No. _____

In The
Supreme Court of the United States

CODY ROSS,

Petitioner,

vs.

JOHNNIE ROCHELL Jr.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, Detective Cody Ross, was in plain clothes conducting surveillance in a truck parked in front of the home of respondent Johnnie Rochell Jr., who pulled into his driveway, exited his vehicle and attempted to get Ross's attention. Ross motioned for Rochell to wait a minute. Rochell left, returned with an assault rifle slung around his body, and approached Ross. Ross exited the truck, weapon drawn, and commanded Rochell to drop the rifle. Rochell dropped the weapon. Ross told Rochell to get on the ground, eventually pushing him down.

Confronted with a suspect who had not yet been searched for other weapons, was not handcuffed, had an assault weapon several feet away, and with backup officers only just arriving, Ross allegedly put his gun to Rochell's head and said he would shoot him if he ever came up on Ross with a weapon like that again. When another officer secured Rochell's arms, Ross retrieved handcuffs from his truck and handcuffed Rochell, who was subsequently convicted of disorderly conduct for approaching Ross with the assault rifle.

The questions presented are:

1. Did the Eighth Circuit depart from this Court's decision in *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148 (2018) (per curiam) and numerous other cases by denying qualified immunity notwithstanding the absence of clearly established law imposing liability under circumstances closely analogous to those confronting Petitioner?

QUESTIONS PRESENTED—Continued

2. Did the Eighth Circuit depart from this Court's decisions in *Graham v. Connor*, 490 U.S. 386 (1989) and *Plumhoff v. Rickard*, 572 U.S. 765 (2014) in denying qualified immunity based upon the absence of a constitutional violation given that the undisputed facts established that petitioner acted reasonably in responding to the potential threat of an unrestrained suspect whose weapon—an assault rifle—was only several feet away?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the Court whose judgment is sought to be reviewed are:

- Cody Ross an individual, defendant and appellant below, petitioner here.
- Johnnie Rochell Jr., an individual, plaintiff and appellee below and respondent here.
- The additional parties listed in the district court and Eighth Circuit captions were not parties to the appeal and did not enter an appearance in those proceedings, which were confined to the parties listed above.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

- United States District Court, Western District of Arkansas, Fayetteville Division, Case No. 5:16-cv-05093-TLB, *Johnnie Lee Rochell Jr. v. Officer Motsinger, Springdale Police Department (SPD), Detective Cody Ross SPD, Detective Frank Gamble SPD, Officer Unknown Badge SPD, Officer Justin Ingram SPD, Officer David Baker SPD, Captain Derek Hudson SPD*; Order denying summary judgment entered October 25, 2017.
- United States Court of Appeals for the Eighth Circuit, Case No. 17-3608, *Johnnie Rochell Jr. v. City of Springdale Police Department; City*

RELATED PROCEEDINGS—Continued

of Fayetteville Police Department; Officer Sutley, Fayetteville; Officer Hunter Carnahan, Fayetteville; Detective Anthony Smith; Officer Motsinger, #3096 Springdale; A. Reznicek, Fayetteville and *Detective Cody Ross, Springdale v. Officer Chris Denton, #253 Fayetteville; Officer Jill Chalfant; Corporal Kim Allen Adee, #106 Fayetteville; Detective Frank Gamble, Springdale; Officer Unknown Badge, #318 Springdale; Det. David Williams, #198 Fayetteville; Officer Daniel L. Robbins, #245 Fayetteville; Justin Ingram, #358 Springdale; Officer Knotts, #205 Fayetteville; Kimberly Shepherd, Fayetteville; Officer David Baker, Springdale; L. Rota, Fayetteville; Officer Derek Hudson, Springdale; Marion J. McCandless, named [sic] changed from M. Candless; City of Springdale, Arkansas*; Judgment entered April 25, 2019; Order denying rehearing entered May 28, 2019.

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UNITED STATES CONSTITUTION AND FEDERAL STATUTES

OPINIONS BELOW

The Eighth Circuit's opinion, the subject of this petition, is not reported and is reproduced in the Appendix hereto ("Pet. App.") at pages 1-7. The Eighth Circuit's order denying rehearing, filed May 28, 2019, is reproduced in the Appendix at page 40. The district court's decision denying petitioners' motion for summary judgment based on qualified immunity is not reported and is reproduced in the Appendix at pages 8-39.

BASIS FOR JURISDICTION IN THIS COURT

The Eighth Circuit entered its judgment and its opinion on April 25, 2019. (Pet. App. 2.) Petitioner timely filed a petition for panel and en banc rehearing, and on May 28, 2019, the court denied the petition. (Pet. App. 40.)

