

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

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Defendants concede Klum never moved the gun. Under controlling precedent, that fact precludes qualified immunity. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Yet Defendants, like the courts below, ignore Roth's sole justification for deadly force: that Klum was advancing toward bystanders near the alley and close enough to take a hostage. Pet.App.55a. Refusing to assess that mistaken perception for objective reasonableness contravenes clearly established law. *Loch v. City of Litchfield*, 689 F.3d 961, 966 (8th Cir. 2012).

The claim that Plaintiffs failed to preserve a Second Amendment argument is factually false and legally irrelevant.

Defendants also urge denial of certiorari on grounds that conflict with settled precedent and/or are contradicted by the record.

I. Plaintiff Did Not Waive Any Second Amendment Argument

Plaintiffs amended petition cites and seeks redress for the violation of the Iowa statute guaranteeing the right to openly carry a firearm. Iowa Code § 704. Reply.App.1a. Plaintiffs repeatedly raised this claim in the district court, citing and quoting Iowa Code § 704.2:

[d]eadly 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 person's actions are limited to creating an expectation that the person may

use deadly force to defend oneself, another, or as otherwise authorized by law.

Reply.App.2a and 3a.

Plaintiffs also advanced specific Second Amendment arguments in their initial appellate brief and en banc petition. (“The panel’s decision conflicts with the Second Amendment to the U.S. Constitution . . .”). Reply.App.6a and 8a.

Plaintiffs do not seek relief under the Second Amendment. Claims involving deadly force against armed suspects are analyzed under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Plaintiffs maintain that the Eighth Circuit’s refusal to apply Fourth Amendment protections in this case effectively undermines the gun rights of anyone who possesses a firearm but does not comply with law enforcement directives—not just Klum, but all gun owners.

II. Defendants’ Justifications for the Use of Deadly Force Conflict with Well Established Precedent and/or are Factually Unsupported by the Record

A. Klum’s Unknown to Roth Criminal History is Irrelevant

Deadly force cannot be justified by facts unknown to the officer at the time. *Graham v. Connor*, 490 U.S. 386, 396 (1989). When Roth shot Klum, he had no knowledge of Klum’s criminal history. Reply.App.10a. In his deposition, Roth admitted that the only information he possessed before firing was what he observed on the scene and that there was a foot pursuit in progress, the suspect was armed, and what the suspect was wearing.

Defendants' reliance on Klum's criminal history is therefore entirely irrelevant.

B. The Failure of Non-Lethal Force Does Not Justify the Use of Deadly Force

The video shows that, after being struck by the rubber bullet, Klum turned and began walking across the street. Defendants' assertion that the failure of non-lethal force justified the use of deadly force is unsupported and illogical. Deadly force is permissible only when a suspect poses an "immediate threat" of "serious physical harm." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). The Eighth Circuit has likewise held, in a case involving an armed suspect, that the shooting officer "will be liable if the decedent 'never pointed the gun at the officer.'" *Partridge v. City of Benton*, 70 F.4th 1030, 1040 (8th Cir. 2023) (quoting *Partridge v. City of Benton*, 929 F.3d 562, 565, 567 (8th Cir. 2019)).

C. The District Court's Confusion Regarding the BB Gun Klum Held Exclusively to His Own Head Is Immaterial

Defendants' reference to the district court's confusion about the type of weapon Klum held to his own head is immaterial. Defendants have admitted that Klum was holding a BB gun. ("If Plaintiffs wish to identify and provide the source of the Iowa Department of Criminal Investigation's alleged conclusion that the BB gun Bobby held was never pointed at anyone other than himself, Defendants will review the same and determine if they can admit or deny this Request based on that information."). Pet.App.73a.

Plaintiffs acknowledge that Roth did not know Klum was holding a BB gun. Accordingly, just as Klum's unknown criminal history cannot justify the use of force, neither can the actual type of gun Klum possessed negate an otherwise objectively reasonable use of force. Facts unknown to the officer at the time are immaterial to the reasonableness inquiry. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Roth had no choice but to assume that Klum possessed a real handgun, and Plaintiffs have never suggested otherwise.

