

No. 15-566

IN THE
Supreme Court of the United States

BILLY BOLIN, ET AL.,

Petitioners,

v.

LOUISE MILAN,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this case, petitioner law enforcement officers executed a search warrant at the home of an elderly woman and her daughter by hurling flash bang grenades through the door and window and entering the home with an eleven-person SWAT team, despite lacking evidence suggesting that a dangerous individual was inside the home. On petitioners' motion for summary judgment based on qualified immunity, the district court concluded that there were genuine issues of material fact and held that, if those facts were resolved in favor of respondent, petitioners would not be entitled to qualified immunity because it was clearly established that their conduct violated the Fourth Amendment. The Seventh Circuit affirmed. The question presented is:

Whether this Court should review the Seventh Circuit's decision affirming the district court's conclusion that genuine issues of material fact preclude summary judgment for petitioners.

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INTRODUCTION

On the afternoon of June 21, 2012, 68-year-old Louise Milan was folding laundry upstairs in her home of more than thirty years while her eighteen-year-old daughter Stephanie was watching television downstairs in the living room. Suddenly, two loud explosions shook the house so violently that Milan believed “the world was coming to an end.” She frantically went downstairs to find her daughter and was greeted by an eleven-person SWAT team. She and Stephanie were ordered to the ground at gunpoint and taken from the house in handcuffs, a scene that was watched by her neighbors and replayed on the local news that night. Yet neither Milan nor her daughter was suspected of committing a crime.

A day earlier, the Evansville, Indiana, Police Department had learned of anonymously posted online threats against police officers, and they had determined that the posts were made using the wireless network associated with the Milan home. The police therefore obtained a warrant to search the house for electronic devices. Then, despite knowing that the Milans’ wireless network could be accessed from outside of the house and might not have been password protected, and despite suspecting that a neighbor with a history of violent interactions with police had made the threats, the police decided to assemble a SWAT team to storm the house using flash bang grenades. Upon arriving at the house, the SWAT team knocked, waited only a few seconds, and then, without looking to see if anyone was inside, tossed a flash bang grenade through the living room window. Seconds later, they broke down the door and tossed another grenade inside.

Milan brought suit under 42 U.S.C. § 1983 against the officers involved, alleging, among other things, that, by breaking into her home and using flash bang grenades, the officers used excessive force in executing the search warrant. The district court denied petitioners' motion for summary judgment, and the Seventh Circuit affirmed, agreeing with the district court that there were genuine issues of material fact as to whether the officers' conduct violated the Fourth Amendment, and that if the factual issues were resolved in respondent's favor, petitioners would have violated clearly established law regarding the use of flash bangs.

The Seventh Circuit's application of established legal principles to the unique facts of this case does not merit review. The court correctly applied the objective reasonableness balancing test set forth in *Graham v. Connor*, 490 U.S. 386, 396 (1989), and its conclusion that the officers' actions violated the Fourth Amendment was consistent with the decisions of other courts of appeals that have addressed similar factual scenarios. Further, the court identified closely analogous circuit case law showing both that the actions of the officers here were clearly unreasonable and that the right at issue had been clearly established.

Petitioners' second question presented is not presented by this case. They erroneously contend that the Seventh Circuit's holding was based on a bright-line rule that officers must carry a fire extinguisher when using flash bang grenades. That contention is wholly unsupported by the court's opinion, which relied on a multi-factor test to conclude that the conduct of the officers violated a clearly established right.

