No. 24-504

In the Supreme Court of the United States

JOSEPH M. HOSKINS,

Petitioner,

v.

JARED WITHERS AND JESSE ANDERSON,

Respondents.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Petitioner's questions presented erroneously state the clearly established law at a high level of generality and ignore the undisputed facts that made the show of force here objectively reasonable.

When the clearly established law is examined at the correct level of specificity, the single question presented is:

Whether the Tenth Circuit correctly held that no clearly established law put the matter beyond debate that a police officer's objectively reasonable show of force in response to officer safety concerns was illegal simply because a suspect cursed at the officer.

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INTRODUCTION AND SUMMARY OF REASONS TO DENY THE PETITION

This case does not raise the broad questions presented by Petitioner and is a poor vehicle, or no vehicle at all, to answer them. At bottom, the case involves the circuit court's application of well-established qualified immunity principles constrained by the facts of the case. Even if this Court were to undertake a plenary review to issue a fact-specific decision, the Court would apply settled law to inevitably reach the status quo: the application of qualified immunity in favor of Respondents.

No circuit conflict warrants this Court's review. Instead of showing an actual conflict involving cases where truly similar facts led to different outcomes, Petitioner parades a mass of cases with substantially dissimilar facts, most of which don't even involve traffic stops or implicate the use of reasonable force under the Fourth Amendment. And those few cases that do implicate the Fourth Amendment have materially different facts. It is unremarkable that different facts lead to different qualified immunity outcomes. The circuit courts are not "all over the map," Pet. 2, on retaliatory-use-of-force cases involving similar facts. Petitioner is patently wrong in insisting otherwise. Pet. 23. And he notably fails to actually produce any conflicting cases with materially identical facts.

Few retaliatory-use-of-force cases have percolated through the circuit courts. And Petitioner points to no pressing developments in the law since this Court denied certiorari last year in a retaliatory-use-of-force case. *Molina v. Book*, 144 S. Ct. 1000 (Mem), 218 L.

Ed.2d 20 (Feb. 20, 2024). Further percolation is needed.

Meanwhile, the existing guidance from this Court is adequate for lower courts reviewing retaliatory-use-of-force cases. For instance, in *Nieves v. Bartlett*, 587 U.S. 391 (2019), this Court stated that a First Amendment retaliation claim will lie only when "non-retaliatory grounds are in fact insufficient to provoke the adverse consequences" of the retaliation. *Id.* at 398. So where, as here, a non-retaliatory basis justifies police conduct, a retaliatory use of force claim appropriately fails. Petitioner hasn't shown that existing guidance is inadequate.

And the lower court correctly decided that the law was not clearly established. Petitioner's recitation of general propositions of law cannot by itself determine "whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) ("we have repeatedly told courts . . . not to define clearly established law at a high level of generality") (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). The existing case law doesn't instruct reasonable officers that objectively reasonable conduct allowed under the Fourth Amendment *becomes illegal* simply because the suspect is cursing at the officer. Reasonable officers scouring the case law would not conclude that a suspect's cursing renders them unable to act reasonably to address officer safety concerns in "circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 397 (1989).

STATEMENT OF THE CASE

A. Factual and Procedural Background.

1. The traffic stop.

In 2018, Trooper Withers pulled Petitioner over for having an obstructed license plate. Pet. 1a. While waiting for dispatch to check on Petitioner's license and possible outstanding warrants, Trooper Withers had his narcotics dog sniff the outside of Petitioner's car. Pet. 4a. Based on the dog's reaction, Trooper Withers had probable cause to search the car for drugs. Pet. 5a. He informed Petitioner he was going to search the car and told him where to stand during the search. *Id*. He asked Petitioner to place his cell phone on the hood of the car. *Id*. As Trooper Withers prepared to conduct the search, he noticed Petitioner was holding a second cell phone. *Id*.

Trooper Withers took the second cell phone, and Petitioner reacted angrily and cursed. Pet. *Id*. As he cursed, Petitioner had his hands in or near his pockets. *Id*. Petitioner had not been patted down at that point. Pet. 20a. Trooper Withers pointed his gun at Petitioner and told him to remove his hands from his pockets. *Id*. Petitioner raised his hands, and Trooper Withers put his gun away. *Id*. The gun was pointed at Petitioner for eight seconds. Pet. 5a. Petitioner was patted down and secured in Trooper Wither's patrol vehicle. Pet. 5a.

