

No. 20-578

IN THE
Supreme Court of the United States

SERGEANT GARY HEDGER, ET AL.,

Petitioners,

v.

RONALD GRAVES,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the court of appeals' holding that disputed issues of material fact precluded summary judgment where Petitioners do not contest that the court set forth the correct legal standard.

**PARTIES TO THE PROCEEDING
AND RELATED CASES**

The parties to the proceeding in this Court are listed in the petition for a writ of certiorari.

The following proceedings are directly related to this case:

- *Graves v. Malone, et al.*, No. 17-12227, U.S. District Court for the Eastern District of Michigan. Judgment entered on October 10, 2018.
- *Graves v. Malone, et al.*, No. 18-2296, U.S. Court of Appeals for the Sixth Circuit. Judgment entered on April 17, 2020. Rehearing en banc denied on May 20, 2020.

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INTRODUCTION

Sheriff's Deputies Myers and Potratz and Sgt. Hedger knew that respondent Ronnie Graves was mentally unstable before they entered his home. When they entered, they found Mr. Graves sitting motionless in a bathtub, his legs dangling over the edge of the tub and his eyes staring straight ahead. They also knew that Mr. Graves no longer possessed the blade of the knife he had forty minutes prior, which they had already obtained from his grandmother. Nonetheless, when Mr. Graves raised his arm, holding a black plastic object, Deputy Myers shot at Mr. Graves with a handgun and Deputy Potratz shot at Mr. Graves with an AR-15, hitting him in the face. After observing that Mr. Graves's "face was hanging off," thinking that Mr. Graves was most likely in shock, and noting that his colleagues were unharmed, Sgt. Hedger tased Mr. Graves with the full charge of his taser. Per Sgt. Hedger, he let him "ride" the taser "for five" seconds.

Mr. Graves filed suit against all three officers based on their use of excessive force in violation of the Fourth Amendment. The district court granted Petitioners' motion for summary judgment on qualified immunity grounds. The court of appeals affirmed in part and reversed in part, holding, as relevant here, that disputed issues of material fact precluded summary judgment on Mr. Graves's excessive-force claims.

The petition for certiorari should be denied for three reasons. First, the Sixth Circuit did not misunderstand or misconstrue this Court's qualified immunity doctrine, and the Sixth Circuit's decision does not conflict with that of any other court of

appeals. Petitioners rightly do not argue otherwise. Second, the court below properly held that the existence of material issues of fact require determination by a jury before a court can address questions of law regarding the reasonability of the officers' use of force. Third, the clearly established rights at issue are not unreasonably abstract. While contending that the court of appeals defined the rights at issue too generally, the petition offers no alternative formulation of the governing legal standard, instead arguing essentially that, on the facts here, Petitioners did not act unreasonably.

STATEMENT

Factual background

On July 16, 2015, Mr. Graves was suffering from auditory hallucinations. Pet. App. 3. During this mental-health episode, Mr. Graves stabbed his grandmother with a kitchen knife in the trailer where they lived together. *Id.* at 3, 51–52. Because Mr. Graves is 5'6" tall and weighs approximately 140 pounds, D. Ct. Dkt. No. 30-5 at 853 (Dispatch transcript), his grandmother was able to flip him into the bathtub, Pet. App. 2. During their struggle, the knife blade separated from the handle. His grandmother took the blade, fled to a neighbor's trailer, and called the police. *Id.* at 2, 3.¹

Deputies Myers and Potratz, along with Sgt. Hedger and another deputy, were called to the scene. The dispatcher reported that Mr. Graves was currently delusional and previously had threatened to

¹ Mr. Graves has no memory of the attack and was subsequently acquitted of criminal charges on the ground of insanity. Pet. App. 3, 8.

kill himself several times—always by knife, not by gun, because he did not own a gun. *Id.* at 3.

Sgt. Hedger was the first to arrive. Mr. Graves's neighbors explained to him that Mr. Graves was in an abnormal mental state and still in his mobile home. They also told him that Mr. Graves no longer possessed the knife blade. Sgt. Hedger instructed another deputy to take the blade and place it in a police car. *Id.* at 3–4.

Deputy Potratz arrived next, followed by Deputy Myers. Deputy Potratz stationed himself outside in front of the rear door of the trailer, wielding an AR-15. Together, Deputy Myers and another deputy, each wielding a handgun, and Sgt. Hedger, wielding a taser, entered Mr. Graves's trailer. They did not see Mr. Graves, so Deputy Myers stayed in the living room while the others exited the trailer. Sgt. Hedger then used a crowbar to pry open the rear door where Deputy Potratz was stationed. *Id.* at 4.

