NO. 25-_____

In the Supreme Court of the United States

NICOLE KLUM, AS ADMINISTRATOR OF THE ESTATE OF BOBBY JO KLUM, ET AL.,

Petitioners,

v.

CITY OF DAVENPORT, IOWA, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The decision below contravenes the Second Amendment right to "keep and bear arms," and the Fourth Amendment prohibition "against unreasonable searches and seizures." U.S. Const. amen. II and IV. In *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 1701, 85 L.Ed.2d 1 (1985), the Court held that the use of deadly force "to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable."

The below decision also conflicts with all other Circuit Court precedent, and applicable Iowa law affirming the right to openly carry firearms. I.C.A. §§ 724.5 and 704.2(2) . Prior to the panel's decision it was clearly established that deadly force may not be used on a person "in possession of a gun" unless the gun is "point[ed] at another or wield[ed] in an otherwise menacing fashion." *Cole ex rel. Est. of Richards v. Hutchins*, 959 F.3d 1127, 1134 (8th Cir. 2020). The decision below violates that precedent by conceding the gun Klum held to his own head never moved, but authorizing deadly force because Klum allegedly turned to walk in the general direction of bystanders located a half a block away. The decision below also disregards the requirement to provide a warning before using deadly force.

Whether the Second and Fourth Amendments to the United States Constitution forbid police from using deadly force against a suspect exclusively for holding a gun to his own head?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Nicole Klum, as Administrator of the Estate of Bobby Jo Klum
- Wanda Albright

Respondents and Defendants-Appellants below

- City of Davenport, Iowa
- Mason Roth

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Eighth Circuit

No. 24-2165

Published at 145 F.4th 907 (8th Cir. 2025)

Nicole Klum, Estate of Bobby Jo Klum;
Wanda Albright, *Plaintiffs-Appellants,* v.
City of Davenport; Mason Roth, *Defendants-Appellees*

Final Opinion: July 31, 2025

Rehearing Denial: September 3, 2025

U.S. District Court, S.D. Iowa

No. 3:23-cv-00043

Nicole Klum, individually and as administrator of the Estate of Bobby Jo Klum, and Wanda Albright, Individually, *Plaintiffs,* v. City of Davenport and Mason Roth, *Defendants*

Final Order: May 30, 2024

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OPINIONS BELOW

The Opinion of the U.S. Court of Appeals for the Eighth Circuit, published at 145 F.4th 907 (8th Cir. 2025), is included at App.1a. The U.S. District Court, Southern District of Iowa's decision granting the Defendants' qualified immunity and dismissing the case was issued on May 30, 2024, and is unpublished. 2024 WL 2880640. App.17a.

JURISDICTION

The Eighth Circuit entered judgment on July 31, 2025 (App.15a), and denied a timely filed petition for rehearing en banc on September 3, 2025. App.58a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. II

> * * * [T]he right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. IV, in relevant part

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

Iowa Code § 724.5

> The availability of a professional or nonprofessional permit to carry weapons under this chapter shall not be construed to impose a general prohibition on the otherwise lawful unlicensed carrying or transport, whether openly or concealed, of a dangerous weapon, including a loaded firearm.

Iowa Code § 704.2(1) and (2), in relevant part:

> The term "deadly force" means . . . [f]orce used for the purpose of causing serious injury [or f]orce which the actor knows or reasonably should know will create a strong probability that serious injury will result . . . ***
>
> "Deadly force" does not include a threat to cause serious injury or death, by the production, display, or brandishing of a deadly weapon, as long as the actions of the person are limited to creating an expectation that the person may use deadly force to defend oneself, another, or as otherwise authorized by law. ***

INTRODUCTION

On October 13, 2021, Klum was attempting to evade arrest on a warrant by meandering thru a neighborhood of modest homes holding what turned out to be a BB gun to his own head. App.2a-3a, 73a, 79a. It is undisputed that the gun Klum held to his own head "never moved;" that Klum exhibited no change in his calm demeanor or unhurried pace; that no warning was ever issued; and at the time he was

shot, Klum was neither closer to the bystanders, nor walking more directly toward them. Officer Roth used deadly force because Klum, who "was walking essentially due south . . . turned toward the east . . . on a path directly" towards bystanders and was getting close enough to take one hostage. App.76a. Synced video of the incident establishes that the closest bystander to Klum when he was killed was a half a block away.[1]

The Eighth Circuit's decision conflicts with the Second and Fourth Amendments to the United States Constitution, controlling Supreme Court precedent, prior decisions of the Eighth Circuit, the holdings of every other circuit, and applicable Iowa law recognizing the right of Iowans to openly carry firearms. Before the panel's decision, it was clearly established that the use of deadly force is not justified against an individual merely "in possession of a gun," absent evidence that the person "point[ed] [the firearm] at another or wield[ed] it in an otherwise menacing fashion." *Cole ex rel. Est. of Richards v. Hutchins*, 959 F.3d 1127, 1134 (8th Cir. 2020). The panel's ruling departs from that precedent by authorizing the use of deadly force against an armed individual who is not perceived as "pointing the gun or wielding it in a menacing fashion," solely because the individual allegedly begins to move in the "general direction" of another person located approximately fifty yards away. App.9a. As a result, the Eighth Circuit now stands alone as the only circuit to hold that the mere possession of a firearm, without

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[1] The entire video was captured on numerous cruiser and body worn cameras. A synced video of the critical sequence of time from different angles is available on YouTube and may be accessed at the following link https://youtu.be/sXaZMdWAL7Q.

any menacing use or threat, may justify the use of deadly force.

