

No. 24-287

IN THE
Supreme Court of the United States

JENNIFER ROOT BANNON,
AS THE SPECIAL PERSONAL REPRESENTATIVE OF
THE ESTATE OF JUSTON ROOT,
Petitioner,
v.

DAVID GODIN, BOSTON POLICE OFFICER;
JOSEPH MCMENAMY, BOSTON POLICE OFFICER;
LEROY FERNANDES, BOSTON POLICE OFFICER;
BRENDA FIGUEROA, BOSTON POLICE OFFICER;
CORY THOMAS, BOSTON POLICE OFFICER;
PAUL CONNEELY, MASSACHUSETTS STATE TROOPER;
THE CITY OF BOSTON,
Respondents.

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

**BRIEF IN OPPOSITION FOR OFFICERS GODIN,
MCMENAMY, FERNANDES, FIGUEROA AND
THOMAS AND THE CITY OF BOSTON**

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**COUNTERSTATEMENT OF
QUESTIONS PRESENTED**

1. Whether this case is appropriate for review by this Court where the United States Court of Appeals for First Circuit and the United States District Court for the District of Massachusetts applied the usual summary judgment standard in granting and affirming summary judgment.
2. Whether this case is appropriate for review by this Court where the First Circuit's application of the objective reasonableness standard is consistent with the other Circuits.

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STATEMENT OF THE CASE

This is a straightforward case under 42 U.S.C. § 1983¹ in which the District Court and the First Circuit applied the appropriate and well-established summary judgment and objective reasonableness standards. There are no “compelling reasons” to grant the petition. Sup. Ct. R. 10. The majority opinion did not apply a new standard or disregard established legal principles. The decision did not create a Circuit split on an important federal question. There is no unsettled question of federal law. In short, there are no grounds for issuing a writ of certiorari.

At issue in this case is the objective reasonableness of the use of force by five Boston Police Department (“BPD”) officers and a Massachusetts State Trooper when they shot and killed Juston Root, at a moment in time when they believed him to be armed and reaching for a gun. While the gun in question turned out to be one of two paintball guns and a BB gun that Root had in his possession that day, there was no evidence that any police officer was aware of that fact prior to the recovery of the gun

¹ In footnote six, Petitioner states that the request for review is limited to the § 1983 claim of excessive force arising from the shooting and the corresponding state law claims, which all fail if there is a determination that the use of force was objectively reasonable. *See, e.g., Kelley v. LaForce*, 288 F.3d 1, 10 (1st Cir. 2002); *Raiche v. Pietroski*, 623 F.3d 30, 40 (1st Cir. 2010); App. 27a. Petitioner does not seek review of the claims related to the PIT maneuver (Counts 5 and 6) or the claim against the City of Boston pursuant to this Court’s decision in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

following the shooting. App. 3a.² The District Court and the First Circuit each applied the appropriate standard and determined that given the facts and the totality of the circumstances confronting the officers in that moment, it was objectively reasonable to use deadly force as a matter of law under this Court's firmly-established test in *Graham v. Connor*, 490 U.S. 386, 397 (1989). App. 27a-30a.³

Petitioner presents two questions in her petition, neither of which merit this Court's attention. First, Petitioner contends that the majority decision "creates a new summary judgment standard, allowing lower courts to make factual determinations, weigh evidence, assess credibility, and draw inferences in the movant's favor despite contradictory evidence." The majority decision, of course, did nothing of the sort, either expressly (App. 26a) or implicitly. Rather, the majority considered all of the arguments presented by Petitioner and determined that there was no evidence to dispute the testimony of the officers, corroborated by a third party, that Root was reaching for what they believed to be a gun at the time that they all simultaneously fired their weapons.

² References to the Appendix filed by Petitioner will be referred to by the abbreviation "App." followed by the page number.