This Court has jurisdiction to review the Eighth Circuit's April 25, 2019 decision on writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondent brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondent alleges petitioner violated the rights secured by the United States Constitution's Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. The Underlying Incident.

On February 19, 2016, Petitioner, Detective Cody Ross, along with other detectives, was conducting surveillance on a house in the area near Respondent Rochell's residence. (Pet. App. 9.) Detective Ross had a beard and was in civilian clothes. (*Id*.) Detective Ross would periodically peer through binoculars at the house he was surveilling and report his observations to other officers in the vicinity via phone or radio. (*Id*.) Detective Ross was parked against the curb in front of Rochell's house in an unmarked red pick-up truck when Rochell and his son pulled into their driveway. (*Id*.) Rochell's son went across the street to a neighbor's house. (*Id*.)

Rochell attempted to motion to Detective Ross several times by waving his arm and trying to get him to roll his window down. (*Id*.) Ross was the only officer at the time that was observing the house they were surveilling, and could not get out of his car to engage with Rochell. (Pet. App. 9-10.) Detective Ross, who was on the phone, held his finger up, indicating to Rochell to "hold on just a minute." (Pet. App. 10.)

Eventually, Detective Ross motioned for Rochell to come over to him, and Rochell shook his head and walked inside his house. (*Id*.) Detective Ross attempted to radio another detective to ask him to call dispatch and tell them they may be getting a phone call about him from a concerned citizen, but all he got out was "will you call dispatch." (*Id*.) It was at that moment

that he saw Rochell walking towards him with an AR-15 rifle slung around his body. (*Id*.)

Although Detective Ross contends he pulled his badge out from under his shirt while in the truck, according to Rochell—whose account is accepted as true for purposes of appeal—Ross jumped out of the truck, weapon drawn, without any visible badge and screamed "Drop the fucking gun or I'll blow your fucking brains out! Drop the gun or I'm going to fucking kill you!" (Pet. App. 11-12.) According to Rochell, he did not drop his weapon because he did not know Ross was a police officer, and because Arkansas is an open carry state, he was well within his rights to carry his weapon wherever he felt like it. (Pet. App. 12.) Rochell contends that when Ross pulled his badge out and he realized Ross was a police officer, he complied by taking his left hand, grabbing the gun strap, pulling it over his head, passing it to his right hand, and setting the gun on the ground to his right. (Pet. App. 12-13.) Rochell claims that at this point, Detective Ross yelled "I'll fucking blow your brains out, get on the ground! I'll fucking kill you, get on the ground!" (Pet. App. 13.) Rochell acknowledges that he did not immediately comply with Ross's command to get on the ground, but instead turned around very slowly. (*Id*.) As Detective Brashear arrived on the scene, he observed Ross giving Rochell loud verbal commands to get on the ground, and when Rochell did not obey and "was just standing there," Ross grabbed Rochell and put him on the ground. (Pet. App. 13-14.)

Rochell alleges that once on the ground, with his hand behind his back and his rifle laying several feet away from him, Detective Ross took his gun and pressed it behind Rochell's right ear saying, "I'll blow your fucking brains out if you ever approach me like that again." (Pet. App. 14.) Detective Ross does not recall what he said to Rochell once he was on the ground, only that he was screaming at Rochell and Rochell was screaming at him. (*Id*.) Detective Ross admits he pointed his gun at Rochell when he was on the ground at almost point-blank range and it was very likely that the barrel of the pistol was against Rochell. (*Id*.)

Detective Ross did not have handcuffs with him, so he asked Detective Brashear to hold Rochell while he ran to his truck to get handcuffs. (Pet. App. 14.) Detective Ross holstered his weapon and returned with the handcuffs. (Pet. App. 15.) Once Rochell was handcuffed, Detective Ross asked Rochell what his name was and Rochell said his name was "Johnnie Rochell L." (*Id*.) At this point, other officers arrived at the scene, and Rochell was placed in the back of a police vehicle. (*Id*.)

Rochell was arrested at the scene for being a convicted felon in possession of a firearm based on the officers' receipt of inaccurate information from the dispatcher when they called her in an effort to identify Rochell. (Pet. App. 15-17.) Over the next couple of days, Detective Ross conducted an investigation that determined that Rochell was in fact not a convicted felon, however, Rochell was eventually charged with, and

found guilty of, disorderly conduct for the events that occurred on February 19, 2016. (Pet. App. 18-20.)