STATEMENT

Factual Background

On June 20, 2012, the Evansville Police Department was alerted that someone had posted online anonymous threats against the Department's officers. Pet. App. 2a, 11a-12a. The posts implied that in two weeks, on July 4, the author planned to attack the home of a police officer, potentially using explosives. *Id.* at 12a. The posts also referenced an ongoing homicide investigation. *Id.*

Detective Bryan Brown traced the posts to an IP address connected with the home of 68-year-old Louise Milan and her two daughters. *Id.* at 2a, 13a. Detective Brown drove by the Milan residence and, using his iPhone, noted that there were several wireless access points in the vicinity. *Id.* at 13a. One of the wireless access points was unsecured, meaning that the network was not password-protected and could be accessed by anyone in or near the home, including someone in a neighboring house or on the street. *See id.* at 2a. Despite knowing about the unsecured network, the police did not attempt to find out whether that network matched Milan's IP address "as they easily could have done, precisely because it was unsecured and therefore accessible." *Id.* at 3a.

That same day, other police officers conducted surveillance of the Milan home, during which they observed only Milan's daughter Stephanie coming and going from the house.¹ *Id.* at 4a. The officers also observed Derrick Murray, a gang member well-known to the Evansville police, on the porch of his mother's house two doors down from the Milan residence. *Id.* at 3a, 13a-

¹ Stephanie was small for her age, and the officers believed her to be around thirteen to fifteen years old. Pet. App. 4a.

14a. Murray had been a “thorn to the police department for a while” and had been convicted of intimidating a police officer. *Id.* at 13a. He was also known to have sprayed the number 187, which is “a synonym for murder,” on an officer’s garage door. *Id.* The police did not question Murray or otherwise investigate whether he could have made the threats. *Id.* at 3a.

The next day, Detective Brown obtained a warrant to search the Milan residence. *Id.* at 14a. The warrant was based solely on the connection between the IP address and the threats, and the warrant request asserted that only an electronic device inside the residence could have utilized the IP address, although Detective Brown knew that the wireless network associated with the IP address might be unsecured and accessible from outside. *Id.*

At around the same time, Detective Todd Seibert discovered possible connections between Milan and three men with prior criminal convictions. *Id.* One was a gang member whose last name was Milan but who otherwise had no connection to the residence and, in fact, had never been there. *Id.* The other two were Milan’s stepson and step-grandson, both of whom had been arrested previously for violent offenses. *Id.* The officers were aware that neither the stepson nor the step-grandson currently lived at the residence, but a four-year-old entry in police records listed the house as a previous known location of the stepson. *Id.* During the brief surveillance of the house by the police, no men were seen entering or leaving, and the police did not conduct any further investigation into the current whereabouts of the men or their connection with the house. *Id.* at 14a-15a.

Using a “threat assessment” worksheet, Lieutenant David Molinet determined that an eleven-person SWAT team should be called in for the search. *Id.* at 15a. In

doing so, Lieutenant Molinet considered the online threats of violence against police, the references to explosives in the threats, and Facebook pictures of the step-grandson with a handgun. *Id.* Similarly, based primarily on the anonymous poster's threat to take violent action two weeks later, the leader of the SWAT team, Officer Mike Gray, decided to use flash bang grenades to enter the home. *Id.* at 15a. Flash bang grenades emit blinding flashes of light and deafening sounds intended to stun and disorient people who come into contact with them, and they have the potential to injure or kill a person that they land on or near, particularly a child. *Id.* at 5a. Lieutenant Molinet approved Officer Gray's plan to use flash bangs, and Police Chief Billy Bolin gave at least implicit authorization to the plan. *Id.* at 16a.

The officers executed the search warrant on June 21, 2012, one day after they became aware of the online threats. At a pre-raid briefing, detectives voiced their opinion that Murray, not someone in the Milan household, was responsible for the threats. *Id.* at 16a. Nonetheless, accompanied by Chief Bolin and a news team, the SWAT team went to the house and rushed to the front door. *Id.* Without giving the Milans a chance to answer, they broke the living room window and tossed a flash bang inside.² *Id.* at 16a-17a. They also broke down the front door and threw a flash bang into the house. *Id.* at 5a, 16a-17a. The SWAT team rushed in, ordered the two women to the ground, handcuffed them, and removed them from the house for questioning. *Id.* at 17a. The entire search and detention was filmed by the news

² Based on the footage from one of the SWAT team members' helmet cameras, approximately four seconds passed between the knock and the first flash bang being thrown through the window.

crew, which had been invited along by the Department, and it appeared on the news that night. *Id.* After questioning Milan and her daughter for about twenty minutes, the officers determined that they were not the source of the threats and released them. *Id.* The officers also determined—in about thirty seconds—that Milan’s wireless network was indeed the unsecured network that Detective Brown had noticed when driving by the house, and that someone near the house could have used the wireless network to make the threats. *Id.* at 17a.

