No. 15-795

IN THE
Supreme Court of the United States

BRIAN PITZER,
Petitioner,
v.

RUSSELL TENORIO,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner, a police officer, shot respondent as respondent stood in his living room holding a small kitchen knife loosely at his side, approximately ten feet away from the nearest officer. Respondent had not threatened to hurt anyone but himself, had not made any movements toward anyone with the knife, and was given less than three seconds to comply with petitioner's command to drop the knife. On petitioner's motion for summary judgment based on qualified immunity, the district court concluded that genuine issues of material fact precluded it from granting the motion. The Tenth Circuit affirmed. The question presented is:

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

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INTRODUCTION

When respondent Russell Tenorio, who had a history of depression, threatened to hurt himself with a kitchen knife, his wife's sister-in-law called 911 to obtain the assistance of the Albuquerque Police Department in calming him down and keeping him and his family safe. Four officers, including petitioner Brian Pitzer, responded to the call. Upon arriving at the house, and before discussing a tactical plan or obtaining more than cursory information about the situation inside, Pitzer announced that he was "going lethal" and lined up in the doorway in front of the other officers with his gun drawn.

Without announcing his presence, Pitzer entered the living room of the house, where he could see Tenorio's wife, Michaele, in the kitchen. Pursuant to Pitzer's command, Michaele walked out of the kitchen with her hands up, and Tenorio followed her, holding the small kitchen knife loosely at his side. Pitzer yelled at Tenorio to drop the knife and then immediately shot him. The entire sequence of the commands and the shooting took only a few seconds.

Tenorio sued Pitzer under 42 U.S.C. § 1983, alleging that Pitzer violated his Fourth Amendment rights by using excessive force. The district court denied Pitzer's motion for summary judgment, and the Tenth Circuit affirmed, agreeing with the district court that there were genuine issues of material fact as to whether Pitzer's conduct violated the Fourth Amendment, and that, if the factual issues were resolved in Tenorio's favor, Pitzer would have violated clearly established law regarding the use of deadly force.

The Tenth Circuit's application of established legal principles to the facts of this case does not merit review. The court correctly applied the totality of the circum-

stances test set forth in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), and its conclusion that Pitzer's 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 that Pitzer's use of deadly force was unreasonable and that the right at issue had been clearly established.

STATEMENT

Factual Background

On November 11, 2010, Hilda Valdez called 911 to report that her sister-in-law's husband, Russell Tenorio, was intoxicated and holding a knife to his own throat. Pet. App. 3. "I need someone to come over here right away," she said, explaining that she was also with her brother, Robert Torres, and Tenorio's wife, Michaele Tenorio, and that she was afraid that Tenorio might hurt himself or Michaele with the knife. *Id.*

Three Albuquerque police officers—Douglas Moore, Francisco Hernandez, and Robert Liccione—were dispatched to the scene, and Pitzer voluntarily joined them. *Id.* While the officers were en route, Valdez continued to describe the situation to the 911 operator, who relayed information about the scene to the officers through their dispatcher. *Id.* The dispatcher reported to the officers that Tenorio had vandalized the windows at the house and that there were no reported injuries. *Id.* at 3-4. The officers were also told by the dispatcher that Tenorio was in the kitchen with Torres and was holding a knife to his own throat, while Valdez and Michaele were in the living room. *Id.* The dispatcher updated the officers that Tenorio was "waving the knife around." *Id.* at 4. The dispatcher also relayed to the officers that Tenorio was on medication for seizures and stated,

erroneously, that Tenorio had a history of violence. *Id.* at 3-4, 49 n.2.

The officers arrived on the scene within approximately eight minutes and approached Valdez, who was standing outside the house speaking on the phone to the 911 operator. *Id.* at 4-5. After ending the call, Valdez told the officers: "He's got a knife. He's been drinking. . . . Um, we tried to talk to him but he got mad 'cause we took his beer away from him." *Id.* at 5.

Pitzer then announced that he was "going lethal," and, without discussing a tactical plan or asking Valdez further questions about the situation inside the house, the officers lined up outside the front door. *Id.* Pitzer took the front position with his handgun drawn; Moore stood behind him with a taser. *Id.* Liccione, also with a handgun drawn, was behind Moore, and Hernandez, carrying a shotgun with beanbag rounds, was last. *Id.*

The front door was open, and from the doorway Pitzer could see all of the 14' by 16' living room and into part of the kitchen, the entrance to which was across from him on the opposite wall. *Id.* None of the officers heard raised voices or other noises that would suggest a disturbance. *Id.* Pitzer entered the living room without announcing his presence and with his gun still drawn, followed by Moore and Liccione. *Id.* The living room was empty, but Pitzer saw Michaele move into the visible area of the kitchen. *Id.* He said, "Ma'am," followed by: "Please step out here. Let me see your hands, okay?" *Id.* at 6. It was not clear to the other officers whether this request was directed only at Michaele or at everyone in the kitchen, and Michaele found the commands to be confusing. *Id.* at 6.