The Eighth Circuit's decision also violates Iowa codified law. Iowa is an open-carry state, including protection for "the production, display, or brandishing of a deadly weapon," without using the gun in a threatening manner. Iowa Code §§ 724.5 and 704.2(2).

The Eighth Circuit's decision contravenes *Tolan v. Cotton*, reversing the Fifth Circuit for the failing to view the evidence at summary judgment stage in the light most favorable to the non-moving party. 572 U.S. 650, 656-657 (2014) (per curiam). The panel repeatedly relies on the contested assertion that "Klum continued to walk south, diagonally toward the east side of Iowa Street in the general direction of the bystanders when Officer Roth shot him." App.6a. It is undisputed that at the time Klum was killed all bystanders were in or near the house on the corner. *Id.* Roth never claimed Klum was walking toward the house on the corner. App.63a-64a and 76a-77a. Roth claimed Klum was walking toward the alley intersection in the middle of the block where he incorrectly perceived bystanders to be located. *Id.* During his deposition Roth circled an area on deposition exhibit 1 where he believed bystanders were located at the time he killed Klum. App.64a.

Finally, the Eighth Circuit's decision abrogates the requirement that a warning be issued, if feasible, before the use of deadly force. The encounter lasted for 10 minutes and at no point was Klum warned that he would be killed for his conduct. App.4a and 37a.

It is well-settled across the Circuits that an officer may not use deadly force solely because a suspect is armed. Mere possession of a firearm—without the

suspect pointing it or otherwise wielding it in a threatening manner—does not, by itself, justify deadly force.

- *Conlogue v. Hamilton*, 906 F.3d 150, 156 (1st Cir. 2018) (qualified immunity allowed where suspect was "moving closer to the troopers and pointing his gun in their direction." The court refused to accept plaintiff's argument that the "gun must be pointed directly at an officer in order to be threatening.").
- *Salim v. Proulx*, 93 F.3d 86, 92 (2nd Cir. 1996) (qualified immunity granted where it was undisputed that officer shot suspect "in the midst of a struggle when the possibility that [the suspect] might gain control of the officer's weapon was imminent.").
- *Lamont v. State*, 637 F.3d 177, 183 (3rd Cir. 2011) ("An officer is not constitutionally required to wait until he sets eyes upon a weapon before employing deadly force to protect himself against a fleeing suspect who moves as though to draw a gun.").
- *Cooper v. Sheehan*, 735 F.3d 153, 159 (4th Cir. 2013) ("deadly force may only be used by a police officer when, based on a reasonable assessment, the officer or another person is threatened with the weapon.").
- *Baker v. Putnal*, 75 F.3d 190 (5th Cir. 1996) (denying qualified immunity where a factual dispute existed regarding whether the suspect was holding a pistol or pointing it at the officer.).
- *Jacobs v. Alam*, 915 F.3d 1028, 1040 n. 3 (6th Cir. 2019) (denying qualified immunity where suspect

"unequivocally denied telling [officer] that he pointed a gun at anyone. As set forth below, we lack jurisdiction to resolve this factual dispute.").

- *Weinmann v. McClone*, 787 F.3d 444, 449 (7th Cir. 2015) (denying qualified immunity based upon a threat posed by the "the way [the suspect] was holding the gun," because "the way in which [the suspect] was holding the gun is disputed.").
- *Cole ex rel. Est. of Richards v. Hutchins*, 959 F.3d 1127, 1134 (8th Cir. 2020) (the use of deadly force is not justified against an individual merely "in possession of a gun," absent evidence that the person "point[ed] [the firearm] at another or wield[ed] it in an otherwise menacing fashion.").
- *Calonge v. City of San Jose*, No. 22-16495, 2024 U.S. App. LEXIS 13912, at 12-13 (9th Cir. June 7, 2024) ("If a person possesses a weapon but 'doesn't reach for his waistband or make some similar threatening gesture, it would clearly be unreasonable for the officers to shoot him.'" [citing *Cruz v. City of Anaheim*, 765 F.3d 1078, 9th Cir. 2014]).
- *Walker v. City of Orem*, 451 F.3d 1139, 1157-60 (10th Cir. 2006) (denying qualified immunity where a fact issue existed regarding whether a suspect was armed and pointing his hands in a "classic shooting stance.").
- *Perez v. Suszczynski*, 809 F.3d 1213, 1220 (11th Cir. 2016) ("the mere presence of a gun or other weapon is not enough to warrant the exercise of deadly force . . . Where the weapon was, what type of weapon it was, and what was

happening with the weapon are all inquiries crucial to the reasonableness determination.").

- *Flythe v. District of Columbia*, 791 F.3d 13 (D.C. Cir. 2015) (denying qualified immunity where an officer received a report that a suspect attempted to stab another officer, was close to the suspect and perceived the suspect turning toward him with a knife, because there were credible disputes about whether the suspect actually posed an immediate threat at the moment deadly force was used.").

Tennessee v. Garner requires that a warning be given, if feasible, before the use of deadly force. 471 U.S. 1, 11, 105 S. Ct. 1694, 1701, 85 L.Ed.2d 1 (1985). It is undisputed that during the entire ten-minute encounter, no law enforcement officer warned Klum that he would be shot and killed if he failed to comply with orders. App.4a and 37a. Nevertheless, the panel opinion dismissed the constitutionally required warning by incorrectly characterizing this matter as an "escalation case." App.12a. Despite disclaiming that it was not changing the law, the panel held that Officer Roth was justified in using deadly force without a warning and without any finding of a menacing movement with the gun. *Id.* n. 4.