Following the search, Detective Brown subpoenaed records from Facebook and determined that Murray, the neighbor, had logged into his Facebook account using the IP address connected with Milan’s wireless network. *Id.* The police used that information to obtain a search warrant for Murray’s house. *Id.* They executed the warrant by knocking and announcing their presence and waiting for Murray to let them into the house, where they found the cell phone from which the threats had been posted. *Id.* The officers then asked Murray to come to the police station, where he was arrested. Murray pled guilty to charges stemming from the threats. *Id.*

Proceedings Below

Louise Milan filed the instant suit pursuant to 42 U.S.C. § 1983 against the City of Evansville, the Evansville Police Department, Police Chief Billy Bolin, Lieutenant Molinet, Officer Gray, and the members of the SWAT team who participated in the search. Pet. App. 18a. She argued that the police used excessive force in searching her home and unreasonably detained and falsely arrested her after the search. *Id.* The district court granted summary judgment to the defendants on the unreasonable detention/false arrest claim, *id.* at 20a-21a, but held that they were not entitled to summary

judgment on the basis of qualified immunity as to the excessive force claim, *id.* at 27a. The court also denied summary judgment with regard to Milan’s claim against the city.³ *Id.* at 31a.

Quoting extensively from *Estate of Escobedo v. Bender*, 600 F.3d 770, 780 (7th Cir. 2010)—another case involving unreasonable use of flash bangs—the district court concluded that the facts in the summary judgment record, viewed favorably to Milan, did not establish as a matter of law that the defendants’ conduct was reasonable because: (1) although the posts threatened violence, the crime for which the suspect was sought was a relatively minor Class D felony; (2) it was “questionable” whether the suspect posed an “immediate” threat to the officers because “there [was] little evidence” that any of the suspects would actually be found in the home; (3) the officers tossed, rather than strategically placed, the flash bang grenades in the home, thus increasing the risk to those inside; (4) “[i]t [was] questionable whether the officers had sufficient time to look inside to ensure that no one would be injured by the devices”; and (5) the officers were not carrying a fire extinguisher. Pet. App. 25a-26a.

The district court also held that, at the time of the search, *Estate of Escobedo* had clearly established that the use of flash bang grenades was disfavored under the Fourth Amendment and had set forth a clear description of the circumstances under which the use of a flash bang device would be reasonable. *Id.* at 28a. Because none of the factors cited by the court in *Estate of Escobedo* were present here, the district court concluded that, assuming

³ The City and the Department did not appeal. Regardless of whether this Court grants certiorari, therefore, Milan’s claims will proceed to trial.

the facts alleged by Milan were established at trial, a reasonable officer would have known that the use of flash bangs here was “constitutionally excessive.” *Id.*

The officers appealed the denial of summary judgment, and the Seventh Circuit affirmed. Although acknowledging that police must “tak[e] threats against them and their families seriously,” the court emphasized that, at the time the officers used the flash bangs, the only known occupants of the house were Louise, the owner, and Stephanie, who had been observed coming and going from the house. *Id.* at 7a. The police made no effort to investigate “the actual suspects,” neither the three Milan men whom they allegedly believed were associated with the house nor Murray, who was seen near the house. *Id.* And they made no attempt to determine whether any of the suspects had been living there. *Id.* The court also faulted the police for their “failure to check whether the network was open and the failure to conduct a more extensive investigation before deciding that flash bangs were appropriate means of initiating the search.” *Id.* at 8a.