The search of Petitioner's car revealed $89,000 in cash. *Id*. The cash was double-wrapped in plastic, vacuum sealed, and hidden in a lining between the trunk and a rear seat. *Id*. Petitioner was arrested, though charges were never filed, and he was released. *Id*.

2. Proceedings below.

Petitioner sued Trooper Withers under 42 U.S.C. § 1983, claiming that his constitutional rights were violated at every stage of the encounter. Petitioner alleged that the pointing of the gun was excessive force under the Fourth Amendment and retaliation under the First Amendment. Trooper Withers successfully moved to dismiss. The district court concluded that Trooper Withers was entitled to qualified immunity because he did not violate the constitution at any stage of the encounter—the initial stop, the duration of the stop, conducting the dog sniff, pointing the gun, conducting the patdown, applying handcuffs, searching the car, and eventually arresting Petitioner.

Petitioner also brought a Fourteenth Amendment due process claim against Jess Anderson (misspelled in the petition as Jesse Anderson), the Commissioner of the Utah Department of Public Safety, but that claim is not the subject of the petition, so his inclusion in the petition's caption is erroneous.

The Tenth Circuit affirmed. Though the district court had concluded that Trooper Withers didn't violate the First or Fourth Amendment by pointing the gun at Petitioner, and Trooper Withers defended those rulings on appeal, the circuit court opted to affirm under the clearly established prong of the qualified immunity analysis, an argument that Trooper Withers made in the alternative. Pet. 23a.

As to the pointing of the gun, the circuit court agreed that, with Petitioner's hands "in or near his pockets," Trooper Withers "could reasonably fear that [Petitioner] was going to pull out a handgun." Pet. 19a. And because Petitioner had not been patted down at

that point, "Trooper Withers could thus believe that he needed to act quickly, pointing a gun at [Petitioner] in case he was reaching for his own gun." Pet. 20a. Even "assuming for the sake of argument that the cursing and complaints" made by Petitioner "constituted protected speech," the circuit court ultimately concluded that the law was not clearly established: "Even if Trooper Withers had scoured the case law, he might have reasonably concluded that the First Amendment wouldn't prevent him from pointing his gun at [Petitioner] in the face of his cursing and complaints." Pet. 24a. The circuit court also concluded that a Fourth Amendment violation would not have been clearly established: "[g]iven these circumstances, reasonable law-enforcement officers could reasonably believe that the Fourth Amendment would allow them to point a gun at the suspect for roughly eight seconds." Pet. 25a-26a.

ARGUMENT

I. There is no conflict among the lower courts on retaliatory-use-of-force cases and further percolation is needed.

Petitioner argues this case warrants certiorari review based on allegedly conflicting cases. But there is no actual conflict among the lower courts on retaliatory-use-of-force cases. Importantly, the circuit court's decision is constrained by its facts—a traffic stop where a felony suspect is cursing with his hands in or near his pockets. In a portion of the opinion Petitioner doesn't acknowledge, the circuit court emphasized the factual context of its clearly established analysis: "We've never held that the

Constitution prohibits an officer from pointing his gun at suspects when there's probable cause to believe they're committing a felony." Pet. 3a. The use of the term probable cause—a Fourth Amendment term of art—makes clear that the court was looking at the obvious overlap with that amendment. This overlap also makes the decision of limited applicability to First Amendment retaliation cases with no Fourth Amendment overlap, like most of the cases Petitioner cites.

Petitioner fails to show an actual conflict among the circuits with cases involving materially similar facts. He fails to show that "different circuits have come to different outcomes on materially identical facts," Pet. 23, that there has been "disparate treatment among similarly situated plaintiffs based on nothing except the panel or judge that hears the case," Pet. 22, or that there has been "wildly divergent qualified immunity analyses, and wildly divergent outcomes, in cases presenting identical facts." Pet. 10. Rather, the fact patterns in his cases are what's wildly divergent. He includes everything from discontinuing a city contract in retaliation for filing a lawsuit, Pet. 14, to denial of employment perks in retaliation for unrequited romantic advances, *id.*, to retaliating against an inmate for filing a grievance, Pet. 15, to firing an employee for suggesting government misconduct. Pet. 18. The facts in most of his cases bear little to no passing resemblance to the facts here.