³ The majority also held that the officers were entitled to qualified immunity. The issues raised by Petitioner are moot, because the District Court and First Circuit decisions demonstrate that even if this Court were to consider the case and now determine that the use of force here was excessive and unconstitutional, the law was not "clearly established" at the time of the shooting. *See, e.g., Conlogue v. Hamilton*, 906 F.3d 150, 155 (1st Cir. 2018); *see also* App. 42a-45a. Petitioner's reliance on Fourth Circuit precedent to create an artificial Circuit split further illustrates this point.

App. 33a-40a. It was Petitioner (and the dissent) that focused on the credibility of the officers and argued for rejection of their testimony outright at the summary judgment stage. App. 38a, n. 21; *see also* App. 99a. Rejecting that argument, the First Circuit held, as it “has often held” that “a party cannot survive summary judgment simply by asserting that a jury might disbelieve the moving party’s evidence.” App. 38a. The Petitioner “must instead present sufficient affirmative evidence of its own to create material issues of fact.” She failed to do so.

Second, Petitioner contends that the First Circuit created a Circuit split by rejecting two “fundamental principles” governing the use of force by police officers: (1) that use of force may be reasonable in one moment, but not the next, due to a meaningful change in circumstances; and (2) that the use of deadly force against an incapacitated suspect who no longer poses a threat is unconstitutional. The First Circuit did not reject these legal principles, it simply found that there were no facts to support their application in this case. Petitioner’s argument (as well as the dissent) is premised on an inference that is unsupported and in fact directly refuted by the evidence in the case - that Root was so incapacitated at the time that the officers used deadly force that he could not have reached for a gun. The majority opinion thoughtfully considered the facts presented by Petitioner and found no evidence to support that inference and refute the eyewitness testimony that Root had reached toward his jacket. App. 35a-37a. Indeed, the majority explicitly highlighted a surveillance video of the moments just before the shooting that showed Root moving under his own

power. The majority did not create a Circuit split, it found a lack of evidence supporting the § 1983 claim, which is precisely why summary judgment was appropriate. This use of deadly force was objectively reasonable under clearly established precedent of this Court and the First Circuit.

What Petitioner truly complains of is the outcome, not the manner in which the majority got there. That puts her in the same position as every other plaintiff whose claims are dismissed at summary judgment. It is not a compelling reason to grant the petition for a writ of certiorari.

I. Factual Background

At approximately 9:20 a.m. on the morning of February 7, 2020, BPD received a report of an individual with a gun at the Brigham and Women's Hospital ("BWH"). App. 3a. Two BPD Officers, Officer Godin and Officer St. Peter, responded to a dispatch relaying the information that a man had pulled a gun on BWH security. App. 3a. After Officer Godin arrived at the scene, a security officer told him that a man had just pointed a gun at him. App. 3a. Officer Godin parked his cruiser and ran in the direction the security officer indicated. As Officer Godin turned a corner, he observed an individual later identified as Root, with an unzipped jacket walking toward him with a gun in his waistband. App. 3a.

After Root identified himself as law enforcement, Officer Godin drew his firearm, knowing that law enforcement officers do not carry guns in

their waistbands. App. 4a. Officer Godin continued to approach Root until he was within a few feet of him, at which point Root withdrew his gun from his waist, and pointed it directly at Officer Godin. App. 4a. Officer Godin saw Root start to pull the trigger and heard what he believed to be gunshot noises. App. 4a. He fired several shots at Root as he fell backward into the street. App. 4a. Officer St. Peter was a short distance away, and upon seeing Root point a gun at Officer Godin and hearing shots, fired at Root. App. 4a. Multiple civilians at the scene observed Root with a gun and believed that he had fired it. Both officers believed that Root had been shot at BWH. App. 4a. Petitioner did not dispute that the use of deadly force at the BWH location was objectively reasonable.

Limping and still carrying the gun, Root got into his vehicle and drove off. App. 4a. Godin returned to his own vehicle and followed. App. 4a. While doing so, he radioed that he had been involved in an officer-involved shooting, that he had been fired upon, and that he believed he had shot the suspect. App. 4a. Other BPD units responded and joined the pursuit, including Officers Fernandes, Figueroa, McMenemy and Thomas. App. 5a.