The decision below sanctions a district court ruling that has departed so far from the accepted and usual course of judicial proceedings—including the failure to follow controlling decisions of this Court and the Eighth Circuit's own precedent, as well as its contradiction of Iowa statutory law protecting the rights of gun owners—that the exercise of this Court's supervisory power is warranted.

This case raises a significant question of federal law regarding the constitutional protections afforded to gun owners and the limits on law enforcement's use of deadly force. The circuit court's decision conflicts with this Court's precedents and the rulings of every other federal court of appeals, including prior precedent within the Eight Circuit. Review by this Court is necessary to restore uniformity in the law and reaffirm the constitutional safeguards guaranteed by the Second and Fourth Amendments.

In the Eighth Circuit, the law is now that police may use deadly force — without warning — against a suspect who does not pose an immediate threat to the officer or others, simply because the suspect is armed, disobeying orders and falsely perceived to move in the direction of bystanders a half a football field away. This departs from the previous Eighth Circuit rule (*see Cole ex rel. Est. of Richards v. Hutchins*), which held that deadly force may not be used on a person "in possession of a gun" unless the gun is "point[ed] at another or wield[ed] in an otherwise menacing fashion." 959 F.3d 1127, 1134 (8th Cir. 2020).

The change in law has serious adverse consequences for gun-owners and for citizens previously protected against the use of unreasonable deadly force. It "lessens the Fourth Amendment's protection of the American public, devalues human life, and frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." *Barnes v. Felix*, 91 F.4th 393, 401 n.* (5th Cir. 2024) (Higginbotham, J., concurring).

The petitioners in this case are Bobby's spouse and mother, Nicole Klum and Wanda Albright. They lost their husband and son because Officer Roth used

excessive deadly force without warning, violating Bobby's constitutional rights, over the execution of an arrest warrant on an unknown charge. App.22a. They respectfully request that the Court grant certiorari and reverse the decision below.

STATEMENT OF THE CASE

A. Statement of Facts

The subject matter incident occurred on October 13, 2021, and was initiated by Officer Dustin Mooty of the Davenport Police Department who had a warrant for Klum's arrest. App.2a. While in foot pursuit Mooty observed Klum holding a gun to his head *Id.* The walking pursuit meandered through the neighborhood for several minutes. App.79a. Klum did not comply with orders to drop the gun. App.3a.

The only background information Officer Roth had about Klum before killing him was a description of the clothes Klum was wearing; that another officer was pursuing Klum on foot; and Klum had a gun.[2] App.8a and 21a-22a.

Roth drew red markings on an overhead of the scene indicating key locations regarding the subject matter incident, including an X where he was located when he shot Klum, a line showing Klum's path before the shooting and an oval where Roth claimed a "group of bystanders" gathered and remained during the incident. App.63a-64a.

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[2] The gun was a BB gun. App.22a, n.2 and 63a-64a.

Prior to shooting Klum, Roth got close to Klum while Roth was exposed without any cover. App.3a and 21a. Roth was well within shooting range of a handgun. *Id.* Klum crossed E. 9th St. while bystander Tina West was stopped in a vehicle on the other side of the intersection. App.22a. West was clearly within shooting range of a handgun. *Id.* Klum continued south on the sidewalk while turned around facing north and walking backwards. *Id.*

Videos showing the entire critical sequence of events from various perspectives have been synced together into one video. App.22a and *infra* p.3, n.1. The defense admitted at the time Roth shot and killed Klum; other law enforcement officers were in the process of moving into position to assist with setting up a perimeter and seeking safe resolution of the incident. App.62a. No warning that deadly force was going to be used was provided to Klum prior to the use of deadly force. App.4a.

Synced video of the incident establishes that at the time Roth shot Klum no bystanders were in, or anywhere near, the area Roth claims they were located. App.64a. The district court admitted that "[i]t is undisputed that the two bystanders closest to Klum were 148 feet and 179 feet away from him." App.36a. The synced video establishes that all bystanders followed officers' orders to move to safety, despite Roth's adamant claim to the contrary. App.70a and 76a. Some bystanders were outside, but only because they did not have enough time to get into the house before Roth fired. *Id.* Despite the significant distance between Klum and the closest bystanders, the district court relied on "the proximity of bystanders" to justify the use of deadly force because they were within the

300-foot range of a handgun. App.6a, 35a and 64a. The district court did not address the undisputed fact that at no time during this incident was Klum ever more than 300 feet from an officer or bystander. App.2a and 79a.

Both the district court and the circuit court ignored Roth's false claim that bystanders were located in the circled area on deposition exhibit 1 and were in imminent danger from Klum. Roth claimed that as Klum "started approaching the people, I was worried that he might try to take one of them hostage to escape or he might start killing people. Or who knows what else?" App.64a and 76a-77a. Roth elaborated on his alleged justification for using deadly force on Klum agreeing with the DCI agent that "it's fair to say that when [Klum] was walking towards the group of people on Iowa, going towards Eight and a Half [the alley intersection], that he could have ["easily"] shot somebody there, including a young child [and] could have taken any number of people hostage." *Id.*

The courts below effectively rewrote Roth's bystander-location allegations to conform to what the video showed—treating the bystanders not as positioned near the alley intersection, as Roth alleged, but instead as standing near the corner house half a block away. App.6a and 35a. (["Klum] began walking across Iowa Street in a 'southeasterly direction' toward a collection of bystanders . . . [and] continued to walk toward a residence toward which several bystanders had fled on foot."). The District Court incorrectly claimed, "there is no genuine dispute as to any of these facts." App.31a. The critical problem with that assessment is, not only is there a factual dispute about whether Klum was walking "toward bystanders" when Roth fired, but the synced video establishes that claim is

not accurate. App.6a, 35a and 64a. Roth does not even make that claim because he alleges bystanders were located near the alley intersection and that is where Klum was heading. App.64a and App.76a-77a.