The court emphasized that “we mustn’t base our decision on the wisdom of hindsight” and that the fact that no suspect was found did not render the search unreasonable. *Id.* But the court agreed that “the police acted unreasonably and precipitately in flash banging the house without a minimally responsible investigation of the threats.” *Id.* Finally, the court discussed its earlier decision in *Estate of Escobedo*, in which it listed several factors to consider in determining the reasonableness of the use of flash bangs: “the use of a flash bang grenade is reasonable only when there is a dangerous suspect and a dangerous entry point for the police, when the police have checked to see if innocent individuals are around

before deploying the device, when the police have visually inspected the area where the device will be used and when the police carry a fire extinguisher.” *Id.* at 8a-9a (quoting *Estate of Escobedo*, 600 F.3d at 784-85). The court held that the petitioners “flunked” that test, noting that the only requirement they had possibly met was that of bringing a fire extinguisher, which they then left in the car. *Id.* at 9a. The court concluded that “in this case the Evansville police committed too many mistakes to pass the test of reasonableness.” *Id.*

REASONS FOR DENYING THE WRIT

I. Petitioners’ first question does not warrant review.

Petitioners ask this Court to review the Seventh Circuit’s straightforward application of well-established law on the use of excessive force by police officers. Consistent with the “objective reasonableness” test described in *Graham*, 490 U.S. at 396—a case on which petitioners heavily rely—the court of appeals balanced the officers’ interest in safety against the substantial intrusion on respondent’s Fourth Amendment rights, concluding that the officers acted unreasonably when they barged into respondent’s home with flash bang grenades and an eleven-person SWAT team. That conclusion is consistent with the views of other federal courts of appeals and was based on prior Seventh Circuit case law describing the limited circumstances under which the use of flash bang grenades during the search of a home can be reasonable. The court thus correctly held that the unreasonableness of the officers’ actions was clearly established at the time of the raid on the Milan home.

A. The question whether petitioners acted reasonably does not warrant review.

1. The decision below does not implicate a conflict among the circuits.

Petitioners do not suggest that the decision below conflicts with any other court of appeals cases, nor could they. The decision is consistent with other circuits' case law concerning the use of flash bang grenades.

For example, in *Boyd v. Benton County*, the Ninth Circuit held that the use of a flash bang grenade was objectively unreasonable where the officers knew that innocent people might be present, did not consider alternatives "such as a controlled evacuation followed by a search," and deployed the grenades "without looking or warning the occupants." 374 F.3d 773, 779 (9th Cir. 2004). Those facts describe precisely what happened here, and the factors considered by the Ninth Circuit are similar to those considered by the Seventh Circuit.

Likewise, in *Estate of Smith v. Marasco*, the Third Circuit balanced the risk of harm to the suspect from a flash bang grenade against the seriousness and immediacy of the threat to police, concluding that the use of a flash bang under the circumstances was unreasonable. *See* 430 F.3d 140, 151-53 (3d Cir. 2005). Although the suspect had initially pointed a rifle at police from inside his house, the court emphasized that the police stormed the house using flash bangs more than six hours later, and during that time they had not seen or interacted with the suspect. *Id.* at 151. The lack of interaction with the suspect, the court held, would have caused a reasonable officer to "reassess[] the danger [the suspect] posed." *Id.* Similarly, here, the court looked at the information available to the officers regarding whether they could have reasonably thought that a

suspect (one of the Milan relatives) was in the house. Pet. App. 8a. Because the officers did not see any suspect at the house and had no reason to believe any of the suspects was there, the Seventh Circuit, like the Third Circuit, held that it was unreasonable to view the threat posed by the occupants as more than minimal. *Id.*