It was rush hour on a weekday morning prior to the institution of any public COVID-19 measures. Root turned on to Huntington Avenue, a “major, crowded urban artery used by cars, buses, trollies and other forms of transportation” as well as large numbers of bikes and pedestrians. App. 5a, n. 3 and 4. At some point, Officer McMenemy used a Precision Immobilization Technique, or PIT maneuver, to bring Root’s vehicle to a stop, got out of his vehicle, drew his

firearm and ordered Root to show his hands. App. 5a. Rather than obey, Root drove off at high speeds, first using his own vehicle to push Officer McMenemy's cruiser out of his way. App. 5a. The high-speed pursuit continued on to Route 9, another "major urban thoroughfare serving large numbers of cars, buses, bikes and pedestrians." App. 5a, n. 4. Root reached speeds of up to ninety miles an hour, and traffic camera footage showed him weaving through other vehicles at high speeds. App. 5a-6a.

The pursuit ended with a violent collision at the corner of Route 9 and Hammond Street near a shopping center parking lot. App 6a. Root exited his vehicle and continued to flee on foot. App. 7a. Root fell on the sidewalk and got up again, and then proceeded to a mulched area near the parking lot, where he fell again. App 7a. Officer McMenemy stated that Root was slumped over as if in some pain, but that he was moving at a speed faster than a walk. App. 11a. Shelley McCarthy, a civilian, saw Root fall and ran to his side. App. 7a. She was there less than ten seconds, when multiple approaching officers, including Officers Godin and McMenemy, ordered her to get away from Root, which she did. App. 7a, 10a-11a. In the subsequent ten seconds that elapsed prior to the shooting, McCarthy did not see him again, including at the time of the shooting. App. 8a.

Body worn camera ("BWC") footage from Officer Figueroa showed her arriving at the mulched area ordering Root to get down, and to show her his hands. App. 7a. Several other officers can be heard to give similar commands, which they confirmed in their respective statements and deposition testimony,

and which was supported by the statements and testimony of two civilian witnesses, including McCarthy. App. 7a, 10a-18a, 21a-22a. Officer Figueroa stated that “we begged this person to drop his gun, show us his hands,” and that he smirked, “like a laugh” in response. App. 17a. At one point, Officer McMenemy pushed or kicked Root to the ground with the flat of his foot. App. 10a-11a. In the instance before the officers’ fire, you can hear an officer begin a command to Root to “drop” App. 7a.

The officers all testified that Root was not incapacitated or in a prone position at the time that they fired. Officer McMenemy stated that Root was “standing, but crouching down” when he first approached, and after he pushed him to the ground with his foot, stood back up. App. 10a-11a. Trooper Conneely stated that Root was trying to get up and got to one knee – that he was not prone, but never got to a fully upright position. App. 12a-13a. Officer Thomas stated that Root was in a “half lying, half kneeling position,” but wasn’t fully standing or sitting. App. 14a. Officer Fernandes testified that Root seemed as if he was trying to stand, “a lean-type standing,” but wasn’t standing fully up. App. 15a-16a. Officer Figueroa stated that Root was on his knees, kneeling facing the officers. App. 16a-17a. Godin stated that Root was in a sitting position, possibly laying halfway on his side. App. 18a.

Five of the six officers, who fanned out around Root, saw him make a move that they believed to be him reaching for his weapon. Officer McMenemy stated that he saw Root grab at his jacket with his left hand which revealed the backside and handle of a