Roth never claimed he used deadly force because Klum turned to walk in the general direction of bystanders. Roth claimed that Klum "turned toward the east and started walking on a direct path directly [sic] at the people who had been standing [around the alley intersection] . . . I didn't know what he was going to do . . . I didn't know if he was going to attempt to take a hostage. I didn't know if he was going to do a mass killing and start shooting those people." *Id.*

Certainly, a fact issue was created on the critical issue of where Roth was heading that was used to justify the shooting death of Bobby Klum.

Also, the panel posed the wrong question. The correct issue to be determined is would any reasonable officer conclude Klum's change of course, as a matter of law, constituted menacing behavior. That question is answered by the synced video and the dozens of other officers present, none of whom concluded that the use of deadly force was justified.

B. Procedural History

Petitioners Nicole Klum, as Administrator of the Estate of Bobby Klum, and Wanda Albright, individually, as the mother of Bobby Klum, filed the lawsuit against the City of Davenport and Officer Mason Roth in state court alleging violations 42 U.S.C. § 1983 and related state-based claims. Respondents removed to federal court. At summary judgment, the district court held that Officer Roth's use of deadly force was reasonable, even while acknowledging that Klum's

gun, held solely to his own head, never moved, because Klum turned and advanced in the direction of bystanders who were within the shooting range of a handgun. App.35a-36a. The circuit court affirmed finding that "Klum neither pointed the gun at the bystanders nor threatened officers, but he did walk in the bystanders' general direction." App.11a.

In this Court's landmark decision in *Graham v. Connor*, the Court explained that determining whether the use of force is "reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." 490 U.S. 386, 396 (1989) (quotation marks omitted).

A court should consider "whether the totality of the circumstances" justified an officer's use of deadly force, paying "careful attention to the facts and circumstances of each particular case." *Id.* (quotation marks omitted). Graham identified non-exhaustive factors to consider, "including 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." *Id.* This wholistic inquiry is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," and "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Id.* at 396-397. The officer's actual "intent or motivation" is irrelevant to whether a use of force was constitutional. *Id.* at 397. What

matters instead is whether the officer's use of force was "objectively reasonable." *Id.*

Petitioner appealed the district court's adverse ruling. In a published opinion the Eight Circuit affirmed claiming the facts presented an "escalation case." App.12a. A request for rehearing by the panel or en banc was denied. App.1a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts with Precedent from This Court

This Petition sets out the failure of the Eighth Circuit to follow precedent from this Court regarding the intersection of gun rights, as protected by the Second Amendment, and the use of deadly force by police, as regulated by the unreasonable search and seizure provision of the Fourth Amendment. *See* Sup. Ct. R. 10(c). Since *Tennessee v. Garner*, it has been clear that simply possession of a gun was not grounds for the use of deadly force by police, without the gun being used in a threatening manner. 471 U.S. 1, 11, 105 S. Ct. 1694, 1701, 85 L.Ed.2d 1 (1985).

Garner also requires that a warning be given, if feasible, before the use of deadly force. It is undisputed that during the entire twelve-minute encounter, no law enforcement officer warned Klum that he would be shot and killed if he failed to comply with orders. App.4a and 35a. Nevertheless, the panel opinion dismissed the constitutionally required

warning by incorrectly characterizing this matter as an "escalation case." App.12a. Despite claiming that it was not changing the law, the panel proceeded to do precisely that by holding that Officer Roth was justified in using deadly force without a warning and without any finding of a menacing movement with the gun. *Id.*

In *Graham v. Connor*, this Court held that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." 490 U.S. 386, 396 (1989), *quoting United States v. Place*, 462 U.S. 696, 703, 103 S. Ct. 2637, 2642, 77 L.Ed.2d 110 (1983). The *Graham* court noted that the test of reasonableness under the Fourth Amendment "requires careful attention to the facts and circumstances of each particular case, including 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* at 396, *quoting Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 1884, 60 L.Ed.2d 447 (1979).

Although Klum was attempting to evade arrest by calmly walking through the neighborhood with a gun held to his own head, he posed no immediate threat to the safety of anyone, other than himself, because it is undisputed that the gun never moved. App.9a.

Plaintiffs found no other appellate decision in the country holding that qualified immunity shields

officers who use deadly force against an armed suspect where the record is undisputed that the suspect was never even perceived as making an aggressive movement with the weapon. The panel opinion effectively concedes this point, stating:

> This case, however, does not stand for the proposition that lethal force is reasonable any time a suicidal individual with a weapon is within 300 feet of a bystander or for the proposition that lethal force is reasonable based on speculation alone about what someone with a gun might do in the future.

App.12a, n. 4. This footnote, however, cannot be reconciled with the panel's holding.