After opening the rear door, Sgt. Hedger and Deputy Potratz could see Mr. Graves in the bathtub across the hall, seated facing out with his legs dangling over the tub. Mr. Graves was still, staring straight ahead, and not making eye contact. *Id.* When they spoke to him, Mr. Graves initially did not react. Indeed, throughout the encounter, Mr. Graves sat in the same position—his legs dangling over the side of the tub, his back to the wall. Mr. Graves continued staring into space, even when Sgt. Hedger shouted, "In the tub. In the tub. Right there. Don't f***ing move." *Id.* at 5.

Deputy Potratz remained just outside the door, his AR-15 pointed at Mr. Graves, while Sgt. Hedger instructed Deputy Myers to walk down a cluttered

hallway to the bathroom. Mr. Graves remained unresponsive, and Sgt. Hedger was not worried about Mr. Graves escaping, only that Mr. Graves would orchestrate “suicide by cop” by provoking the officers into deploying their weapons against him. *Id.*

As the officers were yelling at Mr. Graves to raise his hands, Mr. Graves moved for the first time, raising his hand straight up in the air. *Id.* at 5–6. The parties agree that Mr. Graves was holding an object. Mr. Graves, who was still suffering from delusions, thought he held a comb. Deputy Myers testified both that he perceived Mr. Graves was holding a gun and, contradictorily, that he had no reason to believe that Mr. Graves had a gun. *Id.* at 6. Nonetheless, Deputy Myers shot at him, but missed. Deputy Myers also testified that he tripped and fired his gun while falling. Mr. Graves, however, testified that Deputy Myers shot at him before he tripped, while he had a clear line of sight into the bathroom. *Id.* at 6, 16.

At about the same time, Deputy Potratz shot Mr. Graves in the face with his AR-15. The shot was so powerful that after the bullet traveled through Mr. Graves’s face, it traveled through the trailer wall and then through at least two other trailers. Deputy Potratz testified that he was not sure whether he or Deputy Myers fired first. *Id.* at 7.

Conferring with his colleagues immediately after the incident, Deputy Potratz said that he fired because he feared that Mr. Graves had a gun. In his deposition, however, Deputy Potratz stated that he did not know what he thought the object was at the time Mr. Graves moved his arm. Deputy Potratz stated after the shooting that he thought Mr. Graves had a “weapon,” *id.* at 6, but at his deposition, testified

that “anything could be a weapon.” *Id.* at 17 (quoting deposition testimony). He also “testified he did *not* perceive that Graves held a gun, nor did he perceive that Graves held a knife with a blade.” *Id.*

Entering the bathroom, Sgt. Hedger saw that Mr. Graves was still sitting in the bathtub with his legs hanging over its edge, bleeding profusely, with his face “hanging off.” *Id.* at 24. Sgt. Hedger heard Deputy Myers say “Not hit. Not hit. Shots fired,” *id.* at 23, and “confirmed that Myers had not been shot,” *id.* at 7, 23. There is a dispute over what happened next. Sgt. Hedger asserts that he ordered Mr. Graves, who was unresponsive to the commands of the officers during the entire encounter, to raise his hands. However, the dashcam recording of the scene does not register any audio commands after the shooting. And Sgt. Hedger conceded that he knew by this point, if not beforehand, that Mr. Graves was unresponsive and potentially in shock from the shot to his face. *Id.* at 7–8. Still, even after making these assessments of the scene, Sgt. Hedger tased Mr. Graves, letting him “ride for five” seconds—a full taser cycle. *Id.* at 8; D. Ct. Dkt. No. 30-3 at 576–77 (Hedger depo.).

As a result of the gunshot, Mr. Graves’s face is severely disfigured. He is permanently blind in his right eye; his right cheekbone is gone, and his sinus cavity is exposed. He suffers from headaches, constant jaw pain, and difficulty breathing due to nostril impairment. Pet. App. 8.

Procedural background

Mr. Graves filed suit under 42 U.S.C. § 1983 against Deputies Myers and Potratz and Sgt. Hedger for violating his Fourth Amendment rights by using excessive force. The officers moved for summary

judgment, arguing that their actions were objectively reasonable and that they were entitled to qualified immunity. The district court granted the motion. Pet. App. 8, 50–51, 66.

