Garner* clearly established the rule that "deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Haugen v. Brosseau*, 339 F.3d 857, 873 (9th Cir. 2003).

This Court reversed, holding that the "general test[]" set out by *Garner* is cast at too high a level of generality to clearly establish that the officer's actions were unconstitutional. *Brosseau*, 543 U.S. at 199. Instead, for qualified immunity to be denied, there must be a prior decision with similar facts establishing the law in a more "'particularized' sense." *Brosseau*, 543 U.S. at 199–200. Because the court of appeals was unable to point to any such similar prior decision, *id.* at 201, it erred in holding that the officer was not entitled to qualified immunity.

Similarly, in *Mullenix v. Luna*, 577 U.S. 7 (2015) (*per curiam*), another case involving alleged excessive force, this Court once again cautioned against defining clearly established law at too high a level of generality. There, a police officer attempted to disable a suspect's car during a high-speed chase by shooting at it, but instead struck and killed the suspect. *Id.* at 9–10. The Fifth Circuit held that officer had violated the clearly established rule that "a police officer may not use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officers or others." *Id.* at 12. This Court reversed, explaining that the Fifth Circuit had "define[d] the qualified immunity inquiry at a high level of generality" and "fail[ed] to consider th[e] question in the specific context of the case." *Id.* at 16.

Like the lower courts in *Brosseau* and *Mullenix*, the Eleventh Circuit in this case defined the inquiry "at too high a level of generality." In determining whether Officer Benton is entitled to qualified immunity, the court of appeals stated that "*Garner* clearly established that an officer cannot use deadly force to stop an unarmed man who is not suspected of committing a violent crime from fleeing on foot." Pet. App. at 19a. That approach is directly contrary to this Court's holdings in *Brosseau* and *Mullenix* because it lacks the "high degree of specificity" necessary for the law to be established in a "particularized" sense.

It may be true that *Garner* clearly establishes the general proposition that "an officer cannot use deadly

force to stop an unarmed man who is not suspected of committing a violent crime from fleeing on foot." Pet. App. at 19a. But that general rule does not speak at all to what constitutes the use of deadly force, a question as to which this Court has expressly recognized there is no bright-line, general rule. *Scott v. Harris*, 550 U.S. 372, 384 (2007). All force has some probability of resulting in death. Whether force constitutes deadly force necessarily depends on the specific circumstances of the case, including the magnitude of the risk of death. *Garner* provides no guidance on that point outside its specific context of an officer shooting to kill the fleeing person.

For these reasons, the Eleventh Circuit departed from this Court's instructions by determining clearly established law at too high a level of generality. The proper initial inquiry here is whether, under clearly established law, the particular force used by Officer Benton crossed what *Scott* teaches can be the fuzzy line between deadly and non-deadly force. *See Brosseau*, 543 U.S. at 198–99 ("[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987))). More specifically, the court of appeals should have asked whether all reasonable officers would have known that deploying a taser on a person on an eight-foot wall constitutes use of deadly force.

Because *Garner* involved an officer shooting a suspect in the head, it says nothing about whether deploying a taser under different circumstances constitutes deadly force. To be sure, there may be circumstances in which use of a taser or other force is so obviously deadly that a prior case with similar facts is not necessary for the law to be clearly established that such force cannot be used where use of deadly force is unlawful. But deploying a taser on a person on an eight-foot wall is not close to being in that category. Yet, without citing a single case in which deploying a taser under similar circumstances has been held to be use of deadly force, the Eleventh Circuit treated the difference between Officer Benton's use of a taser and the officer in *Garner* shooting the suspect in the head as a "distinction without a difference." Pet. App. at 19a.

Moreover, the Eleventh Circuit did not consider the other significant factual distinctions between *Garner* and this case. Notably, unlike the officer in *Garner* who was "reasonably sure" the suspect was not armed, uncontradicted summary judgment evidence showed that Officer Benton had reason to believe Robinson might have a weapon and was headed into a residential community.

In short, the facts of *Garner* are far too different to constitute clearly established law putting every reasonable officer on notice that deploying a taser, as Officer Benton did here, would be unlawful. Because the approach taken in the court of appeals' decision

conflicts with this Court's precedent, this Court should grant review.