Even if one accepts the panel's mistaken view that Klum generally began walking toward bystanders positioned nearly half a football field away, while maintaining a non-aggressive demeanor, the only remaining bases for the use of deadly force were that Klum was armed and Officer Roth's speculative fears about what Klum might do. App.76a-77a. Such speculation, unsupported by any immediate threat or aggressive conduct, is insufficient under clearly established law to justify deadly force. *See Z.J. v. Kan. City Bd. of Police Comm'rs*, 931 F.3d 672, 682-83 (8th Cir. 2019).

In *Partridge v. City of Benton*, the Eighth Circuit held that "a genuine dispute of material fact" was created regarding "whether [the suspect] pointed his gun at the officers," precluding summary judgment. 929 F.3d 562 (8th Cir. 2019). *Partridge* cites and follows the *Garner* rule, while the below decision does not. *See Partridge* at 567 ("But where a person poses no

immediate threat to the officer and no threat to others, deadly force is not justified."). Here, there is no dispute—the gun never moved. App.9a.

The below opinion attempts to distinguish *Partridge* but is non-persuasive. ("Klum was non-compliant and evaded arrest while walking through a residential neighborhood with a gun to his head and in the general direction of bystanders . . . "). App.10a. The suspect in *Partridge* was also suicidal and non-compliant, although not moving away from the officers. *Id.* But the critical distinction in *Partridge* is that the suspect "began moving the gun away from his head when the officer shot and killed him." *Id.* Even with a moving gun qualified immunity was denied because the suspect could also be reasonably perceived as complying with the order to drop the gun. *Id.* This case would present the same factual scenario in *Partridge*—if Klum moved the gun. It cannot be seriously contested that an armed person walking in the general direction of another person 148 feet away is more of a threat then moving to point a gun at that person.

The fact that Officer Roth fired despite it being undisputed that Klum was walking in a non-aggressive manner—in the general direction of a bystander who was running away, approximately fifty yards distant, and about to enter a home—while still pointing the firearm only at his own head, overrides any asserted factual distinctions and renders Roth's conduct significantly more egregious than that of the officer in *Partridge.* App.9a and synced video.

The below opinion also cites and attempts to distinguish *Kong v. City of Burnsville*, another case that cited and accurately followed the Garner rule.

960 F.3d 985, 995 (8th Cir. 2020). ("[W]here 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." *Quoting Garner*, 471 U.S. at 11, 105 S.Ct. 1694.). App.11a. The circuit's attempt to distinguish Kong, is equally unpersuasive. The panel noted that "Klum neither pointed the gun at the bystanders nor threatened officers, but he did walk in the bystanders' general direction like the man in *Kong*. *See Id.* at 990." The suspect in *Kong* was acting belligerently, aggressively and threateningly while running toward officers and bystanders. *Kong* at 989-990.

In *Kong*, the suspect was "jumping up and down inside his car, waving a knife back and forth," "rocking back and forth, slashing a large knife through the air," and would "occasionally burst into frantic fits of gyrations and knife waving." *Kong* at 989-90. Officers believed "Kong was high on methamphetamines." *Id.* He "did not drop his knife or stop bouncing up and down in his seat," and at one point "swung his knife closer to . . . where Officer Jacobs stood." *Id.* at 989.

The encounter culminated when "Kong stumbled out the driver-side door, falling to the pavement. He quickly stood up, knife in hand, and began running across the parking lot." *Id.* at 990. As officers opened fire, "a customer's vehicle exited the parking lot about 30 feet away," and "Kong ran in the general direction of the vehicle."

Klum's demeanor could not have been more different than Kong. See synced video. Klum unquestionably remained calm and deliberate through

the entire sequence of events and never threatened anyone else, verbally or by his conduct.

The panel improperly found that Roth was not required to give a warning before using deadly force in contradiction of *Garner*, 471 U.S. 1, 8-9. App.4a and 12a. The panel improperly reasoned that Roth could have perceived Klum turning to walk in the general direction of bystanders as an escalation requiring use of deadly force." App.12a. That is not an accurate statement because Klum was doing nothing different than what he had been doing during the entire twelve-minute incident, calmly walking through the neighborhood holding a gun to his own head. *See* synced video and App.35a. Reviewing the video of the incident establishes that Klum was arguably never further away from all others than at the time he was killed and was undoubtedly much closer to others at times. App.79a. There was no escalation on Klum's part.

II. The Decision Below Conflicts with Decisions from the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuit Courts

It was well settled across the Circuits that an officer may not use deadly force solely because a suspect is armed. Mere possession of a firearm—without the suspect pointing it or otherwise wielding it in a threatening manner—does not, by itself, justify deadly force.

In *Lamont v. State*, the Third Circuit held that an "officer is not constitutionally required to wait until he sets eyes upon a weapon before employing deadly force to protect himself against a fleeing suspect who moves as though to draw a gun." 637 F.3d 177, 183

(3rd Cir. 2011). The *Lamont* court noted that the suspect pulled his right hand out of his waistband—a movement uniformly described by those on the scene as being similar to that of drawing a gun. At that point, the troopers were justified in opening fire. *Id.* At 183. ("An officer is not constitutionally required to wait until he sets eyes upon [a] weapon before employing deadly force to protect himself against a fleeing suspect who . . . moves as though to draw a gun."). In *Salaam v. Wolfe*, the Third Circuit held that a reasonable officer could believe that when Salaam started to turn towards them, with his gun in the leading hand, that he posed a serious risk of harm to them and those around them. 806 Fed. Appx. 90 (3rd Cir. 2020).