Michaele said, "Russell, put that down," and walked into the living room with her hands up. *Id.* Tenorio

followed. His hands were down at his side and he was carrying a vegetable paring knife with a three-and-a-quarter inch blade loosely in his right hand. *Id.* Hernandez grabbed Michaele to take her outside, and Tenorio took a few steps into the living room. *Id.* At that point, Pitzer saw the knife and yelled in quick succession: "Sir, put the knife down! Put the knife down, please! Put the knife down! Put the knife down!" *Id.* Pitzer then immediately shot Tenorio in the abdomen, Moore tased him, and he fell to the ground. *Id.*

When Pitzer shot him, Tenorio had only walked about two and a half steps into the living room with the knife by his side. The officers were far out of his reach. *Id.* The entire duration of the commands to drop the knife and the shooting was two to three seconds. *Id.* The time from the officers' arrival on the scene to the shooting was less than four minutes. *Id.*

Tenorio suffered life-threatening injuries, and was hospitalized for two months. *Id.*

Procedural Background

Tenorio sued Pitzer, the City, and Police Chief Raymond D. Schultz under 42 U.S.C. § 1983, arguing that Pitzer violated his Fourth Amendment rights by using excessive force. Pitzer moved for summary judgment based on qualified immunity, and the district court denied the motion. *Id.* at 63. The court concluded that "genuine issues of material fact preclude[ed] summary judgment on the defense of qualified immunity." *Id.* at 63.

The district court reasoned that the evidence, if resolved in Tenorio's favor, would support a finding that Pitzer violated Tenorio's Fourth Amendment rights under either of two distinct theories. First, the court held that, "when [Pitzer] shot [Tenorio], [Pitzer] did not have

probable cause to believe that [Tenorio] presented a threat of serious physical harm to [Pitzer] or another person." *Id.* at 53. The court examined the four "non-exclusive" factors set out by the Tenth Circuit in *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008): "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect." *See* Pet. App. 53-54.

The court concluded that factors two, three, and four weighed in favor of Tenorio because the evidence would support findings that: he "was holding a small kitchen knife loosely by his thigh"; "he made no threatening gestures toward anyone"; he "was shot as he was walking in [Pitzer]'s general direction, but before he was within striking distance of [Pitzer]"; he could no longer harm Michaele because Hernandez had taken her out of the way; "the only person that [Tenorio] was known to have threatened that night was himself"; and "he did not raise the knife from his side or make threatening gestures or comments towards anyone." *Id.* at 54-55. The court found the first factor to be neutral because, although Tenorio did not comply with Pitzer's order to drop the knife, a reasonable jury could find that he did not have time to comply with the order. *Id.* at 54. The court therefore held that a jury could conclude that Pitzer did not have probable cause to use deadly force against Tenorio. Accordingly, Pitzer was not entitled to summary judgment. *Id.* at 55-56.

Second, the court found that a reasonable jury could conclude that "[Pitzer] and the other officers recklessly

and unreasonably created a situation giving rise to [Pitzer]'s resort to deadly force." *Id.* at 56, 58. In this regard, the court noted the officers knew or should have known that Tenorio was not holding anyone against their will and that, before entering the home, the officers did not ask Valdez about the situation inside. *Id.* at 56 (citing *Sevier v. City of Lawrence*, 60 F.3d 695, 701 n.10 (10th Cir. 1995)). The court relied on the evidence in the record that Tenorio's only threat had been to harm himself, the dispatcher had told the officers that no one had been injured, two of the officers had received crisis intervention training that they did not even attempt to employ, and Pitzer chose quickly to "go lethal," without attempting to resolve the situation verbally. *Id.* at 57. Citing these and several other pieces of evidence, the court concluded that a reasonable jury could find that Pitzer and the other officers "acted recklessly by barging into the residence with deadly force deployed." *Id.* at 57-58.

Turning to the question whether Pitzer violated a right that was clearly established, the court cited seven cases from the Tenth Circuit and the District of New Mexico that "provided [Pitzer] with sufficient notice of established Fourth Amendment limitations on his use of deadly force." *Id.* at 59. In particular, the court pointed to the *Larsen* factors as delineating the circumstances under which the use of lethal force is justified in response to encountering a suspect with a weapon. *Id.* The court concluded that "[t]he present case is merely an example of the application of settled law to a new, but in no way unusual set of facts," and that therefore "[t]he law as it existed on November 11, 2010, gave [Pitzer] fair notice of Fourth Amendment limitations on his use of deadly force." *Id.* at 61.