### B. The Eleventh Circuit erred in concluding that Officer Benton violated clearly established law.

Review is also warranted because the court of appeals erroneously concluded on the merits that Officer Benton is not entitled to qualified immunity. An official sued under § 1983 is entitled to qualified immunity unless the plaintiff shows that it was clearly established that the official's particular conduct violated a constitutional right. *al-Kidd*, 563 U.S. 731 at 735. Here, Officer Benton is entitled to qualified immunity because it was not clearly established that his deployment of the taser in the specific circumstance he confronted constituted excessive force in violation of the Fourth Amendment.

#### 1. It was not clearly established that deploying a taser on a fleeing person eight feet off the ground constitutes deadly force.

No decision of this Court would have alerted Officer Benton that tasing a person on an eight-foot wall constitutes deadly force. This Court has never held that using a taser under any particular circumstances constitutes deadly force. To the contrary, this Court has recognized that a taser is a

nonlethal alternative to a gun. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1157 (2018) (pointing to expert testimony that tasing presented less of a risk than shooting a gun); *see also Caetano v. Massachusetts*, 577 U.S. 411, 419 (2016) (Alito, J., concurring in the judgment) (noting that tasers are useful "for such purposes as nonlethal crowd control").

Likewise, the lower court did not point to any Eleventh Circuit or Georgia Supreme Court decision holding that using a taser in any particular circumstance constitutes deadly force, let alone a case with facts similar to those here. To the contrary, the one Eleventh Circuit case that the lower court cited involving a suspect who was tased eight feet off the ground, just as Robinson was here, acknowledged doubts about whether tasing in those circumstances constitutes deadly force, characterizing using a taser in that circumstance as "bordering on deadly force." *Harper v. Davis*, 571 F. App'x 906, 912 (11th Cir. 2014).

In *Harper,* officers responded to a domestic violence call. *Id.* at 908. When they arrived on the scene, they learned that the suspect had fired a rifle and threatened suicide before running into the nearby forest. *Id.* at 909. Tracking the suspect into the forest, the officers eventually found him hiding in a tree. *Id.* In a confusing sequence of events regarding whether the suspect had a gun, two officers deployed their tasers. *Id.* at 909–10. The second taser caused the suspect to fall from an eight-foot branch, resulting in

him being paralyzed. *Id.* at 910. The Eleventh Circuit held that the officers were entitled to qualified immunity on the ground that the circumstances warranted incapacitating the suspect. *Id.* at 912.

The Eleventh Circuit distinguished *Harper* on the ground that the suspect there had committed a serious offense and posed a threat to the officers and others, whereas "Robinson was neither armed nor suspected of committing a violent crime." Pet. App. at 20a. This attempted distinction misses the key relevance of *Harper*, which is not the officers' justification for using force but rather the Eleventh Circuit's own characterization of using a taser on a person eight feet in the air as "bordering on deadly force." *Harper*, 571 F. App'x at 912.

The Eleventh Circuit did not provide any meaningful explanation for why Officer Benton's use of a taser on a fleeing person on an eight-foot wall is so different from the use of a taser on a suspect eight feet up in a tree as in *Harper* that the former is "deadly force" as a matter of established law whereas the latter merely "borders on deadly force." And, although the Eleventh Circuit correctly observes that *Harper* is an "unpublished, nonprecedential opinion," Pet. App. at 19a, the court of appeals provides no reason why any reasonable officer would have known that what the Eleventh Circuit had declined to call deadly force was in fact deadly force under clearly established law. The Eleventh Circuit's own acknowledgement that the tasing in *Harper* fell short

of deadly force undermines any claim that *Harper* provided clear notice to Officer Benton that tasing a person on an eight-foot wall constitutes deadly force.

Moreover, of course, an officer in hot pursuit of a fleeing person cannot know with precision anything like the height of a wall. Considering that the Eleventh Circuit cited no prior case establishing that tasing a person eight feet off the ground constitutes deadly force, and *Harper*'s characterization of such force as something short of deadly force, reasonable officers in Officer Benton's shoes would not have had clear notice that deploying the taser on Robinson constituted deadly force.

To support its decision that Officer Benton's conduct violated clearly established law, the court of appeals pointed to *Garner*, as well as evidence that Officer Benton "knew" that deploying a taser "would create a substantial risk of causing death or serious bodily harm." Pet. App. at 19a (quoting *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985)). But neither provides a basis for holding that Officer Benton violated clearly established law when he deployed the taser.