In *Cooper v. Sheehan*, the Fourth Circuit held specifically held that "deadly force may only be used by a police officer when, based on a reasonable assessment, the officer or another person is threatened with the weapon." 735 F.3d 153, 159 (4th Cir. 2013). The *Cooper* court elaborated that "the mere possession of a firearm by a suspect is not enough to permit the use of deadly force," and emphasized that deadly force is only justified when the officer reasonably believes the officer or others are threatened by the weapon. *Id.*

In *Baker v. Putnal*, the Fifth Circuit denied qualified immunity where a factual dispute existed regarding whether the suspect was holding a pistol or pointing it at the officer. 75 F.3d 190 (5th Cir. 1996). The *Baker* court noted that the decedent had a gun but allegedly made no threatening movements. The *Baker* court noted fact issues regarding whether Putnal ordered Baker, Jr., to freeze or to drop the pistol and

whether Baker, Jr., was even holding the pistol or pointing it at Putnal at the time, precluding summary judgment. *Id.*

In *Jacobs v. Alam*, the Sixth Circuit held that "an individual's possession of a gun alone does not create a threat that justifies the use of deadly force." 915 F.3d 1028, 1040 (6th Cir. 2019). Likewise, in *Thomas v. City of Columbus*, the Sixth Circuit noted that an individual's mere possession of a gun alone does not create a threat that justifies the use of deadly force and that "we do not hold that an officer may shoot a suspect merely because he has a gun in his hand." 854 F.3d 361 (6th Cir. 2017).

The Seventh Circuit denied qualified immunity where "the mere possession of the gun" was insufficient because no threat was posed. *Weinmann v. McClone*, 787 F.3d 444, 449 (7th Cir. 2015). In *Mason-Funk v. City of Neenah*, the Seventh Circuit denied qualified immunity where officers shot an armed person who was suicidal, but otherwise in a non-menacing posture. 895 F.3d 504 (7th Cir. 2018).

The Eighth Circuit previously held in *Cole ex rel. Est. of Richards v. Hutchins*, that a person "in possession of a gun" is not an immediate threat unless the gun is "pointed at another or wielded in an otherwise menacing fashion." 959 F.3d 1127, 1134 (8th Cir. 2020).

In *Calonge v. City of San Jose*, the Ninth circuit held "[i]f a person possesses a weapon but 'doesn't reach for his waistband or make some similar threatening gesture, it would clearly be unreasonable for the officers to shoot him.'" No. 22 16495, 2024 U.S. App. LEXIS 13912, at 12 13 (9th Cir. June

7, 2024), [*citing Cruz v. City of Anaheim,* 765 F.3d 1078, 9th Cir. 2014]). "Law enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat of injury to persons." *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997).

In *Walker v. City of Orem*, the Tenth circuit denied qualified immunity where a fact issue existed regarding whether a suspect was armed and pointing his hands in a "classic shooting stance," *i.e.*, made some at least perceived threating movement with the gun. 451 F.3d 1139, 1157-60 (10th Cir. 2006).

In *Perez v. Suszczynski*, the court held that "the mere presence of a gun or other weapon is not enough to warrant the exercise of deadly force . . . Where the weapon was, what type of weapon it was, and what was happening with the weapon are all inquiries crucial to the reasonableness determination." 809 F.3d 1213, 1220 (11th Cir. 2016).

III. Decisions from the First, Second, and D.C. Circuit Courts Are Inconsistent with the Below Decision

For the remaining circuits the controlling law is consistent with the same underlying principle set out in *Garner*, *i.e.*, that deadly force is allowed when an officer reasonably believes an imminent threat exists.

In *Conlogue v. Hamilton*, the court found the suspect armed with a knife and a gun continued to escalate the confrontation by making threatening gestures, moving closer to the troopers, and pointing his gun in their direction. 906 F.3d 150, 156 (1st Cir. 2018). The Conlogue court held that under these

circumstances, *Hamilton* reasonably perceived Conlogue to be an imminent threat. *Id.* The court refused to hold that the gun must be pointed at the suspect to justify the use of deadly force. *Id.*

In *Salim v. Proulx*, the court held that in the midst of a struggle when the possibility that the suspect might gain control of the officer"s weapon was imminent, the use of deadly force was justified. 93 F.3d 86 (2nd Cir. 1996). The Salim court held that in that circumstance no rational jury could find the officer's decision to use deadly force "was so flawed that no reasonable officer would have made a similar choice." *Id.*

In *Flythe v. District of Columbia*, the D.C. Circuit denied qualified immunity where an officer received a report that a suspect attempted to stab another officer, was close to the suspect and perceived the suspect turning toward him with a knife, because there were credible disputes about whether the suspect actually posed an immediate threat at the moment deadly force was used. 791 F.3d 13 (D.C. Cir. 2015).

IV. The Decision Below Departs from the Accepted and Usual Course of Judicial Proceedings

The decision below sanctions a district court ruling that has departed so far from the accepted and usual course of judicial proceedings—including the failure to follow controlling decisions of this Court and the Eighth Circuit's own precedent, as well as its contradiction of Iowa statutory law protecting the rights of gun owners—that the exercise of this Court's supervisory power is warranted.

The below decision departs from that precedent by authorizing the use of deadly force against an armed individual solely because the individual begins to move in the "general direction" of another person located approximately fifty yards away. App.6a. As a result, the Eighth Circuit now stands alone as the only circuit to hold that the mere possession of a firearm, without any menacing use or threat, may justify the use of deadly force.