Of all the cases Petitioner cites, only two involving traffic stops warrant a response, and then only to emphasize there is no actual conflict despite some superficial similarities. In *Sharpe v. Winterville Police Department*, 59 F.4th 674 (4th Cir. 2023), a police

officer retaliated against a passenger for livestreaming the officer during the stop. While the Fourth Circuit observed that the general right to film police is clearly established as a protected activity, it held that *livestreaming* was a different matter altogether. 59 F.4th at 683-84.

As the Tenth Circuit did here, the Fourth Circuit looked at the case law to see if it clearly established the law in the specific situation faced by the officer. The cases "provide general guidance about First Amendment doctrine," but "they offer no concrete direction to the reasonable officer tasked with applying that doctrine to the situation [the officer] faced. So they do not clearly establish the right." 59 F.4th at 683. Both courts employed the proper level of specificity in the clearly established analysis. Both courts eschewed Petitioner's erroneous approach of defining the law at a high level of generality. There is no conflict here.

Finally, Petitioner cites *Watson v. Boyd*, 119 F.4th 539 (8th Cir. 2024), which also involved a traffic stop. While its facts are arguably the closest to the case here, it is manifestly not factually "indistinguishable," as Petitioner asserts. Pet. 19 n.3. There are key factual differences. During the stop, the driver asked the officer for his badge number. 119 F.4th at 544. The officer became "visibly upset" and said the badge number would be on the ticket. *Id.* The driver of the car moved his hand from the steering wheel to reach for his phone. *Id.* The officer instructed the driver to put his hand on the steering wheel. *Id. After* the driver put his hand back on the steering wheel, the officer called for backup, pointed his gun at the driver, and

said, "I can shoot you right here" "[a]nd nobody will give a s**t." *Id.*

Significantly, the gun was pulled *after* the driver put his hand back on the wheel. In contrast here, Trooper Withers pulled his gun while Petitioner's hands were in or near his pockets, and then he holstered his weapon after Petitioner showed his hands. Once the safety issue was ameliorated, Trooper Withers put his gun away. And Trooper Withers did not taunt or threaten the suspect as the officer did in *Watson*. These are not small differences. Trooper Withers's conduct was reasonable because it was in response to a reasonably perceived and imminent safety concern; he then holstered his weapon when Petitioner showed his hands. The officer in *Watson* had no reasonable, non-retaliatory basis to pull the gun *after* the driver put his hand back in view. The safety concern was addressed by then. And, of course, Trooper Withers did not taunt or threaten Petitioner. The facts in the two cases are thus readily distinguishable.

Petitioner having failed to show a split among the circuits, this Court should deny the petition.

II. The Tenth Circuit's decision is correct.

The Court should also deny the petition because the Tenth Circuit's decision is correct. This Court has "repeatedly stressed" that clearly established law should not be defined "at a high level of generality." *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014)). The clearly established law must be "particularized" to the facts of the case. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). This prevents

plaintiffs from side-stepping qualified immunity and turning it "into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id*. at 639. The existing law "must have placed the constitutionality of the [public official's] conduct *beyond debate*." *Wesby*, 583 U.S. at 63 (emphasis added). "The dispositive question is whether the violative nature of *particular* conduct is clearly established," and that "inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix*, 577 U.S. at 12 (citations and internal quotation marks omitted).

The correct level of specificity is not the abstract right to be free from retaliation for one's speech, but what concrete guidance the case law gives to the specific situation the officer faced here—including overlapping Fourth Amendment case law on the reasonable use of force to address officer safety concerns. To be clearly established, the case law needed to put the matter beyond debate such that every reasonable officer would understand that objectively reasonable conduct allowed under the Fourth Amendment—in this case briefly pointing a gun at someone suspected of committing a felony whose hands are in or near his pockets—becomes disallowed simply because the suspect is cursing at the officer. But the case law doesn't come anywhere close to saying that the entire body of Fourth Amendment case law is displaced in this way by the First Amendment.