B. The District Court Denies Petitioner's Motion For Summary Judgment Based On Qualified Immunity.

Rochell filed suit in federal court against petitioner Cody Ross, as well as other defendants, asserting claims under 42 U.S.C. § 1983 for excessive force, false arrest and false imprisonment in violation of the Fourth and Fourteenth Amendments. (Pet. App. 20.)

Detective Ross filed a motion for summary judgment asserting that 1) the force employed against Rochell was reasonable; 2) there was probable cause to arrest Rochell based on the misinformation Ross had received from the dispatcher at the scene; 3) Ross could not be liable for false imprisonment as he had no duty to further investigate Rochell's apparent felony conviction in the days after Rochell's arrest; and 4) even assuming any constitutional violation occurred, he would be entitled to qualified immunity because no clearly established law would have put him on notice that his conduct could give rise to liability. (Pet. App. 21.)

The district court granted summary judgment on the false arrest claim, finding that Ross reasonably relied on the information provided to him by the dispatcher. (Pet. App. 34.) The court denied summary judgment on the false imprisonment claim, concluding that Ross should have immediately conducted further investigation concerning Rochell's ex-felon status and

had been incompetent in reviewing pertinent materials. (Pet. App. 36-38.)

The court denied summary judgment on the excessive force claim, concluding that a jury could find that pointing a gun at Rochell's head was unreasonable in light of his lack of resistance and eventual compliance with Ross's commands. (Pet. App. 27-32.) The court acknowledged "there does not appear to be a case in this Circuit with exactly the same fact-pattern alleged here," but nonetheless denied qualified immunity, concluding that the law was clearly established that "an officer who threatens to kill an individual who is lying on the ground, weaponless, cooperative, and posing no danger to the officer or to others, may violate the individual's Fourth Amendment rights." (Pet. App. 31.) The court found that the constitutional violation was obvious, and hence immunity was improper "'notwithstanding the lack of caselaw [sic]. . . .'" (*Id*.)

Ross appealed.

C. The Eighth Circuit Affirms The District Court And Rejects Petitioner's Qualified Immunity Claim.

Following briefing—argument was waived—on April 25, 2019, the Eighth Circuit issued a per curiam unpublished decision affirming the district court's denial of qualified immunity to Ross. (Pet. App. 1, 5.) Citing *Wilson v. Lamp*, 901 F.3d 981, 990-91 (8th Cir. 2018), the court held that the district court properly concluded that an excessive force claim could be

premised on contentions that an officer used unreasonable force "by pointing his service weapon at the head of the suspect who has dropped his weapon, has submitted to arrest, and no longer poses an immediate threat to the safety of officers or others," and that this right was clearly established in February 2016. (Pet. App. 2-3.)

The Honorable Circuit Judge Colloton filed a concurring opinion observing that this Court had repeatedly admonished lower courts that given the highly fact-specific nature of Fourth Amendment claims, in other than the most obvious cases, courts were required to identify existing case law addressing specific facts similar to those confronted by an officer in order to overcome qualified immunity. (Pet. App. 5-6.) Judge Colloton noted that the *Wilson* case had held that pointing a firearm at a compliant suspect was unreasonable and that the unreasonableness of the conduct was clearly established in September 2014—more than a year before the incident in this case—and that *Wilson* had relied on cases involving the use of physical force or violence against a compliant suspect, as opposed to mere threat of violence as in this case. (Pet. App. 6.) Nonetheless, the court was bound by *Wilson* and thus was required to find that the law was clearly established at the time of this incident.[1]

[1] Judge Colloton also observed that although the district court's denial of summary judgment on the false imprisonment claim was not before the court, the fact that Rochell was eventually convicted for disorderly conduct was relevant to the issue of whether there was probable cause for him to be in custody, given

Petitioner filed a petition for panel and en banc rehearing, and the Eighth Circuit denied the petition. (Pet. App. 40.)

REASONS WHY CERTIORARI IS WARRANTED

This Court has repeatedly recognized the importance of qualified immunity in assuring that law enforcement officers may perform their duty to protect public safety, without fear of entanglement in litigation and potential liability, and make decisions in tense, rapidly evolving circumstances. Most recently, in *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548 (2017) (per curiam), *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148 (2018) (per curiam), and *City of Escondido v. Emmons*, ___ U.S. ___, 139 S. Ct. 500 (2019) (per curiam), the Court reaffirmed the special importance of qualified immunity in use of force cases which, by their nature, turn on the particular facts in a given case. The Court has stressed the need to "identify a case where an officer acting under similar circumstances" was "held to have violated the Fourth Amendment." *White*, 137 S. Ct. at 552. As the Court held in *Kisela*, in use of force cases "police officers are entitled to qualified immunity unless existing precedent '*squarely governs*' the *specific facts* at issue." 138 S. Ct. at 1153 (emphasis added).