The below decision acknowledged that "it was clearly established that a person does not pose an immediate threat of serious physical harm to another when, although the person is in possession of a gun, he does not point it at another or wield it in an otherwise menacing fashion. [Citing] *Cole ex rel. Est. of Richards v. Hutchins*, 959 F.3d 1127, 1134 (8th Cir. 2020)." App.9a. The synced video shows Klum never pointed the firearm at anyone, other than himself, and never wielded it in a menacing manner. *Id.* During the twelve-minute incident Klum never changed his calm demeanor or deliberate pace. *See* synced video and App.35a.

V. The Decision Below Violates Iowa Law

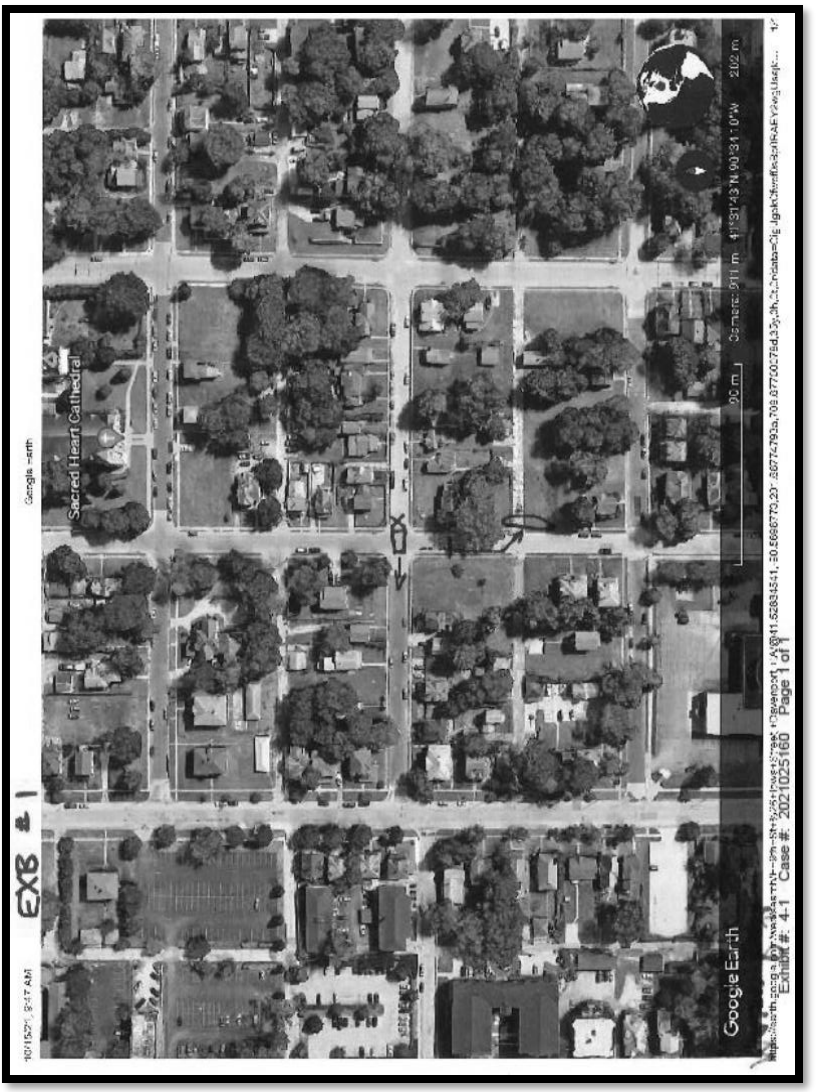
The panel's decision also violates clearly established Iowa law. Iowa Code § 724.5 establishes Iowa as an open-carry state. The Iowa Code essentially enacts the Garner rule regarding the use of deadly force by police. *See* § 804.8. ("A peace officer, while making a lawful arrest, is justified in the use of any force which the peace officer reasonably believes to be necessary to effect the arrest . . . However, the use of deadly force is only justified when a person cannot be captured any other way and either . . . the person has used or threatened to use deadly force in committing

a felony, [or] the peace officer reasonably believes the person would use deadly force against any person unless immediately apprehended.").