“black gun” which Root reached for with his right hand. App. 10a-11a. It was this point that he fired. App. 11a. Trooper Conneely stated that he saw Root reach into his chest and that he saw a “black handle,” at which point he fired. App. 12a-13a. Officer Fernandes testified that he witnessed Root reach into his jacket as if to pull something out, and at that point shots were fired. App. 15a-16a. Officer Figueroa stated that she saw Root start to take something out of his jacket and she saw the handle of a firearm. App. 17a. Officer Godin stated that he saw Root reach into his jacket and fired when he heard someone yell, “gun.” App. 18a. A civilian witness and medical doctor, Dr. Gerbaudo, testified that he saw Root reach with his right hand under his coat and it was at that moment the police officers discharged their firearms.⁴ App. 18. The only officer that did not see Root reach, Officer Thomas, stated that he was not in a position to see Root’s hands, but that he was “moving very abruptly and aggressively versus in a surrendering manner” and that he fired when he heard gunshots, believing it to be Root firing on his fellow officers. App. 14a. Within three seconds, the officers fired a total of thirty-one shots. App. 8a.

After the shooting, Trooper Conneely and Officer Figueroa approached Root to roll him over and secure his hands. App. 8a, 12a. A non-party, Officer Elcock of the Brookline Police Department, rolled Root’s body over at which point he observed a handgun fall out of Root’s chest area. App. 19a. Brookline Police Detective Wagner saw the suspect

⁴ Dr. Gerbaudo told State Police investigators that he had not spoken to any officers between witnessing the shooting and the time of his interview.

get rolled over and observed a firearm fall from Root's chest area. App. 19a. The firearm was recovered by Trooper Conneely, who is seen holding the firearm on Officer Figueroa's BWC footage immediately after the shooting. App. 8a, 12a.

Following the shooting, it was determined that the gun found on Root's person was a BB gun. App. 22a. The search of Root's vehicle revealed substantial amounts of blood loss and two additional guns, including the gun from BWH that Root pointed at Officer Godin. App. 23a. In discovery, Petitioner's expert medical witness opined that the amount of blood lost by Root inside the car was significant, but could not be quantified and that it would have rendered him mentally and physically impaired at the time of the Brookline shooting. App. 23a.

II. Proceedings Below

Petitioner filed the operative complaint in this matter on August 10, 2020. Relevant to this petition, Petitioner asserted the following claims: (1) Count I for excessive force at the Brookline scene under § 1983; (2) Count II for violations of the Massachusetts Civil Rights Act, M.G.L. c. 12, §§ 11H and 11I based on the allegations of excessive force at the Brookline scene; (3) Count VIII for assault and battery; and (4) Count IX for wrongful death under M.G.L. c. 229, § 2. On August 8, 2022, the BPD Officers and the City moved for summary judgment, arguing, *inter alia*, that the use of deadly force was objectively reasonable, and alternatively, that they were entitled to qualified immunity because the law was not clearly established that they could not use

deadly force in the circumstances they confronted on February 7, 2020. Petitioner cross moved for partial summary judgment.

On December 7, 2022, the District Court granted the BPD Officers' motion for summary judgment, concluding that with respect to the Counts relevant here – those based on the use of deadly force – “after viewing the undisputed facts in the light most favorable to” Petitioner, the defendant officers did not violate Root's Fourth Amendment rights. App. 97a. The District Court went one step further and held that the defendant officers were entitled to qualified immunity based on this Court's then-recent decision in *City of Tahlequah, Oklahoma v. Bond*, 595 U.S. 9 (2021) and the First Circuit's even more recent decision in *Rahim v. Doe*, 51 F.4th 402 (1st Cir. 2022) that it found to be “squarely on point and based on numerous cases that predate the encounter.” App. 101a-102a.

Petitioner appealed the decision of the District Court on December 7, 2022. Petitioner did not appeal the denial of her own summary judgment motion, instead choosing to assert that there were in fact genuine issues of material fact. After briefing and oral argument, on April 22, 2024, the First Circuit issued a split 2-1 decision affirming the decision of the District Court in its entirety. App. 3a. Acknowledging that it was bound to “construe the facts in the light most favorable to the nonmoving party – here, Bannon – and draw all reasonable inferences in her favor,” the majority nonetheless found the officers' use of deadly force was objectively reasonable under the *Graham* test, 490 U.S. at 397,

and the factors it had gathered and articulated in *Rahim*, 51 F.4th at 414. App. 26a-28a. The majority further affirmed the finding of qualified immunity, distinguishing the cases forming Petitioner’s perceived Circuit split and noting that Petitioner “failed to ‘[i]dentify a single precedent finding a Fourth Amendment violation under similar circumstances.’” App. 44a (citing *City of Tahlequah*, 595 U.S. 14 (2021)).