Mr. Graves appealed to the Sixth Circuit, which unanimously upheld the district court’s grant of summary judgment for Sgt. Hedger on Mr. Graves’s claims for supervisory liability and failure to protect. On the claims of excessive force against each of the three officers, however, the court reversed the district court’s grant of summary judgment. *Id.* at 25.

On the issue whether Deputies Myers’s and Potratz’s use of lethal force was reasonable, the court noted that they encountered Mr. Graves when he was “incapacitated by position: ... seated, facing out with his back to the wall, and his legs ... dangling over the side of the tub.” *Id.* at 15–16. Despite the deputies’ assertion that they felt threatened when Mr. Graves made a motion with his right arm, the court held that a reasonable juror might “decline to credit” their accounts, in part because the object Mr. Graves held did not resemble a gun and they had no reason to believe that he possessed a gun. *Id.* at 16–17.

Additionally, the court held there was a genuine dispute of material fact about Deputy Myers’s viewpoint. Deputy Myers stated he fell and then shot his gun, which would have altered his perception. Mr. Graves asserts Mr. Myers fired first, then fell. *Id.* at 16. The court also held that there was a material dispute of fact over Deputy Potratz’s perception of the object Mr. Graves held: “In the immediate aftermath of the shooting, Potratz claimed that he believed Graves held a gun. Later, during his deposition, he

testified he did not perceive that Graves held a gun” or even a knife with a blade. *Id.* at 17.

Taking the facts in the light most favorable to Mr. Graves, as the court was required to do, the court concluded that Deputies Myers and Potratz “used lethal force against an unresponsive, slight, unarmed man who was trapped in his bathtub” and whose “only movement was to raise his hand, which contained an object that ... the officers perceived as no more inherently dangerous than a permanent marker, or a cell phone, or an action figure.” *Id.* Taking “the totality of facts and circumstances,” *id.* at 19, the court explained that “because the officers did not have probable cause to believe that Graves posed an immediate threat of severe physical harm, the ‘minimum requirement’ to justify the use of lethal force is not met,” *id.* at 18 (quoting *Untalan v. City of Lorain*, 430 F.3d 312, 314 (6th Cir. 2005)). Rather, the court held, “[o]ur case law is clear: no reasonable officer would make such a conclusion” to deploy lethal force. *Id.* at 18 (citing *Sample v. Bailey*, 409 F.3d 689 (6th Cir. 2005)). The court further stated that the right of a criminal suspect not to be shot unless a pursuing officer perceives him to pose a threat to officers or others has long been clearly established. *Id.* at 20.

As to tasing Mr. Graves after he had been shot and his “face was hanging off,” *id.* at 7, the court of appeals held that the right not to be tased unless resisting arrest is also clearly established. *Id.* at 21–22. Viewing the facts in Mr. Graves’s favor, the court held that Mr. Graves—nonresponsive, immobile, gun-less, and suffering from a gunshot wound to the face from an AR-15—was not resisting arrest. The district court had emphasized that Sgt. Hedger had mistakenly

thought that Deputy Myers had been shot when he tripped. However, “by the time Hedger tased Graves, Hedger had confirmed that Myers had *not*, in fact, been shot.” *Id.* at 23. Although whether Sgt. Hedger ordered Mr. Graves to raise his hands before tasing him is disputed, the court of appeals explained that the question was immaterial because the failure to raise his hands after he was shot in the face would not constitute resisting arrest. *Id.*

Dissenting, Judge Larsen wrote that Deputies Myers and Potratz perceived Mr. Graves as “brandishing a dangerous weapon,” *id.* at 26, such that their use of lethal force was not excessive under the circumstances. She also concluded that a reasonable officer in Sgt. Hedger’s position might have tased Mr. Graves—even after he was shot in the face by an AR-15 at close range—because the officer might have believed that Mr. Graves had a gun and the ability to fire it. She thought that it was therefore “debatable” whether Mr. Graves was resisting arrest and that his right not to be tased was thus not clearly established. *Id.* at 46–47.

The three officers petitioned for rehearing and rehearing en banc. The petitions were denied, with no judge voting for panel rehearing and no judge calling for a vote on rehearing en banc. *Id.* at 69–70.