D. Deputy Johnson's Subjective Beliefs Are Immaterial and Refuted by Video

Defendants' reliance on Deputy Johnson's testimony fails for two independent reasons. First, the governing inquiry is objective, not subjective. *Graham v. Connor*, 490 U.S. 386, 397 (1989). Second, Johnson's testimony is contradicted by video evidence. Johnson was not in a position to shoot at the same time as Roth and even had his safety engaged. *See* Reply.App.12a, 13a and 14a.

The cropped and enlarged screengrab below shows Johnson kneeling behind a cruiser with his rifle raised, Klum nearly across the street, when Roth was about to fire. Reply.App.13a.



E. Mistakes of Fact Must be Assessed for Objective Reasonableness

The synced video shows Klum advancing toward the alley—where Roth mistakenly believed bystanders were located—not toward the house on the corner, where all bystanders had retreated nearly 50 yards away. Pet.App.36a. No record evidence supports Defendants’ post hoc claim that Klum was advancing toward

bystanders at the corner after the video confirmed that all bystanders had moved to that location.

The Supreme Court has long held that the Fourth Amendment allows for reasonable mistakes of fact. An officer's use of force based on a mistaken perception does not violate the Constitution if the mistake was objectively reasonable under the circumstances. *See Graham v. Connor*, 490 U.S. 386, 396 (1989); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

The Eighth Circuit has repeatedly held that when an officer's use of force is based on a mistaken perception, the court must assess that perception for objective reasonableness. *Dooley v. Tharp*, 856 F.3d 1177, 1182–83 (8th Cir. 2017) (“We must view [the officer’s] mistaken-perception action for objective reasonableness.”); *Thompson v. Dill*, 930 F.3d 1008, 1013 (8th Cir. 2019) (“Deadly force is not unconstitutional if the officer has probable cause to believe a suspect poses a serious threat—even if that belief or perception is mistaken, so long as it is objectively reasonable.”).

Refusing to evaluate Roth's mistaken perception about the location of bystanders and whether Klum was close enough to seize one as a hostage under the objective-reasonableness standard contravenes clearly established law. *Loch v. City of Litchfield*, 689 F.3d 961, 966 (8th Cir. 2012).



CONCLUSION

The decision below should be reheard and reversed because it departs from the accepted and usual course of judicial proceedings. The case also raises significant questions regarding the constitutional protections afforded to gun owners and the limits on law enforcement's use of deadly force.

Respectfully submitted,

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February 13, 2026

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**PLAINTIFFS AMENDED PETITION AT LAW
AND JURY DEMAND, RELEVANT EXCERPTS
(JUNE 6, 2023)**

IN THE IOWA DISTRICT COURT
FOR SCOTT COUNTY

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.

Case No.

[. . .]

62. The prohibition against using lethal force against an individual who posed no immediate threat of serious injury or death to anyone else was clearly established at the time Defendant Roth violated that rule in shooting and killing Bobby through the back while he was walking away from officers holding a BB gun to his own head. *See* I.C.A. § 704, § 804.8 and *Tennessee v. Garner*, 471 U.S. 1 (1985). R. Doc. 1-1 at 253.

**PLAINTIFFS' COMBINED REPLY BRIEF AND
RESISTANCE BRIEF REGARDING CROSS
MOTIONS FOR SUMMARY JUDGMENT,
RELEVANT EXCERPTS
(APRIL 5, 2024)**

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

NICOLE KLUM, as Administrator
of the Estate of BOBBY JO KLUM, and
WANDA ALBRIGHT, Individually,

Plaintiffs,

v.

CITY OF DAVENPORT and MASON ROTH,

Defendants.

CASE NO. 3:23-CV-00043-RGE-WPK

[. . .]

. . . I.C.A. 704.2 (“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.”). R. Doc. 32 at 16.

[. . .]

Reply.App.3a

Plaintiffs amended and substituted petition filed on June 6, 2023, sets out a legally sufficient factual basis for Iowa based claims against the Defendants for assault, battery and for violation of express statutes on use of deadly force, I.C.A. 804.8 and 704, all without justification. R. Doc. 32 at 19.

[. . .]

. . . Roth violated that rule in shooting and killing Bobby through the back while he was walking away from officers holding a BB gun to his own head. *See* I.C.A. § 704, § 804.8 and *Tennessee v. Garner*, 471 U.S. 1 (1985). R. Doc. 32 at 20.

[. . .]

Respectfully submitted.