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that an officer's subjective state of mind is irrelevant to whether there is probable cause for arrest. (Pet. App. 7.)

Here, the Eighth Circuit departed from this controlling principle. It denied Ross qualified immunity based on the general holding of *Wilson v. Lamp*, 901 F.3d 981, 990-91 (8th Cir. 2018)—a decision issued two years after the events in question here—that as of 2014 it was clearly established that officers could violate the Fourth Amendment by pointing a weapon at an unarmed, compliant suspect. (Pet. App. 2-3.) As Judge Colloton observed, although binding on the panel, *Wilson* itself departed from this Court's recent decisions in *Kisela* and *Emmons* in that the court found that the law was clearly established with regard to threated use of deadly force, without identifying a single case involving such facts, relying instead on cases where force was actually employed. (Pet. App. 5-6.)

In any event, here, the Eighth Circuit conducted no particularized factual analysis in determining whether the law was clearly established with respect to the circumstances Ross confronted. The court ignored the fact that Ross was confronted with tense, rapidly evolving circumstances. Ross was in the midst of conducting an investigation, engaged in surreptitious surveillance, when Rochell saw him, attempted to get his attention and instead of waiting, went into his home to retrieve an assault rifle and then approached Ross with the weapon slung around his body—provocative action for which Rochell was eventually convicted of disorderly conduct.

By his own admission, Rochell was slow to comply with Ross's commands, including the command, once

he had dropped the rifle, to get on the ground. When Ross pushed Rochell to the ground, Ross had no way of knowing whether Rochell had any other weapons on his person, Rochell was not handcuffed, the assault rifle was only several feet away, and back-up assistance was only just arriving. Under the split-second circumstances, in such close physical proximity to a suspect who was already known to have been carrying a weapon, a reasonable officer could certainly believe it was appropriate to threaten deadly force to assure compliance and avoid any further physical confrontation.

Certainly, the Eighth Circuit cited no authority that suggested otherwise. In *Los Angeles County v. Rettele*, 550 U.S. 609 (2007) (per curiam), this Court held that in executing a warrant, officers acted reasonably in holding two scantily clad occupants in bed at gunpoint for several minutes until it could be determined whether there were weapons within reach. In *Edwards v. Giles*, 51 F.3d 155, 157 (8th Cir. 1995), the Eighth Circuit had held that merely pointing a pistol at a suspect without attempting to fire, or without stating an immediate intention to fire, in order to bring a suspect into compliance, did not constitute excessive force. In light of this existing authority, Ross could reasonably believe that pointing his weapon at Rochell's head while he attempted to fully secure him, search for additional weapons, and foreclose any attempt to retrieve the assault rifle, was proper.

Under this Court's controlling authority, the Eighth Circuit was not free to ignore salient facts

relevant to assessing the reasonableness of Ross's conduct or abdicate its responsibility to identify pertinent case law imposing liability under substantially similar facts before rejecting qualified immunity. Indeed, the Eighth Circuit's generalized approach in this case conflicts with the Ninth Circuit's decision in *Thompson v. Rahr*, 885 F.3d 582 (9th Cir. 2018). In *Thompson*, the court acknowledged abundant Ninth Circuit authority holding that pointing a weapon at compliant suspects could constitute excessive force, but granted qualified immunity to an officer who pointed his pistol at a calm and compliant suspect's head. The court observed that no prior case addressed the circumstances confronted by the officer—a presently compliant suspect illegally possessing a weapon, not handcuffed, with a weapon 10-15 feet away. *Id*. at 588.

The Eight Circuit's decision in this case cannot be reconciled with this Court's precedent, or the Ninth Circuit's decision in *Thompson*. No case involving facts remotely similar to those present here—a recently disarmed suspect, being physically subdued at close quarters, without handcuffs, not yet searched for other weapons, and with an assault rifle several feet away—suggests that an officer could be held liable for excessive force. The absence of such clearly established law entitles Ross to qualified immunity. In addition, given the tense, rapidly evolving circumstances confronted by Ross, his threat to use deadly force in the event of any renewed assault, no matter how coarsely phrased, was reasonable and did not constitute excessive force.