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to review the Sixth Circuit’s straightforward application of well-established law on the use of excessive force by police officers. They do not claim a conflict among the circuits, and they do not claim that the court of appeals overlooked the relevant law of this Court. And they agree with the court of appeals’ ruling that

summary judgment was appropriate as to the claim against Sgt. Hedger based on supervisory liability or failure to protect. Pet. App. 14. They argue, however, that the court got it wrong when it held that disputed facts precluded summary judgment for the officers where, looked at in the light most favorable to the non-moving party, the officers were not entitled to qualified immunity.

Consistent with the “objective reasonableness” test described in *Graham v. Connor*, 490 U.S. 386, 396 (1989), the court assessed the reasonableness of the officers’ actions “in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Id.* at 397, *quoted in* Pet. App. 15. Applying the *Graham* factors, the court concluded that there were genuine disputes of material fact about whether the officers acted unreasonably when they shot at an immobile, unresponsive, and unarmed man, and then tased him after he was shot in his face. Petitioners agree that *Graham* sets forth the correct approach, *see, e.g.*, Pet. 26–27. They simply disagree with the outcome. That disagreement about disputed facts does not warrant this Court’s review. *See* S. Ct. R. 10.

I. The Sixth Circuit correctly held that disputed issues of material fact precluded summary judgment to Deputies Myers and Potratz for their use of lethal force.

A. The Sixth Circuit correctly remanded for a resolution of material disputed facts.

To evaluate Mr. Graves’s claim that the deputies used excessive force in violation of the Fourth Amendment, the Sixth Circuit properly looked to this

Court's precedent to determine whether the force was reasonable under the circumstances or whether it was unconstitutionally excessive. Quoting *Graham*—the same case on which Petitioners rely to set forth the proper test, *see* Pet. 26—the court described the three factors of this fact-based inquiry: whether (1) the suspect's crime was severe; (2) the suspect poses an immediate threat to the officers' or others' safety; and (3) the suspect is actively resisting arrest or attempting to flee. Pet. App. 15 (citing *Graham*, 490 U.S. at 396). Applying this test, the Sixth Circuit held that genuine disputes of material facts precluded summary judgment as to all but the claim for supervisory liability or failure to protect.

Arguing that the “undisputed facts established that the officers' actions were objectively reasonable,” Pet. 7, the petition wrongly construes disputed facts in the officers' favor. For example, the petition's criticism that the court failed to “acknowledge the *perceived* threat to the officers,” Pet. 28, is at bottom a factual disagreement. Regarding Deputy Myers, the Sixth Circuit noted a genuine dispute of fact about whether Deputy Myers was in the process of tripping or whether he had a clear line of sight to Mr. Graves at the time he fired his gun. Pet. App. 16. Deputy Myers' s testimony is unavailing, as he stated that he both perceived Mr. Graves had a gun, and, contradictorily, that he had no reason to believe Mr. Graves had a gun. *Id.* As the court recognized, the resolution of those factual disputes was material and properly resolved by a jury.

Additionally, Petitioners seek to relitigate in this Court the factual dispute concerning how Mr. Graves moved his arm. The court of appeals stated that Mr. Graves moved his arm upward. *Id.* at 2, 6, 16, 17.

Petitioners argue that he also motioned forward. Pet. 13–17. The disputed issue is material to whether any perception of threat was reasonable. *See Sample v. Bailey*, 409 F.3d at 697 (holding that a suspect’s “mere action of moving his arm to grab the top of [a] cabinet would not cause a reasonable officer to perceive a serious threat of physical harm to himself or others”). If Mr. Graves had merely raised his hand upward after having been ordered to raise his hands, “[n]othing about the movement of [his] right arm would be threatening to a reasonable officer” or should have prompted lethal force. *Id.*

Regarding Deputy Potratz, Petitioners assert that he fired his AR-15 at Mr. Graves because “he believed his partner, Myers, was in mortal danger.” Pet. 31–32. Again, the reasonableness of his action turns on disputed facts. As the court below noted, Deputy Potratz’s testimony establishes that, when he fired, he was “just outside the door,” Pet. App. 5, so a juror could find that Deputy Potratz was close enough to see that Mr. Graves did not have a weapon in his hands. Moreover, Deputy Potratz’s own statements were contradictory on a material fact: “In the immediate aftermath of the shooting, Potratz claimed that he believed Graves held a gun.” *Id.* at 17. Later, during his deposition, “he testified he did *not* perceive that Graves had a gun, nor did he perceive that Graves held a knife with a blade.” *Id.* (citing deposition testimony).² A juror could reasonably find—based on Deputy Potratz’s own testimony—that he did not think Mr. Graves had a weapon. If so, he would have no reasonable basis to believe that a small-statured

² *See* D. Ct. Dkt. No. 30-8 at 1033 (Potratz depo. stating “Q: Did you think he had a gun? A: No.”).

man, sitting still in a tub with his legs dangling over the side, presented a threat to Deputy Myers, who was in the hall. *Id.* at 17.