In *Garner*, an officer responding to a possible burglary saw a suspect run across the backyard of a house. 471 U.S. at 3. Shining a flashlight on the suspect, the officer was able to see the suspect's face and hands, making the officer "reasonably sure" that the suspect was unarmed. *Id.* Nonetheless, when the

suspect began to climb over a fence, the officer opened fire with his gun. *Id.* at 4. The bullet struck the suspect in the back of the head, killing him. *Id.* This Court held that the officer violated the Fourth Amendment by using deadly force on an apparently unarmed, non-dangerous fleeing suspect. *Id.* at 1. As this Court later observed, that shooting created a "near *certainty* of death," *Scott*, 550 U.S. at 384.

The facts of this case are not remotely comparable. Officer Benton did not shoot Robinson with a gun. He deployed a taser against a fleeing person who had climbed an eight-foot wall. Tasers are by their very nature intended to provide a nonlethal means for subduing suspects. *See, e.g.*, *Abbott v. Sangamon Cnty.*, 705 F.3d 706, 726 (7th Cir. 2013) (noting that a taser "is generally nonlethal"); Douglas B. Mckechnie, *Don't Daze, Phase, or Lase Me, Bro! Fourth Amendment Excessive-Force Claims, Future Nonlethal Weapons, and Why Requiring an Injury Cannot Withstand a Constitutional or Practical Challenge*, 60 U. Kan. L. Rev. 139, 188 (2011) ("[I]f future nonlethal weapons are as enthusiastically adopted as the Taser . . . .").

To be sure, use of a taser may sometimes result in serious injury or death. But *Garner* provides no insight as to when the use of a taser crosses the hazy border from nonlethal to deadly force. It accordingly does not clearly establish that Officer Benton's use of the taser was unlawful.

Nor does it suffice that Officer Benton may have thought that deploying a taser on a person who "is at an elevated height" could pose a risk of serious injury. Pet. App. at 5a. This Court has made clear that the subjective views of the officer are not relevant to the analysis under either the Fourth Amendment or qualified immunity. Both turn on the "objective reasonableness" of the officer's conduct. *See Torres v. Madrid*, 141 S. Ct. 989, 998 (2021) ("Only an objective test allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." (citation and internal quotation marks omitted)); *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982) (holding that qualified immunity depends on "the objective reasonableness of an official's conduct" instead of "subjective" views of the officer).

**2. It was not clearly established that Officer Benton used excessive force under the circumstances.**

The Eleventh Circuit treated the label "deadly force" as though it were a bright line determinative of Officer Benton's entitlement to qualified immunity. But as explained above, this Court has recognized that there is no such bright line in many circumstances. *Scott*, 550 U.S. at 384. And the Eleventh Circuit itself recognized in *Harper* that "there is no clear signpost demarcating 'the hazy border between excessive and acceptable force.'" *Harper*, 571 F. App'x at 910 (quoting *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th

Cir. 1997)). Instead of focusing on the label put on the force Officer Benton used, the court of appeals should have evaluated whether under established law any reasonable officer would know that deploying a taser as Officer Benton did here would constitute excessive force. As to that question, all of the circumstances Officer Benton faced are relevant. Those circumstances notably include that Officer Benton had reason to believe there was a good chance Robinson was armed and headed into a residential community.

As this Court explained, the question whether a law enforcement officer has used excessive force—whether deadly or not—depends on the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The "reasonableness" must be judged from the perspective of a reasonable officer on the scene, "rather than with the 20/20 vision of hindsight," *id.* at 396, and it must take account of "the fact 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." *Id.* at 396–97. "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally

unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11.

Applying these principles reveals that no clearly established law put all reasonable officers on notice that deploying a taser as Officer Benton did here would constitute excessive force. While chasing Robinson, Officer Benton was facing "tense, uncertain, and rapidly evolving" circumstances. He was pursuing an individual who was fleeing from the police after he heard that his name would be run in the police system. Officer Benton knew that there was at least one gun in the car, had heard another officer on the radio tell him to use caution because Robinson may have been holding something in his waistband, and himself thought Robinson might be armed. He also knew that Robinson was running toward an apartment complex. Given these facts, a reasonable officer could conclude that Robinson was potentially armed and heading toward a residential area.

Yet, the Eleventh Circuit glossed over the fact that Officer Benton had reason to believe Robinson might have a weapon, noting that as it turned out Robinson was not armed. Pet. App. at 15a. It did not cite any case finding the use of comparable force in the context Officer Benton faced to be unlawful. *Garner*, the case on which the court relied, is not a proper comparison for two independently sufficient reasons: the officer in *Garner* used a gun to shoot the suspect in the head and was reasonably certain that the suspect was unarmed.