Under this Court's governing authority, Ross was entitled to summary judgment on the excessive force claim and review is necessary to secure adherence to the decisions of this Court, and to confirm the wide latitude officers have in making split-second decisions when confronting armed individuals in the field.

THE COURT SHOULD GRANT REVIEW TO COMPEL COMPLIANCE WITH *KISELA V. HUGHES* AND OTHER DECISIONS REQUIRING COURTS TO GRANT QUALIFIED IMMUNITY WHERE THE LAW IS NOT CLEARLY ESTABLISHED OR THE UNDISPUTED EVIDENCE DEMONSTRATES THAT NO VIOLATION OCCURRED.

A. This Court Has Repeatedly Recognized The Importance Of Qualified Immunity To Assure That Officers Are Not Subjected To The Burden Of Litigation And Threat Of Liability When Making Split-Second Decisions Under Tense, Rapidly Evolving Circumstances In The Course Of Protecting The Public.

An officer is entitled to qualified immunity when his or her conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. ___, 136 S. Ct. 305, 308 (2015) (per curiam). While this Court's case law "'do[es] not require a case directly on point'" for a right to be clearly established, "'existing precedent must have placed the statutory or

constitutional question beyond debate.'" *Id*. In short, immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Id*.

This Court has recognized that qualified immunity is important to society as a whole. *City and County of San Francisco v. Sheehan*, 575 U.S. ___, 135 S. Ct. 1765, 1774 n.3 (2015); *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 551 (2017) (per curiam). It assures that officers, when confronted with uncertain circumstances, may freely exercise their judgment in the public interest, without undue fear of entanglement in litigation and the threat of potential liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[W]here an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'").

As the Court observed in *Harlow*, failure to apply qualified immunity inflicts "social costs," which "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," as well as "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" 457 U.S. at 814. Those concerns are magnified in the context of use of deadly force, where by definition, an officer is confronted by the imminent threat of serious harm to himself, or to others, and where hesitation could have deadly consequences.

Indeed, in the last three terms, this Court has issued per curiam reversals of lower court denials of qualified immunity in deadly force cases. In doing so, the Court emphasized that such cases, which are necessarily highly fact-dependent and concern tense, hectic circumstances, require courts to closely analyze existing case law to determine whether the law was clearly established within the particular circumstances confronted by the officers in question.

In *White v. Pauly*, the Court held that an officer who arrived belatedly to the scene of an evolving firefight could reasonably rely on the actions of other officers in determining it was necessary to shoot a suspect who fired at the officers. 137 S. Ct. at 550-51. The Court observed that the highly unusual circumstances of the case should have alerted the lower court to the fact that the law governing such situations was not clearly established, and the officer was, indeed, entitled to qualified immunity. *Id.* at 552.

In *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148 (2018) (per curiam), the Court summarily reversed the Ninth Circuit's denial of qualified immunity to a police officer who received a 911 call reporting a woman hacking a tree with a kitchen knife and acting erratically. *Id.* at 1151. Shortly after arriving at the scene, the officer saw a woman standing in a driveway. *Id*. The woman, separated from the street and the officer by a chain-link fence, was soon approached by another woman, who was carrying a kitchen knife and matched the description that had been related to the officer via the 911 caller. *Id.* With the knife-wielding woman only

six feet away from what appeared to be her potential victim, and separated by the chain-link fence, which impaired the potential victim's ability to flee and the officer's ability to physically intervene, when the woman refused commands to drop the knife, the officer fired and wounded her. *Id.*

In reversing the Ninth Circuit, the Court underscored the importance of applying qualified immunity to use of force cases, again emphasizing the highly fact-specific nature of such claims, and the relevance of the exceedingly narrow window of time in which officers usually have to make such life or death decisions. 138 S. Ct. at 1153 (observing that "Kisela had mere seconds to assess the potential danger to Chadwick"). As the Court noted:

> Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful.

Id. at 1153 (citing *Mullenix*, 136 S. Ct. at 309, 312).

In *City of Escondido v. Emmons*, ___ U.S. ___, 139 S. Ct. 500 (2019) (per curiam), the Court again reversed the denial of qualified immunity to an officer where the circuit court had defined the right at issue at too high a level of generality, and had failed to

identify any case involving similar facts that would put an officer on notice that his or her conduct could give rise to liability. In *Emmons*, an officer sought entry into a residence to conduct a welfare check for reported domestic abuse. *Id*. at 501. The plaintiff exited the residence, ignoring the officer's command not to close the door, and attempted to run past the officer, who took him to the ground. *Id.* at 502.