Thus, Petitioners raise no legal issue or error of law. What they raise are disagreements about the best way to resolve disputed material facts. The task of resolving those facts was neither one for the Sixth Circuit or for this Court; it is a task for a jury.

B. The Sixth Circuit stated the relevant clearly established law at the proper degree of specificity.

Like Petitioners, the Sixth Circuit understood that, to be clearly established, a right must be “defined with specificity” and “not at a high level of generality.” Pet. App. 10 (quoting *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (per curiam)) (internal citations omitted); *accord* Pet. App. 20 (citing *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). This Court has reiterated that “[t]here need not be a case ‘directly on point for a right to be clearly established,’ but ‘existing precedent must have placed the statutory or constitutional question beyond debate.’” Pet. App. 20 (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam))).

Here, the Sixth Circuit looked to the clearly established right of a criminal suspect “not to be shot unless he [is] perceived to pose a threat to pursuing officers or to others.” *Id.* (citing *Robinson v. Bibb*, 840 F.2d 349 (6th Cir. 1988)); *see also* *King v. Taylor*, 694 F.3d 650, 664 (6th Cir. 2012); *Ciminillo v. Streicher*, 434 F.3d 461, 468 (6th Cir. 2006). The court also noted that the threat of harm must be a “threat of severe physical harm either to the officer or others.” Pet. App.

18 (citing *Untalan*, 430 F.3d at 314). Tellingly, although Petitioners claim that the court “consider[ed] the right at a high level of generality,” Pet. 28, they do not suggest what they believe a proper “specific” statement of the relevant right to be.

Instead, after asserting that the court stated the clearly established right at too high a level of generality, the petition immediately pivots back to arguing the facts. *Id.* It states that the “flaw” in the court’s identification of the right is that the court “failed to heed acknowledge [sic] the *perceived* threat to the officers here.” *Id.* That argument, however, does not suggest that the court stated the right in too general a fashion; to the contrary, it accepts the court’s statement. And again, whether the deputies shot their weapons at Mr. Graves because they reasonably perceived a threat turns on factual disputes.

Although Petitioners’ argument is not entirely clear, they appear also to argue that they cannot be liable for shooting an immobile, nonresponsive, unarmed man in a bathtub because of differences between the specific facts in *Sample v. Bailey*, a case on which the court below relied, and the facts in this case. Pet. 27–28. In *Sample*, officers encountered a suspect hidden in a cabinet and ordered him to get out. 409 F.3d at 692. When Sample raised his hand upward, the officers claimed that they thought that he was reaching for a weapon and shot him. *Id.* at 692–93. Taking the facts in Sample’s favor, the Sixth Circuit held that the “mere action of moving his arm to grab the top of [a] cabinet would not cause a reasonable officer to perceive a serious threat of physical harm to himself or others.” *Id.* at 697. As the court below explained, in *Sample*, officers encountered

a suspect “found in the same position as Graves: unarmed, silent, and constrained by position.” Pet. App. 18. In both cases, the suspect “was not verbally threatening, but merely silent,” had “limited” movement, “and could not quickly charge the officers.” 409 F.3d at 697. Additionally, in *Sample*, according to the officers, the sound of the officers’ own shots purportedly led them to believe that Sample was firing back at them, *id.* at 692—similar to the purported confusion of Deputies Myers and Potratz over whether Mr. Graves had shot a gun. Pet. 29–32. In addition, Sample was unarmed, like Mr. Graves, and taking the facts in his favor, the officer who shot him saw that he was empty-handed, 409 F.3d at 698—just as, taking the facts in Mr. Graves’s favor (and based on their own testimony), Deputies Myers and Potratz did not believe that Mr. Graves had either a gun or a knife with a blade, Pet. App. 16–17.