It therefore was not clearly established that the Fourth Amendment forbid Officer Benton from using the level of force he did under the circumstances, regardless of on which side of the fuzzy line between deadly force and less lethal force one places using a taser in these circumstances. *See Kisela*, 138 S. Ct. at 1152.

### C. The Eleventh Circuit's decision conflicts with this Court's decisions regarding when a constitutional violation is obvious.

The Eleventh Circuit also departed from this Court's precedents in holding that, even absent a prior case with similar facts, Officer Benton was not entitled to qualified immunity because his use of force was so obviously unconstitutional that any reasonable officer would recognize it was unlawful. Pet. App. at 20a. Under this Court's precedents, the facts of this case do not come close to meriting application of the narrow and rare "obvious clarity" exception to the general rule that an officer is entitled to qualified immunity absent a prior case with substantially similar facts clearly establishing that the officer's conduct was unconstitutional.

To be sure, "general constitutional rule[s] already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Hope*, 536 U.S. at 741. Put differently, "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 (2018); *see Redding*, 557 U.S. at 377–78.

In *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (*per curiam*), for example, this Court held that officers committed an obvious constitutional violation by confining an inmate for six days in two "shockingly unsanitary" cells. *Taylor*, 141 U.S. at 53. The first cell was covered in feces and so unsanitary that the inmate did not eat or drink for the four days he was held there. *Id.* The second cell was frigidly cold and had no disposal system for bodily waste, forcing the inmate to sleep naked in sewage. *Id.* Based on these "particularly egregious facts," this Court held that "any reasonable officer should have realized that [the inmate's] conditions of confinement offended the Constitution." *Id.* at 54.

Similarly, in *Hope*, this Court held that an obvious constitutional violation occurred when officers punished an inmate for minor disruptive conduct by putting him in leg irons, handcuffing him to a hitching post, and leaving him for seven hours in the blazing sun, during which time he was given no bathroom breaks, was given water only once or twice and was taunted about his thirst. *Hope*, 536 U.S. at 734–35. Notwithstanding the absence of a prior decision with substantially similar facts, this Court held that the "gratuitous infliction" of pain on the inmate constituted such an obvious violation "that our own

Eighth Amendment cases gave [the officers] fair warning that their conduct violated the Constitution." *Id.* at 741.

The extreme and shocking facts of these cases in which the Court held the "obvious clarity" exception applies reflect that the "obvious case" is in fact the rare exception and not the rule. *See Wesby*, 138 S. Ct. at 589–90 (noting that "a body of relevant case law is usually necessary to clearly establish the answer with respect to probable cause" (internal quotation marks omitted)).

In *Brosseau*, for example, this Court held that it was "far from . . . obvious" that a constitutional violation occurred when an officer shot a suspect in the back as he was fleeing in a vehicle. *Brosseau*, 543 U.S. at 199. The officer ordered the suspect out of the vehicle several times before shattering the driver's window with her gun, attempting to grab the suspect's key, hitting the suspect's head with the butt of the gun, and ultimately shooting the suspect while he attempted to drive away. *Id.* at 196–97. Noting that the officer's conduct fell within the "hazy border between excessive and acceptable force," this Court held the obvious clarity exception was inapplicable to clearly establish the officer's conduct violated the Fourth Amendment. *Id.* at 199–201 (citation and internal quotation marks omitted).

Officer Benton's conduct in deploying a taser on Robinson while he was on the eight-foot wall does not

rise to the level of shocking and egregious conduct that this Court has found to be sufficient to invoke the "obvious case" exception. *Riojas* and *Pelzer* involved calculated, sustained, intentional misconduct, akin to torture, that utterly shocks the conscience. Here, in contrast, Officer Benton made a split-second decision to use what is typically nonlethal force. Beyond that, Officer Benton had reason to believe the fleeing suspect might be armed and was headed into a residential community.

To be sure, at some height, tasing a person poses such a risk of death that it obviously constitutes deadly force. But an eight-foot wall is not so high that tasing a person on it obviously constitutes deadly force. Likewise, particularly under the circumstances here in which Officer Benton had reason to believe Robinson might be armed, use of the label "deadly force" does not make it obvious that the force used was excessive in the absence of a case with similar facts.

## CONCLUSION

Officer Benton respectfully requests that this Court summarily reverse the Eleventh Circuit's judgment denying qualified immunity or, alternatively, grant the petition to review that judgment.

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