In *Terebesi v. Torres*, 764 F.3d 217, 239 (2d Cir. 2014), the Second Circuit held that the use of flash bang grenades was objectively unreasonable even though the officers believed that the individual in the house was armed and possibly on crack cocaine. The court discussed the holdings by other courts of appeals and identified two factors relevant to the reasonableness analysis: (1) “whether the officers first confirmed that they were tossing the [flash bang] grenade into an empty room or open space”; and (2) whether “the subject of the search or arrest is known to pose a high risk of violent confrontation.” *Id.* at 238. As the court stated, “People do not automatically lose their right to be free from explosive devices being thrown into their houses simply because there is a valid and outstanding search warrant with respect to the property. The use of a [flash bang] grenade must be justified by the particular risk posed in the execution of the warrant.” *Id.* at 239. This decision supports the Seventh Circuit’s holding because the officers here based their decision to use grenades solely on the nature of the threats, rather than on the existence of a “particular risk” posed by the occupants of the Milan home.

Under facts very different from this case, the Sixth Circuit held the use of a flash bang grenade to be objectively reasonable. See *Krause v. Jones*, 765 F.3d 675, 679-80 (6th Cir. 2014). In *Krause*, the suspect was barricaded in a room, “resisting arrest on drug charges,

threatening to shoot [the police], expressing his willingness to die, and refusing all requests to surrender peacefully.” *Id.* at 679. The court cited two factors that made the use of the flash bang reasonable given this serious risk to the officers: “The suspect was isolated in one room, precluding the risk that the flash bang could harm others, including children, the elderly or others in the wrong place at the wrong time,” and “[t]he officers had a clear view into the bedroom and closet, allowing them to ignite the flash bang away from [the suspect].” *Id.* Here, on the other hand, the officers were not faced with an immediate threat from an armed and noncompliant subject, and they had seen a teenaged girl entering the house but had no idea what room she was in, nor did they know where, if anywhere, the suspect they were seeking was located.

As these cases show, the courts of appeals, including the court below, have consistently applied the *Graham* balancing test in cases concerning flash bang grenades by looking at factors specific to the use of these devices, such as the danger of injury to innocent bystanders and whether the police were able to view the area where the grenade would be used before deploying it, balancing those factors against the threat to police safety posed by the suspect under the circumstances in each case.⁴ The

⁴ See also, e.g., *United States v. Boulanger*, 444 F.3d 76, 84 (1st Cir. 2006) (holding that the use of a flash bang grenade was reasonable where the suspect had a history of violent crime, reportedly possessed a gun, and was known to be at the residence, and where “the police planned the search after determining that there were no children or elderly people in the apartment”); *United States v. Myers*, 106 F.3d 936, 940 (10th Cir. 1997) (holding that the use of flash bangs was reasonable where a suspect with a prior history of violence against police was known to be in the house being searched, but stating that, even under those circumstances, the use of flash bangs came “dangerously close to a Fourth Amendment violation”

Seventh Circuit's analysis is consistent with that uniform approach.

2. The Seventh Circuit correctly applied this Court's Fourth Amendment jurisprudence.

“In executing a search warrant[,] officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search.” *Los Angeles Cty., California v. Rettele*, 550 U.S. 609, 614 (2007) (per curiam). Whether the officers' actions are reasonable is an objective test that “requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.” *Plumhoff v. Rickard*, __U.S.__, 134 S. Ct. 2012, 2020 (2014) (quoting *Graham*, 490 U.S. at 396) (internal quotation marks omitted). This Court has emphasized that the “proper application” of the objective reasonableness test “requires careful attention to the facts and circumstances of each particular case.” *Graham*, 490 U.S. at 396.