In denying qualified immunity, the Ninth Circuit simply stated: "'The right to be free of excessive force was clearly established at the time of the events in question. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013).'" *Emmons*, 139 S. Ct. at 502. This Court noted that such a generalized statement of the law was improper, this was a case involving active resistance to an officer and that "the Ninth Circuit's *Gravelet-Blondin* case law involved police force against individuals engaged in *passive* resistance. The Court of Appeals made no effort to explain how that case law prohibited Officer Craig's actions in this case." *Id*. at 503-04.

The Court emphasized that this was "a problem under our precedents":

> "[W]e have stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment. . . . While there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular [action] beyond debate. . . . Of course, there can be the rare obvious case, where the

> unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. . . . But a body of relevant case law is usually necessary to clearly establish the answer. . . ." [*District of Columbia v.*] *Wesby*, 583 U.S. at ___, 138 S. Ct. [577] at 581 [(2018)] (internal quotation marks omitted).

Emmons, 139 S. Ct. at 504.

This Court has repeatedly recognized the importance of qualified immunity, particularly in the context of use of force cases, as the Court observed in *White*. Nonetheless, the lower federal courts have been somewhat recalcitrant in following this Court's dictates concerning the need to apply the doctrine with rigor, particularly at the pre-trial stage, thus repeatedly requiring this Court's intervention. 137 S. Ct. at 551; *Sheehan*, 135 S. Ct. at 1774 n.3 (collecting cases).

The same concerns for vindicating the important purposes of qualified immunity, which have led the Court to repeatedly grant review to reaffirm its jurisprudence concerning the need to define clearly established law with a high degree of specificity, similarly justify this Court's intervention in this case. When qualified immunity is improperly denied, the "social costs" outlined in *Harlow* fall disproportionately on officers. It is necessary for the Court to grant review because the Eighth Circuit's rejection of qualified immunity was flatly improper and departed from the controlling decisions of this Court.

B. No Clearly Established Law Put Petitioner On Notice That His Threatened Use Of Force Might Violate The Fourth Amendment.

As noted, this Court has repeatedly admonished the lower appellate courts that other than in an obvious case, "officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (citing *Mullenix*, 136 S. Ct. at 309); *White*, 137 S. Ct. at 551. Here, no existing precedent squarely governs the facts confronted by petitioner Ross so as to put him on notice that his threatened use of force might be deemed improper under the Fourth Amendment. Indeed, to the contrary. Relevant case law from this Court and the Eighth Circuit strongly support the reasonableness of Ross's actions.

In *Los Angeles County v. Rettele*, 550 U.S. 609 (2007) (per curiam), officers procured warrants for two houses possibly occupied by suspects in an identity theft ring, one of whom had a registered handgun. *Id*. at 610. Unbeknownst to the officers, one of the houses was recently sold to the plaintiffs. *Id*. at 611. Officers entered the residence and found two plaintiffs scantily clad in bed, and held them at gunpoint for several minutes, until officers secured the area, at which point they allowed them to dress. *Id.* The Ninth Circuit rejected qualified immunity for the officers, and this Court reversed, noting that holding the plaintiffs at gunpoint in bed for several minutes to secure the area was reasonable:

> Blankets and bedding can conceal a weapon, and one of the suspects was known to own a firearm, factors which underscore this point. The Constitution does not require an officer to ignore the possibility that an armed suspect may sleep with a weapon within reach. The reports are replete with accounts of suspects sleeping close to weapons.

Id. at 614.

As the Court emphasized, under the circumstances, the officers were allowed to "'exercise unquestioned command of the situation.'" *Id*. at 615.

In light of *Rettele*, it would not be unreasonable for Ross to assume that Rochell, who had gone into his residence to procure an assault rifle, might have other weapons hidden on his person, and that holding him at gunpoint, particularly when in such close proximity, would be reasonable, until he could be fully secured and searched.