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Reply.App.4a

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**BRIEF OF APPELLANTS KLUM AND
ALBRIGHT, RELEVANT EXCERPTS
(JULY 19, 2024)**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NICOLE KLUM, as Administrator
of the Estate of BOBBY JO KLUM, and
WANDA ALBRIGHT, Individually,

Plaintiffs/Appellants,

v.

CITY OF DAVENPORT, IOWA and MASON ROTH,

Defendants/Appellees.

CASE NO. 24-2165

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. . . The Second Amendment to the U.S. Constitution guarantees the right of Iowans to keep and bear arms. *Heller v. District of Columbia*, 554 U.S. 570 (2008).

**APPELLANTS PETITION FOR REHEARING
EN BANC, RELEVANT EXCERPTS
(AUGUST 12, 2025)**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NICOLE KLUM, as Administrator
of the Estate of BOBBY JO KLUM, and
WANDA ALBRIGHT, Individually,

Plaintiffs/Appellants,

v.

CITY OF DAVENPORT, IOWA and MASON ROTH,

Defendants/Appellees.

CASE NO. 24-2165

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[. . .]

The panel's decision conflicts with the Second Amendment to the U.S. Constitution, U.S. Supreme Court precedent, Eighth Circuit precedent, and applicable Iowa law affirming Iowans' right to openly carry firearms.

**ROTH DEPOSITION,
RELEVANT EXCERPTS
(MAY 16, 2023)**

IN THE DISTRICT COURT OF IOWA
FOR SCOTT COUNTY

NICOLE KLUM, individually and as Administrator
of the Estate of BOBBY JO KLUM,

Plaintiffs,

v.

CITY OF DAVENPORT and MASON ROTH,

Defendants.

Case No. LACV135302

VIDEOTAPED DEPOSITION OF MASON ROTH

A. Yeah. He is a coworker.

Q. And you were on another call at that time with a juvenile; is that right?

A. Yes.

Q. Then you heard the call that this subject that he was in a foot pursuit with had a gun; is that right?

A. Yes.

Attorney O'Rourke: Rachel, that is M-o-o-t-y.

- Q. (By Attorney O'Brien) Then turning to the next page you got a description of what the—what Mr. Klum was wearing at the time, green pants and a neon sweatshirt. Do you see that?
- A. Yes.
- Q. All right. And so do you recall that you had any other additional information besides what you observed onsite other than those three items that we just went through, one, there was a foot pursuit; two, the subject had a gun; and three what he was wearing?
- A. No, that was—that was it.
- Q. All right. And so you—when you fired that shot that killed Bobby Klum, you didn't know what crime he was accused of if any; isn't that right?
- A. other than interference for fleeing from the officer and whatever crimes he would have been committing at that time.

**JOHNSON DEPOSITION,
RELEVANT EXCERPTS
(NOVEMBER 30, 2023)**

IN THE DISTRICT COURT OF IOWA
FOR SCOTT COUNTY

NICOLE KLUM, individually and as Administrator
of the Estate of BOBBY JO KLUM,

Plaintiffs,

v.

CITY OF DAVENPORT and MASON ROTH,

Defendants.

Case No. LACV135302

DEPOSITION OF ANTHONY JOHNSON

- Q. All right. You were talking about some of this stuff gun in hand, gun in use. I am wondering if you have heard of the mantra that action always beats reaction?
- A. Correct.
- Q. All right. And is that what you kind of are referring to?
- A. Yes.

- Q. That if he would have chosen to orient the gun at you and fire it, he could have done that before you could have got a shot off?
- A. Absolutely.
- Q. All right. Now, if you had him center mass in your scope, do you think you could pull the trigger before he could turn, point at you and fire a round?
- A. Probably not.
- Q. How—
- A. I still would have had to drop the safety. I mean, I don't even know if I would have gone up as far as putting the holographic sight, the distance there and me aimed at him. (Witness indicated.)
- Q. Yeah, and I am asking you a hypothetical. I am not asking you what you did. But if you were there and you had your safety off and you had the rifle pointed at him and you had him through your optics center mass, could you have pulled the trigger before he turned, pointed the gun . . .

**OFFICER JARRIN
BWC SCREENGRABS**

First Screengrab from Jarrin BWC



Second Screenshot from Jarrin BWC



R. Doc. 32-2, at 6.