The Seventh Circuit faithfully followed that direction here. The court began by recognizing the police officers' prerogative to “tak[e] threats against them and their families seriously,” but then balanced that interest against the fact that “flash bangs are destructive and dangerous and not to be used in a search of a private home occupied so far as the police knew only by an

and that “we could not countenance the use of such a device as a routine matter”); *United States v. Stewart*, 867 F.2d 581, 585 (10th Cir. 1989) (holding that the use of flash bangs was unreasonable where the factors used to justify their use “bore no relation to the particular premises being searched or the particular circumstances surrounding the search” and where “no effort was made to determine who was in the house at the time the entry was made”).

elderly woman and her two daughters.” Pet. App. 7a. In particular, the court noted that, had police conducted an even cursory investigation into the potential suspects and the ownership of the wireless network, they would have known that the suspect they sought was not at the Milan residence, likely obviating the need for any force at all in executing the search warrant. *See id.* at 7a-8a. Given all the facts in the summary judgment record, the court determined that the district court properly denied summary judgment to petitioners. *Id.* at 8a.

Petitioners contend that the court failed to give sufficient weight to the “immediate threat” to the officers that the poster of the anonymous threats posed. That argument assumes, however, that the officers reasonably believed, based on the information available to them at the time, that the person who posted the anonymous threats was at the Milan residence. (Even then, the later peaceful arrest of Murray draws their argument into question.) As the Seventh Circuit emphasized, the evidence, when viewed in Milan’s favor, demonstrates that the officers both subjectively believed and objectively should have known that the person who made the threats was *not* in the house. *Id.* at 7a-8a. Even if the content of the threats suggested a danger (two weeks later) to police and their families, there was no justification for the use of flash bang grenades and an eleven-person SWAT team in executing a search warrant at a house occupied only by a 68-year-old woman and her teenaged daughter.

Moreover, the outcome that results from balancing the factors in a fact-specific balancing test is not a subject that warrants this Court’s review. *See* S. Ct. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual

findings or the misapplication of a properly stated rule of law.”). Here, the court weighed, as *Graham* instructs, the violent intrusion on Milan’s Fourth Amendment interests against petitioners’ interest in safety, holding that the intrusion was unreasonable and allowing Milan’s claims to proceed to trial. That decision does not warrant review.

B. The Fourth Amendment violation was clearly established.

The Seventh Circuit also correctly held that petitioners are not entitled to qualified immunity because they violated a right that was clearly established at the time they acted. “Governmental actors are shielded from liability for civil damages if their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Tolan*, 134 S. Ct. at 1866. A right is clearly established if it is one that is “sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The petition here presents the narrow question whether, under the specific facts of this case viewed favorably to respondent, petitioners violated a right that was clearly established. *See Tolan*, 134 S. Ct. at 1866 (stating that “courts should define the ‘clearly established’ right at issue on the basis of the ‘specific context of the case’”). The Seventh Circuit’s proper resolution of that question does not warrant this Court’s review.

At the time of the raid in this case, the Seventh Circuit had stated repeatedly that the use of flash bang grenades was disfavored because of the significant risk of injury caused by such devices. *See Estate of Escobedo*, 600 F.3d at 786 (“[W]e have repeatedly expressed our concern with the overuse of flash bang devices, especially

where the circumstances do not warrant such extreme measures.”); *United States v. Morris*, 349 F.3d 1009, 1012 (7th Cir. 2003) (“This Court has often emphasized the dangerous nature of flash-bang devices and has cautioned that the use of such devices in close proximity to suspects may not be reasonable.”); *United States v. Folks*, 236 F.3d 384, 388 (7th Cir. 2001) (noting “the potentially serious injuries that may arise from the use of a flash-bang device during a search” and stating that the police “risk significant damage claims from the careless deployment of flash-bang devices”).