The Eighth Circuit's decision in *Edwards v. Giles*, 51 F.3d 155 (8th Cir. 1995), would have similarly suggested to Ross that his conduct would not constitute unreasonable force. In *Edwards*, an officer who was pursuing a suspect who had fled from a stolen vehicle, encountered the plaintiff, who matched the description of the suspect. *Id.* at 156. The officer chased him, eventually saw him hiding behind a tree, and as the officer approached, he drew his weapon and pointed it at the plaintiff, who then fled. *Id.* The officer holstered his

weapon and plaintiff was eventually caught and subdued with the assistance of another officer. *Id.*

The Eighth Circuit held that the officer was entitled to qualified immunity because merely pointing a weapon at a suspect without attempting to fire it, or stating an immediate intention to fire, did not constitute excessive force, and that the officer's actions were "objectively reasonable in the circumstances" because the officer "had ample reason to believe" the plaintiff had "committed a felony, fled from police, and hid from" the officer "to avoid capture." 51 F.3d at 157. Hence, in light of *Edwards*, Ross could reasonably believe that the mere threat to use deadly force in the event of a renewed attempt by Rochell to procure and possibly employ a weapon against him was proper.

In contrast, even assuming one must look at Eighth Circuit law to determine whether the law was clearly established with respect to petitioners' use of force for purposes of qualified immunity (an issue the Court has left open),[2] the relevant case law makes it clear that qualified immunity is appropriate.

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[2] This Court has noted that "[w]e have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity." *Wesby*, 583 U.S. ___, 138 S. Ct. 577, 591 n.8 (2018); *see also Reichle v. Howards*, 566 U.S. 658, 665-66 (2012) (reserving question whether court of appeals decisions can be "a dispositive source of clearly established law"); *Emmons*, 139 S. Ct. at 503 (assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity).

As a threshold matter, from a factual standpoint, *Wilson v. Lamp*, 901 F.3d 981, 990-91 (8th Cir. 2018) cannot render the law "clearly established" with respect to Ross's conduct because the decision was issued almost two years *after* the underlying evens here. *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) ("Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct.").

Moreover, *Wilson* involved completely different facts than those present here. In *Wilson*, police stopped a vehicle, believing it was driven by a person who had just fled a gas station without paying for gas and owned a pistol. 901 F.3d at 985. Officers approached the vehicle with guns drawn, found it was not driven by the suspect, but by his friend, patted him down, found no weapons, but continued to hold him, and a minor in the vehicle, at gunpoint. *Id*.

That is nothing like the situation here, where Ross was confronted with an individual who had been armed, who might still possess weapons, had a weapon several feet away and was not secured by handcuffs.

Nor do any of the cases *Wilson* cites as rendering the law clearly established as of 2014 bear any similarity to this case. As Judge Colloton noted, none concerned a closely analogous factual situation as required by this Court's decision such as *Kisela* and *Emmons*. (Pet. App. 5-6.) Indeed, none involved pointing a weapon at a suspect, and all involved actual application of force.

See, *e.g.*, *Shannon v. Koehler*, 616 F.3d 855 (8th Cir. 2010) (issue of fact whether leg sweep takedown and rough handcuffing of unarmed, compliant suspect was excessive force); *Small v. McCrystal*, 708 F.3d 997 (8th Cir. 2013) (issue of fact whether officer tackled non-resisting plaintiff); *Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir. 2009) (application of Taser to suspect not actively resisting arrest or attempting to flee could be excessive force); *Henderson v. Munn*, 439 F.3d 497 (8th Cir. 2006) (application of choke hold and baton or flashlight strike to compliant suspect could constitute excessive force); *Kukla v. Hulm*, 310 F.3d 1046 (8th Cir. 2002) (manhandling while arresting compliant prisoner for failure to sign ticket for traffic offense could constitute excessive force); *Bauer v. Norris*, 713 F.2d 408 (8th Cir. 1983) (use of physical force against individuals who committed no crime and never physically resisted or physically threatened officers, supports judgment for excessive force); and *Feemster v. Dehntjer*, 661 F.2d 87, 88 (8th Cir. 1981) (plaintiff's claim that officers "beat him after he surrendered" sufficient to support jury instruction on excessive force).

Application of this Court's requirement for factual specificity in the context of excessive force claims makes it clear that Ross is entitled to qualified immunity. The Ninth Circuit's decision in *Thompson v. Rahr*, 885 F.3d 582 (9th Cir. 2018) underscores this point.

In *Thompson*, the plaintiff was stopped for multiple traffic violations at night by Deputy Copeland. 885 F.3d at 584. Copeland ran Thompson's information and

determined he had a suspended license and was a convicted felon, most recently for possessing a firearm. *Id.* Copeland had Thompson exit the vehicle, patted him down for weapons, and finding none, had him sit on the bumper of the patrol car. *Id.* at 585. Copeland searched the vehicle and found a loaded handgun on the floor of the passenger side. *Id.* He called for backup, another officer arrived, and stood over Thompson. *Id.* Thompson contended that Copeland then pointed a gun at his head and threatened to kill him if he did not surrender and get on the ground. *Id.* Thompson complied and was handcuffed. *Id*.