REASONS FOR DENYING THE PETITION

I. The Majority Applied the Traditional Summary Judgment Standard; Petitioner Simply Failed to Present Evidence to Create a Genuine Issue of Material Fact to Dispute it was Objectively Reasonable to use Lethal Force in this Instance

The majority opinion did not adopt a new summary judgment standard under which, the Petitioner contends, “a court may assess the summary judgment record by making factual determinations, weighing evidence, assessing credibility, and drawing inferences in the movant’s favor.”⁵ On the contrary, it was Petitioner that asked the District Court and First Circuit to weigh the testimony of eyewitnesses and determine whether the officers’ testimony was

⁵ The majority explicitly cited established First Circuit precedent in stating that it was bound to “construe the facts in the light most favorable to the nonmoving party – here, Bannon – and draw all reasonable inferences in her favor.” App. 26a (citing *Fagre v. Parks*, 985 F.3d 16, 21 (1st Cir. 2021)). For the reasons discussed below, the majority’s decision was also implicitly consistent with established precedent regarding the summary judgment standard.

credible. Both the District Court and the majority refused to do so, instead focusing on the lack of any evidence sufficient to create a genuine issue as to whether the officers reasonably believed Root was reaching for a gun in his final moments. Even the dissent was forced to concede that if, “as the defendants contend, Root reached into his jacket, then the officers likely reasonably responded to a potential imminent threat because they had reason to believe Root was armed.” App. 54a. That is precisely what the undisputed evidence here showed.

There were eight eyewitnesses to Root’s movements in the final moments before the officers elected to use lethal force: (1) Root; (2) the six officers who fired their service weapons in response; and (3) Dr. Gerbaudo. That is all. One of those witnesses, Root, was the subject of the fatal shooting and thus unfortunately cannot testify as to his actions that day. The remaining eye witnesses all testified consistently, if not identically. In the moments before his death, Root was not incapacitated or in a prone position, and reached for his jacket for what officers believed to be a gun. Several officers saw what they believed to be the handle of the gun. With the exception of Officer Thomas, who could not see Root’s hands, and fired because he heard shots and believed Root was firing, every officer testified that the reach was the impetus for discharging their weapons. Dr. Gerbaudo, corroborated this testimony by stating that the officers fired immediately after Root reached into his jacket.

There was significant additional evidence that the officers’ decision to use lethal force was

“objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Graham*, 490 U.S. at 397. As the majority noted, reasonableness is assessed “from the perspective of a reasonable officer on the scene, rather than with the vision of 20/20 hindsight.” *Id.* at 396; App. 28a. Here, the officers had every reason to think that Root was an imminent threat. Officers knew he was armed with some sort of gun – a gun that was recovered under his body at the scene. Godin had been fired upon at the BWH scene. He called in the police-involved shooting over the radio in the moments before the pursuit. There was no question that Root was an imminent threat to the officers and the public – just moments before the shooting he showed a complete disregard for anyone’s safety by driving through busy city streets, at rush hour, weaving in and out of traffic at speeds approaching ninety miles an hour and ignoring attempts to stop him or pull him over. The pursuit ended only because Root slammed into three occupied civilian vehicles at a high rate of speed. And when he exited the vehicle after the crash, traffic camera footage revealed that he moved in the direction of a shopping area under his own power in the moments before the shooting.