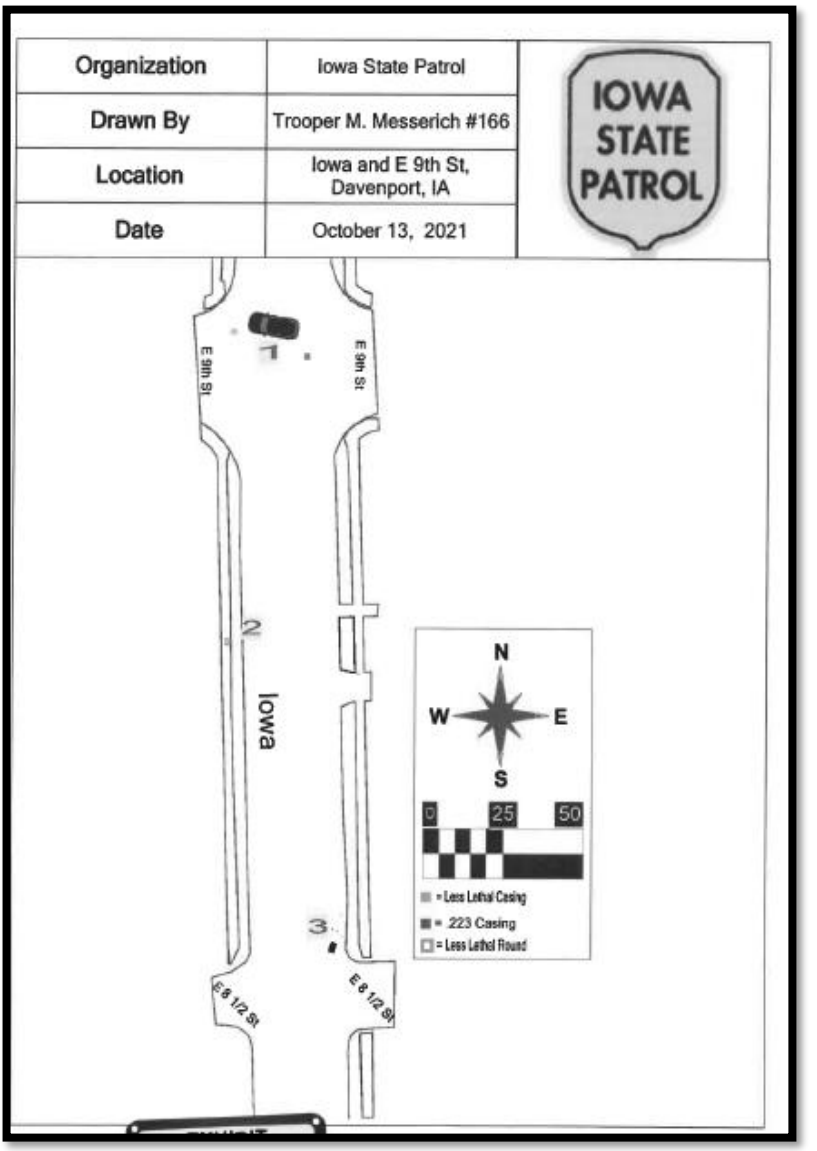
Iowa law includes protection for gun owners for "the production, display, or brandishing of a deadly weapon," without using the gun in a threatening manner. § 704.2(2). In order to justify the use of deadly force when encountering a person in possession of a firearm the suspect must take some action that would a cause a reasonable officer to believe there was an imminent threat. *Id.* The undisputed facts of the case establish that Klum "produced and displayed" a weapon but made no other gestures with the gun that would remove him from the safe harbor of I.C.A. § 704.2(2).

VI. The Decision Below Finds Disputed Facts in Favor of the Defendants on Summary Judgment

The panel concluded that the "video footage shows Klum crossing Iowa Street in a southeasterly direction." App.6a. This conclusion fails to recognize that Klum's path was substantially more to the east than the south, where the bystanders were located. That is the path Roth claimed Klum was taking, directly at the alley intersection and the bystanders he incorrectly perceived to be congregating in that area. App.76a-77a. See Roth's red line marking Klum's path and the circled area where he claimed bystanders were located. App.64a.



Roth identifies the location where Klum was shot on the south side of the alley intersection, but it is undisputed that Klum was on the north side of the alley when he was killed. A DCI scale diagram includes a mark next to the highlighted number 3 showing the location of Klum's body. App.78a.



It is undisputed that no bystanders where in or anywhere near the oval Roth drew identifying where he believed bystanders were located. App.64a. The appellate court below conceded the closest bystander was 148 feet away. App.10a.

Roth never claimed he used deadly force because Klum turned to walk in the general direction of bystanders some distance away. App.76a-77a. Roth claimed that Klum "turned toward the east and started walking on a direct path directly [sic] at the people who had been standing [around the alley intersection] . . . I didn't know what he was going to do . . . I didn't know if he was going to attempt to take a hostage. I didn't know if he was going to do a mass killing and start shooting those people." *Id.*

The below screengrab from 15 seconds before the shooting shows Klum on the other side of the street with the mother running past the alley intersection with no other bystanders in the area. App.68a.

The below screengrab from Officer Mahieu's BWC shows just how far to the north of the alley intersection, in the range of 10-15 feet, Klum was located when he was shot. App.80a.

The house on the corner, where the bystanders were actually located, is a half block to the south, as shown in the screengrab above. The area between the spot where Klum was killed and that corner house is open, with an entirely unobstructed line of sight. *Id.* Any reasonable officer would have been able to see that no bystanders were present in this area at the time Officer Roth killed Klum.

In this case, the decision below replaced the required showing of an aggressive or threatening movement of the weapon with the conclusion that deadly force was justified merely because Klum moved in the general direction of bystanders located roughly half a football field away. App.6a, 9a. The record does not support the panel's factual assertion that Klum was moving toward the bystanders on the corner. Roth never claimed he fired because Klum was approaching bystanders near the home on the corner. App.76a–77a. Instead, Roth testified that he fired because he believed—incorrectly—that bystanders were gathered at the alley intersection and that Klum was "walking directly at" them and would be "intermingled with all those people" within moments. *Id.* As with the district court, the panel overlooked Roth's false claim that bystanders were in the area he circled on deposition exhibit 1 at the time he decided to use deadly force. App.9a, 24a. Qualified immunity cannot be granted or affirmed based on a court's refusal to consider and evaluate the shooting officer's stated reason for using deadly force.

CONCLUSION

For the reasons stated above the Eighth Circuit decision in this case should be re-heard and reversed.

Respectfully submitted,

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