Indeed, at the time of the events in question, the Seventh Circuit had recently reiterated the circumstances in which use of flash bang grenades would be unreasonable and had held that police officers could not invoke qualified immunity under circumstances analogous to this case. See *Estate of Escobedo*, 600 F.3d at 770. In *Estate of Escobedo*, an armed man had barricaded himself in his house and was threatening to kill himself. *Id.* at 774-75. After a prolonged standoff, the police forcibly entered the house and threw a flash bang grenade inside. *Id.* at 777. Upon finding that the man had locked himself in the bedroom with a gun, the police broke down the door to the bedroom and tossed in a second flash bang grenade. *Id.*

The court concluded that it was clearly established at the time the officers acted that their use of flash bang grenades under the circumstances was objectively unreasonable. In particular, the court pointed to several factors, drawn from other Seventh Circuit cases, that made the use of the flash bang device unreasonable: First, the police deployed the flash bang before they knew where the suspect was; second, “there [was] no evidence that the officers visually inspected the area

before throwing the flash bang device or that they looked inside, even ever so slightly, to see if anyone else was present that may be injured by the flash bang”; third, the suspect “was not considered to be a violent, dangerous individual, he was not the subject of an arrest and he did not pose an immediate threat to the police or others.” *Id.*

Those factors mirror those considered here, where the police threw a flash bang into the house without even knowing if a suspect was inside, let alone where the suspect or any innocent bystanders might be. As in *Estate of Escobedo*, the officers did not have a warrant to arrest anyone, and they had no reason to believe that anyone violent was presently inside the house. Given that *none* of the factors that *Estate of Escobedo* cited as supporting the reasonable use of flash bangs were present in this case, the courts below correctly held that it was clearly established that the use of flash bang grenades was unreasonable under the circumstances.

II. Petitioners’ second question is not presented here.

Petitioners’ second question presented is based on the mistaken assertion that the Seventh Circuit relied on a bright-line rule that police officers must carry a fire extinguisher when deploying flash bang grenades. In fact, the court used a multi-factor test based on a line of Seventh Circuit cases about the use of flash bang grenades. Quoting *Estate of Escobedo*, the court identified four factors: “[T]he use of a flash bang grenade is reasonable only when there is a dangerous suspect and a dangerous entry point for the police, when the police have checked to see if innocent individuals are around before deploying the device, when the police have visually inspected the area where the device will be used and when the police carry a fire extinguisher.” Pet. App. 9a. The court then concluded that “[t]he police in this

case flunked the test just quoted.” *Id.* Nothing in that statement or the court’s discussion of the facts suggests that it only considered whether the police carried a fire extinguisher.

Although the court specifically mentioned that the officers failed to bring the fire extinguisher with them when they approached the home, it did so after listing the factors stated in its prior case law. And it addressed this particular factor *only* to point out the extent of petitioners’ ridiculous series of mistakes: “True, they’d brought a fire extinguisher with them—but, as if in tribute to Mack Sennett’s Keystone Kops, they left it in their armored SWAT vehicle.” *Id.* at 9a. Rather than create a *per se* rule about fire extinguishers, therefore, the Seventh Circuit held that petitioners satisfied none of the factors from *Estate of Escobedo*. As the court concluded, “in this case, the Evansville police committed too many mistakes to pass the test of reasonableness.” *Id.*

III. This case does not present an appropriate vehicle for review because material issues of fact remain to be resolved.

The conclusion of the lower courts that genuine issues of material fact remain to be decided makes this case an exceptionally poor vehicle for this Court’s review. At the summary judgment stage, the proper inquiry is “whether the facts, taken in the light most favorable to the party asserting the injury, show the officer’s conduct violated a federal right.” *Tolan*, 134 S. Ct. at 1865 (internal quotation marks and alterations omitted). Thus, the Seventh Circuit’s analysis was based on the facts in the summary judgment record read favorably to respondent and drawing “all justifiable inferences” in her favor. *See id.* at 1863 (quoting *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 255 (1986)). If at trial, however, the jury finds that the circumstances of the raid were significantly different than those described by the Seventh Circuit, the district court might then decide that petitioners are entitled to qualified immunity. Similarly, if the jury finds no Fourth Amendment violation, there would be no need for the qualified immunity analysis at all. Given the possibility of such outcomes, this case does not warrant review at this time.

CONCLUSION

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

Respectfully submitted,

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