In sum, although Petitioners’ first question presented asks whether the court below “misappl[ied] or disregard[ed]” this Court’s case law, Pet. 2, the petition states the same legal principles as the decision below. The disagreement is not one of law, but about how to resolve disputed issues of fact. It presents no issue for this Court’s review.

II. The Sixth Circuit correctly held that disputed issues of material fact precluded summary judgment to Sgt. Hedger for tasing a nonresisting suspect who had been shot in the face.

A. The Sixth Circuit correctly remanded for a resolution of disputed material facts.

In arguing Sgt. Hedger is entitled to qualified immunity, Petitioners again challenge what happened and why—and raise no legal issue for the Court’s consideration. They argue, for example, that “[w]hen Hedger observed Graves ... he was unable to determine if Graves still possessed a weapon or had easy access to it” and that “despite Graves being shot [in the face with an AR-15], Hedger was unable to determine whether the threat had clearly abated.” Pet. 33. After reviewing Sgt. Hedger’s own testimony and Mr. Graves’s testimony, however, the court determined that these facts were reasonably in dispute. Indeed, Sgt. Hedger’s testimony that Mr. Graves’s “face was hanging off” and that Mr. Graves “hadn’t been responsive the whole time” could reasonably lead a jury to conclude that, whatever threat Mr. Graves may have ever posed, that threat had abated by the time Sgt. Hedger tased Mr. Graves, as he lay in the bathtub bleeding profusely after a shot from an AR-15 to his face. Pet. App. 24.

Finally, the petition raises a factual dispute about Sgt. Hedger’s understanding of Deputy Myers’s statement that shots had been fired: whether Sgt. Hedger took that statement to mean that Mr. Graves had fired or to mean that Deputies Myers and Potratz had fired. Pet. 33–34. What is *undisputed*, however, is

that Sgt. Hedger knew his colleagues had drawn their guns, Pet. App. 4–5, could see that Mr. Graves remained sitting in the bathtub, and could see that Mr. Graves’s face was, in Sgt. Hedger’s own words, “hanging off,” *id.* at 7. Given these facts, a reasonable juror could find that Sgt. Hedger understood Deputy Myers to refer to the shots that had just been fired at Mr. Graves. *See id.* at 23–24.

In short, whether Sgt. Hedger used excessive force in tasing Mr. Graves after he had been shot in the face turns on disputed issues of fact. Resolution of this issue is the province of a jury.

B. The right of a suspect who is not resisting arrest to be free from tasing is clearly established.

The court of appeals cited numerous Sixth Circuit cases in reciting the clearly established right of a non-resisting suspect not to be tased. Pet. App. 21 (citing *Rudlaff v. Gillispie*, 791 F.3d 638, 642 (6th Cir. 2015); *Eldridge v. City of Warren*, 533 F. App’x 529, 533 (6th Cir. 2013); *Cockrell v. City of Cincinnati*, 468 F. App’x 491, 495–96 (6th Cir. 2012)); *id.* at 22 (“It is also objectively unreasonable to use a taser against a suspect who previously resisted arrest but was, at the time the taser was deployed, incapacitated.” (citing *Landis v. Baker*, 297 F. App’x 453, 464 (6th Cir. 2008))).

Petitioners quote at length from *White v. Pauly* for the undisputed point—set forth as well by the court below—that clearly established rights should not be stated at a high level of generality. Pet. 35–36. In so doing, Petitioners seem to imply that the Sixth Circuit defined the right too broadly. They do not, however, explain any way in which the decision below fails to

meet the standard of *White v. Pauly*, nor do they suggest what they believe the properly stated right to be. Although they state that suspects do not have the right to be free from tasing when an officer does not perceive a threat abated, Pet. 34, that statement does not draw into question the Sixth Circuit's identification of the right at issue. Rather, once again, it challenges the court's determination that there are disputed factual issues about whether Sgt. Hedger reasonably perceived a threat. Once again, resolution of that issue is properly left to a jury.

Finally, the court below recognized a "limited exception" to the clearly established rule on which it relied for cases where "a suspect ... was not resisting at the moment but had been resisting immediately prior, and—but for the use of a taser—was expected to continue resisting." Pet. App. 22 (citing *Russo v. City of Cincinnati*, 953 F.2d 1036, 1045 (6th Cir. 1992)). That scenario did not apply to Mr. Graves, who had not been resisting but sitting immobile in a bathtub, and who had already been subdued by an AR-15 shot to the face by Deputy Potratz.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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