Petitioner doesn't show that the matter is *beyond debate*. He doesn't cite case law *particularized* to the facts here. Instead, he defines the law at a high level of generality. None of the Tenth Circuit cases he cites

for generalized principles of First Amendment law have facts even remotely similar to this case. Petitioner fails to show "divergent outcomes," Pet. 10, of materially similar cases within the circuit. None of his cited cases, Pet. 10-12, involved circumstances like those here, where an officer is applying and relying on Fourth Amendment law in the face of a "tense, uncertain, and rapidly evolving" situation, *Graham*, 490 U.S. at 397, and acts reasonably in response to a potential threat at a traffic stop. *See DeLoach v. Bevers*, 922 F.2d 618 (10th Cir. 1990) (police detective filed false affidavit leading to suspect's arrest, ostensibly in retaliation for suspect's earlier decision to hire an attorney); *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000) (government officials rescinded an offer of employment after the would-be employee testified as an expert witness for someone on trial for murder); *Robbins v. Wilkie*, 433 F.3d 755 (10th Cir. 2006), *reversed by Wilkie v. Robbins*, 549 U.S. 1075 (2006) (Bureau of Land Management employees attempted to extort a right of way across private property); *Van Deelen v. Johnson*, 497 F.3d 1151 (10th Cir. 2007) (government officials threatened to shoot taxpayer in retaliation for filing tax assessment challenge).

To be sure, *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022), involved a police officer at a traffic stop, but the similarity ends there. The officer there retaliated against a member of the public who was filming another person's traffic stop. The officer blocked the filming and shined a flashlight into the camera, and, after other officers at the scene persuaded the officer to leave, he angrily drove his police car at the person filming. 38 F.4th at 1286. That is nothing like the

eight-second show of force here that reasonably addressed officer safety concerns.

In contrast to all those situations, here Petitioner was a suspect being detained while his vehicle was searched for drugs. Petitioner cursed at Trooper Withers and positioned his hands in or near his pockets. Petitioner had not yet been patted down for weapons. Trooper Withers pointed his gun at Petitioner and ordered him to keep his hands out of his pockets. The gun was pointed at Petitioner for a total of eight seconds. Officer safety concerns objectively justified briefly drawing the weapon. The circuit court noted that when Trooper Withers saw that Petitioner's hands were in or near his pockets, he "could reasonably fear that [Petitioner] was going to pull out a handgun." Pet. 19a. The court noted that "Trooper Withers could thus believe that he needed to act quickly, pointing a gun at [Petitioner] in case he was reaching for his own gun." *Id.*

That Petitioner resorts to highly generalized statements of First Amendment law in factually inapposite circumstances demonstrates the weakness of his clearly established argument—and demonstrates the correctness of the circuit court's decision. Abstract statements of law don't give the concrete guidance required to put the question *beyond debate* such that every reasonable officer would know that reasonable officer safety concerns suddenly no longer matter simply because of a suspect's cursing—that the suspect's cursing essentially requires the officer to disregard voluminous Fourth Amendment guidance from this Court and others as well as to disregard the Fourth Amendment's touchstone of

reasonableness. But the case law doesn't come anywhere close to saying that.

Under Petitioner's novel approach, the moment a suspect curses, police officers and courts alike would be bound to myopically examine the retaliation claim in a vacuum instead of viewing the totality of the circumstances. But that's not the state of the law. Even assuming that Petitioner's cursing here was protected activity, as did the Tenth Circuit, there is simply no support in this Court's precedent, the Tenth Circuit's case law, or the consensus of law from other circuits, to suggest that Fourth Amendment law becomes irrelevant when a suspect begins cursing. According to Petitioner, police officers would be required to refrain from any objectively reasonable conduct that would otherwise be allowed under a Fourth Amendment analysis, including an objectively reasonable show of force justified by officer safety concerns.

What the Tenth Circuit said is absolutely right under the facts of this case—"if Trooper Withers had scoured the case law, he might have reasonably concluded that the First Amendment wouldn't prevent him from pointing his gun at [Petitioner] in the face of his cursing and complaints." Pet. 24a. The court was right because no case says that officer safety concerns take a back seat to a suspect's cursing. Nor are there any cases adopting Petitioner's novel proposition that a mere allegation of retaliatory motive displaces the body of Fourth Amendment case law.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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