Both the Petitioner and the dissent completely ignore all of the context from the BWH scene and the high-speed pursuit through Brookline. App. 73a, n. 40. This myopic view of the evidence of objective reasonableness forms one half of the basis of Petitioner’s fabricated Circuit split discussed below in the following section. But it also ignores this Court’s holding that the majority was required to consider

“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.” *Graham*, 490 U.S. at 397. The dissent’s distinguishing of *McGrath v. Tavares*, 757 F.3d 20, 28 (1st Cir. 2014) in concluding that these officers, one of whom believed he had been shot at earlier, should disregard Root as a threat because he had exited the vehicle in which he had been a menace to the public, is untenable. That he could no longer hit officers with his car did not make him unable to shoot them with his gun.

As the majority held, Petitioner bore “the burden of producing *contrary evidence* and not just hypothetical disputes.” App. 34a (emphasis added and citing *Statchen v. Palmer*, 623 F.3d 15, 18 (1st Cir. 2010). “[T]he party opposing summary judgment in a deadly-force case must point to evidence – whether direct or circumstantial – that creates a genuine issue of material fact.” App. 35a (quoting *Lamont v. New Jersey*, 637 F.3d 177, 182 (3d Cir. 2011)). As the majority determined, none of the facts relied upon by Petitioner contradicted the testimony of the officers and Dr. Gerbaudo that Root was reaching into his jacket at the time of the shooting.

Instead Petitioner relies solely on hypothetical disputes. Petitioner points to only two pieces of affirmative evidence in her attempt to create a genuine issue of material fact. First, Petitioner points to the testimony of Shelly McCarthy, the civilian that approached Root and complied with commands from officers to leave prior to the shooting. However, there

is no dispute that McCarthy did not see the shooting or what Root did or did not do in the moments before. Petitioners (and the dissent) instead rely on her testimony regarding Root's condition in the brief moments that she observed him. But her testimony and the remaining factual record does not allow for, as Petitioner suggests, an inference that Root would have been unable to reach for a gun in the subsequent moments. App. 35a. McCarthy merely testified that in her opinion, Root would not have been able to stand. However, he was standing and walking just seconds before she saw him. And an inability to stand is not inconsistent with testimony that he had reached for a gun in the moments before the shooting. The second piece of affirmative evidence, that the Petitioner's expert testified that the indeterminable amount of blood loss would have rendered him "physically and mentally impaired," fares no better. App. 36a-37a. Impairment and incapacitation (the second half of the fabricated Circuit split discussed below) are two very different concepts. That Root was impaired does not mean that he could not have reached for a gun – indeed that impairment did not prevent him from walking briskly from the vehicle to the mulched area.

What's left is the true crux of Petitioner's argument, that the majority should have ignored the testimony of the officers and Dr. Gerbaudo as inconsistent and unreliable. This argument has no merit. The District Court and majority each properly determined that "a party cannot survive summary judgment simply by asserting that a jury might disbelieve the moving party's evidence." App. 38a. The officers' testimony, no matter how self-serving,

may be properly considered as a fact that must be refuted to defeat summary judgment. See *Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11, 18 (1st Cir. 2007); *LaFrenier v. Kinirey*, 550 F.3d 166, 168 (1st Cir. 2008) (that officers were not disinterested witnesses does not preclude summary judgment). Petitioner in essence argues “that summary judgment could not be granted because [she] is entitled to attack the credibility of the officers’ testimony.” *LaFrenier*, 550 F.3d at 167. “As a matter of law this is incorrect.” *Id.* “A party cannot create an issue for the trier of fact by relying on the hope that the jury will not trust the credibility of witnesses ... [t]here must be some affirmative evidence.” *Sears, Roebuck & Co. v. Goldstone & Sudalter*, 128 F.3d 10, 18 (1st Cir. 1997) (quotation omitted). There is no affirmative evidence here to **refute** the officers’ testimony that Root reached; the only evidence is the corroborating evidence of Dr. Gerbaudo.⁶ Whatever weight a jury might give to the officers’ or the doctor’s testimony, there is simply no evidence to refute their account of what occurred in the moments before the shooting of Root.