Thompson sued Copeland for excessive force, and the Ninth Circuit affirmed dismissal of the suit based on qualified immunity. The court acknowledged that there were numerous Ninth Circuit decisions holding that pointing a weapon at a compliant suspect, or innocent individual constituted excessive force. *Id.* at 586-87. However, mindful of this Court's admonition of the need for factual specificity, the Ninth Circuit noted that no case was sufficiently analogous to the circumstances faced by Copeland, namely an officer confronted with an unrestrained suspect, with a weapon 10-15 feet away:

> Looking to the particular setup here, we cannot say that every reasonable officer in Copeland's position would have known that he was violating the constitution by pointing a gun at Thompson. Thompson's nighttime, felony arrest arising from an automobile stop, in which a gun was found, coupled with a

> fluid, dangerous situation, distinguishes this case from our earlier precedent. More specifically, Copeland was conducting a felony arrest at night of a suspect who was not handcuffed, stood six feet tall and weighed two hundred and sixty-five pounds, was taller and heavier than Copeland, and had a prior felony conviction for unlawfully possessing a firearm. Although Thompson was cooperative, the situation was still critical in terms of potential danger to the officers, especially given that a loaded gun was only 10-15 feet away. Copeland did not violate a "clearly established" right as that concept has been elucidated by the Supreme Court in the excessive force context.

Id. at 588 (citation omitted).

Similarly, here, there was no Eighth Circuit case holding that pointing a weapon at the head of a suspect who had been, and might still be armed, was unrestrained by handcuffs, and with an assault rifle only several feet away, could constitute excessive force. Given the absence of such case law, under the decisions of this Court, the Eighth Circuit was required to grant Ross qualified immunity.

C. The Undisputed Evidence Established That Petitioner's Use Of Force Was Reasonable.

This Court has recognized that where the undisputed evidence establishes that the force used was

objectively reasonable, an officer is entitled to summary judgment. *Plumhoff v. Rickard*, 572 U.S. 765, 776-77 (2014); *Scott v. Harris*, 550 U.S. 372, 386 (2007). Petitioner submits that is the case here.

In *Graham v. Connor*, 490 U.S. 386 (1989), this Court held that claims for excessive force under the Fourth Amendment must be evaluated based upon the objective reasonableness of an officer's conduct. *Id*. at 395-97. That evaluation "requires careful attention of 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." *Id*. at 396. "The operative question in excessive force cases is 'whether the totality of the circumstances justifie[s] a particular sort of search or seizure.'" *County of Los Angeles v. Mendez*, ___ U.S. ___, 137 S. Ct. 1539, 1546 (2017) (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

Moreover, the reasonableness of force must be evaluated based on the information officers possessed at the time. *Saucier v. Katz*, 533 U.S. 194, 207 (2001); *Mendez*, 137 S. Ct. at 1546-47; *Graham*, 490 U.S. at 397 ("the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . . "). Critically, the Court has emphasized that the reasonableness of "a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," making "allowance for 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 396-97.

The circumstances petitioner confronted were certainly "tense, uncertain, and rapidly evolving." Ross was in the midst of conducting an investigation, engaged in surreptitious surveillance, when Rochell saw him, attempted to get his attention and instead of waiting, went into his home to retrieve an assault rifle and then approached Ross with the weapon slung around his body—provocative action for which Rochell was eventually convicted of disorderly conduct. By his own admission, Rochell was slow to comply with Ross's commands, including the command, once he had dropped the rifle, to get on the ground. When Ross pushed Rochell to the ground, Ross had no way of knowing whether Rochell had any other weapons on his person, Rochell was not handcuffed, the assault rifle was only several feet away, and back up assistance was only just arriving. Under the split-second circumstances, in such close physical proximity to a suspect who was already known to have been carrying a weapon, it was reasonable for Ross to threaten deadly force to assure compliance and avoid any further physical confrontation. Indeed, as this Court recognized in *Rettele*, the threat of force by pointing a weapon until it can be determined whether a suspect who might be carrying a weapon has one nearby, is manifestly reasonable. 550 U.S. at 614.

Under the decisions of this Court, Ross is entitled to summary judgment on the excessive force claim, and review should be granted to compel adherence to this Court's decisions and to confirm the wide latitude officers must have in making split-second decisions when confronting armed individuals in the field.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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