As the dissent agreed, if Root was reaching for what officers believed to be a firearm in the moments before the shooting, their use of deadly force was objectively reasonable. The officers and a civilian witness all testified that Root was reaching, with several testifying that they saw the gun. The only thing offered to dispute this eyewitness testimony

⁶ Likewise, the mere fact that the officers killed the only other eyewitness is not sufficient to disregard the officers’ testimony about how the shooting occurred. App. 38a, n. 21 (discussing *Flythe v. District of Columbia*, 791 F.3d 113 (D.C. Cir. 2015)).

was hypothetical opinion testimony and attacks on the officers' credibility. Neither is sufficient to defeat summary judgment under existing and well-established federal summary judgment precedent.⁷ There are no compelling reasons to grant the writ of certiorari, and it should thus be denied.⁸

⁷ In the final section of the petition, Petitioner makes much of the dissent in the First Circuit's recent decision in *Caruso v. Delta Air Lines, Inc.*, 113 F.4th 56, 78 (1st Cir. 2024), arguing that it establishes a pattern of applying a new fact-finding approach to summary judgment. Again, the *Caruso* majority did nothing of the sort. Like the present case, *Caruso* represents nothing more than a disagreement on the panel regarding what facts were material or in genuine dispute. *Caruso* did not involve supervisory liability, and thus the issue was not which story to believe (which was the focus of the dissent – whether there was consent), but rather whether the alleged harassment was causally connected to the company's actions and whether the company had conducted a reasonable investigation. *Id.* at 61, 70-73, 75-76. As the majority noted, “[e]ven if there were disputes of material fact as to the nature of the sexual encounter between Lucas and Caruso and any consent, that does not go to the issue in this case, which is of Delta’s liability and not Lucas’s liability.” *Id.*, at 71, n. 7. Moreover, in the District Court’s decision granting summary judgment in the *Caruso* case, it applied the caselaw referenced on pages 17-19 of the petition, citing this Court’s seminal summary judgment decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) as well as established First Circuit precedent. *Caruso v. Delta Air Lines, Inc.*, 2022 WL 715709, at *3 (D. Mass., Mar. 9, 2022).

⁸ Petitioner’s reliance on the dissent in *N. S. v. Kansas City Board of Police Commissioners*, 143 S. Ct. 2422, 2423 (2023) in support of her argument that the new summary judgment standard applied by the First Circuit here and in *Caruso* (assuming one suspends disbelief and accepts that as what occurred in these majority opinions) is perplexing. There, the dissent similarly argued that the Eighth Circuit improperly drew factual inferences in favor of a police officer, improperly invading the province of the jury. *See id.* It should be noted that

II. There is no Circuit Split. The Majority Followed Existing First Circuit Precedent and Appropriately Distinguished the Cases Cited from Other Circuits

Petitioner’s efforts to concoct a Circuit split are based on the idea that the majority “rejected” two fundamental principles of police use of force jurisprudence. As articulated by Petitioner, these principles are: (1) that use of force may be reasonable in one moment, but not the next, due to a meaningful change in circumstances; and (2) that the use of deadly force against an incapacitated suspect who no longer poses a threat is unconstitutional. The First Circuit did not reject these legal principles, it simply found that there were no facts to support their application in this case. In short, Petitioner’s speculative premise is that when officers arrived at the mulched area, they should have been aware that there had been a change in circumstances because Root was incapacitated. Neither inference has any factual support in the record.

For the first “principle,” Petitioner relies on *McKenney v. Mangino*, 873 F.3d 75, 81-82 (1st Cir. 2017) for the proposition that “police officers must reassess changing circumstances because, even if deadly force is ‘reasonable in the moment, it may become unreasonable in the next if the justification

N. S. involved very different facts – for example, the decedent “never had a gun, he was lifting his hands to surrender,” and the officer “fired without warning.” *Id.* What is important here, however, is the context in which this argument was raised – a **dissent** to a **denial of a petition for writ of certiorari**. See *id.* As was the case in *N. S.*, there is no compelling reason to grant the petition for a writ of certiorari here.

for the use of force has ceased.” Petition at 27 (quoting *McKenney*). According to Petitioner, where circumstances have “meaningfully changed” in a given situation, the reasonableness of the use of force depends on that change in circumstances. Petition at 27 (citing *LaChance v. Town of Charlton*, 990 F.3d 14, 25-26 (1st Cir. 2021)).

For the second “principle,” Petitioner clings to the “immediate threat” language of *Graham*, 490 U.S. at 396 and cases from other Circuits holding that the use of deadly force on an *incapacitated* subject that ***no longer poses a threat*** is unconstitutional, regardless of any prior threat. *See, e.g., Franklin v. City of Charlotte*, 64 F.4th 519, 525 (4th Cir. 2023); *Tan Lam v. City of Los Banos*, 976 F.3d 986, 1002 (9th Cir. 2020); *Estate of Jones by Jones v. City of Martinsburg, W. Va.*, 961 F.3d 661, 669 (4th Cir. 2020).

Both of these “principles” rely on a hypothetical inference that, as discussed above, has zero factual support in the record – that Root had lost so much blood that he had become incapacitated and could not have reached for his gun in the moments before the police shot him. There was no evidence that circumstances had changed such that Root was no longer an imminent danger – Root had just crashed into civilian vehicles at almost ninety miles an hour, got out of his vehicle with a gun in his possession, and walked from his vehicle to the mulched area. Officers had no reason to believe that Root was no longer an immediate threat – because he actually remained an immediate threat. Officers believed he had a gun on his person. He was also still moving under his own

power. There was no evidence that he was incapacitated or unable to draw and fire his gun. The majority's decision is completely consistent with the cases in other Circuits cited by Petitioner regarding changed circumstances and incapacitated suspects – because there were no changed circumstances and there was no evidence that Root was incapacitated. Petitioner's Circuit split relies on an unsupported and hypothetical inference belied by the record.

The majority did not ignore these principles, rather it found that they were inapplicable in these circumstances. The majority found that there was no change in circumstances at the Brookline location requiring the officers to disregard the events at BWH or during the pursuit. App. 31a. This was a public place between a busy street and a shopping center parking lot. Officer McMenemy witnessed him walking to the mulched area. A reasonable officer would conclude that Root, known to be armed with a gun, would endanger officers and nearby members of the public if not quickly apprehended. *See Roy v. City of Lewiston*, 42 F.3d 691, 696 (1st Cir. 1994); *Dean v. City of Worcester*, 924 F.2d 364, 368 (1st Cir. 1991).

Likewise, the majority simply found no evidence from which a jury might conclude that Root was incapacitated at the time of the shooting. The majority distinguished the principal cases from the Fourth and Sixth Circuits upon which Petitioner relies for a Circuit split as involving “factual scenarios too dissimilar to those confronted by the officers here.” App. 44a. The majority expressly referred to *Estate of Jones*, 961 F.3d at 669, as inapposite. App. 44a. The majority discussed *Franklin* in depth,

noting that the individual shot in that case was not aggressive or threatening, did not attempt to resist or flee, and sought to comply with police orders by carefully pulling out his firearm holding it with one hand at the top of the barrel, in a non-firing grip.⁹ 64 F.4th 519, 532-34; App. 44a.

Petitioner's fabricated Circuit split is based on a faulty supposition unsupported by the actual undisputed facts in the summary judgment record – that Root was so incapacitated at the time of the shooting that he was unable to fire a weapon at the officers. There is no split – the majority simply concluded that those cases were inapplicable to the undisputed facts on this summary judgment record. There are no compelling reasons to grant the writ of certiorari, and it should thus be denied.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

⁹ The majority also found *Franklin* to be unhelpful for Petitioner because for purposes of qualified immunity under *City of Tahlequah*, it could not be clearly established law, having been decided over three years after the shooting of Root. App. 44a; *City of Tahlequah*, 595 U.S. at 13; *Franklin*, 64 F.4th at 532-534.

Respectfully submitted,

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