Pitzer appealed from the denial of summary judgment, and the Tenth Circuit affirmed. The court of appeals held that "the evidence would support a violation of clearly established law under the [district court's] first theory," and declined to reach the district court's second theory. *Id.* at 2. The court began by analyzing whether the officers' actions were objectively reasonable. *See id.* at 9 (citing the objective reasonableness test from *Graham v. Connor*, 490 U.S. 386 (1989)). The court explained that "[t]he Fourth Amendment permits an officer to use deadly force only if there is 'probable cause to believe that there is a threat of serious physical harm to the officer or others.'" *Id.* at 9-10 (quoting *Larsen*, 511 F.3d at 1260) (internal quotation marks and alterations omitted). Noting that the *Larsen* factors relied on by the district court are "quite significant" to the probable cause analysis, the court emphasized that "they are only aids in making the ultimate decision, which is whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force." *Id.* at 10.

Applying those standards to Pitzer, the court acknowledged that "one could argue that Pitzer appropriately used lethal force." *Id.* at 10. However, the court deferred to the district court's assessment that the evidence in the record supported the following findings that would establish Tenorio's claim: Tenorio was holding a small kitchen knife loosely by his thigh, had never threatened anyone but himself, was not currently threatening anyone or acting or speaking hostilely, was not given sufficient time to comply with commands to drop the knife, and was still relatively far away when Pitzer shot him. *Id.* at 10-11. The court concluded that it could not "second guess the district court's assessment of the evidence on this interlocutory appeal" and that it was

"comfortable that the evidence, viewed in this light, suffices for Tenorio's claims." *Id.* at 11.

Next, the court pointed to two Tenth Circuit cases that "set[] forth the clearly established law that resolves this case." *Id.* at 11. In *Zuchel v. City of Denver*, officers were faced with an almost identical situation, with a person holding a knife by his side and slowly walking toward officers who were relatively far away. *See* 997 F.2d 730, 735 (10th Cir. 1993). The court held that the evidence was sufficient for a jury to find that the use of deadly force was not objectively reasonable under those circumstances. *See id.* at 737. In *Walker v. City of Orem*, the court stated that the holding in *Zuchel* "specifically established that where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him, that it was unreasonable for the officer to use deadly force against the suspect." 451 F.3d 1139, 1160 (10th Cir. 2006).

Based on those precedents, the Tenth Circuit concluded that Pitzer had violated a clearly established right. Pet. App. 14. The court explained that Tenorio, like Zuchel, merely took a few steps towards the officers and made no aggressive movements with his knife. *Id.* at 13. In addition, "he was no closer to the officers than Zuchel had been," he held the knife by his side, and he was not within striking distance of the officers. *Id.* The court also noted that "Tenorio's behavior before the officers arrived was not more aggressive than what had been reported" to the officers in *Zuchel*. *Id.* at 14.

The court recognized that it had distinguished *Walker* in its more recent opinion in *Larsen*, where the plaintiff had made "hostile actions toward" the officer, turning "toward the officer with a large knife raised in a

provocative motion" after repeatedly ignoring commands to drop the knife. *Id.* (quoting *Larsen*, 511 F.3d at 1263). The court observed that such facts were absent here, and therefore the result in *Larsen* was not controlling. *Id.* In conclusion, the court noted that "because our review is predicated on the district court's assessment of the evidence in the light most favorable to Tenorio, a contrary judgment may be permissible after a trial to a jury." *Id.* at 14.

Judge Phillips dissented, stating that he saw no violation of Tenorio's Fourth Amendment rights. *Id.* at 15.

REASONS FOR DENYING THE WRIT

I. The courts of appeals agree on the test applicable to the reasonableness of an officer's use of deadly force under the Fourth Amendment and have reached consistent results.

Petitioner asks this Court to review the Tenth Circuit's straightforward application of well-established law on officers' use of deadly force to the "in no way unusual" facts of this case. Pet. App. 61. Other courts of appeals have consistently applied the same totality of the circumstances test applied by the Tenth Circuit here, and they have reached the same result when faced with similar facts.

Petitioner argues that there is a conflict between the decision below and the Eighth Circuit's decision in *Estate of Morgan v. Cook*, 686 F.3d 494 (8th Cir. 2012). Contrary to petitioner's contention, the two opinions are entirely consistent. In *Estate of Morgan*, Morgan was sitting on the porch of his home, clearly intoxicated and "attempting to conceal a kitchen-type knife" in his hand. *Id.* at 496. A police officer, positioned on the ground in front of the porch as few as six feet away from Morgan,

drew his gun and told him to drop the knife. *Id.* Instead of complying with the officer's command, Morgan suddenly stood up, holding the knife at his side, and began to move towards the officer. *Id.* The officer then fired his gun, killing Morgan. *Id.*

Morgan's estate sued the officer, who moved for summary judgment on the ground that he was entitled to qualified immunity. *Id.* at 496. The district court first denied the motion, concluding that "[t]he facts show that a reasonable officer in [the defendant]'s position would not have used deadly force because there was no probable cause to believe that Morgan posed a significant and immediate threat of death or serious physical injury to the officer." *Id.* On a motion for reconsideration, however, the district court changed course and granted the motion, noting that it had overlooked uncontroverted evidence that Morgan had moved toward the police officer with the knife after being ordered to drop the knife as many as fifteen times. *See Estate of Morgan v. Cook*, 2011 WL 4543931, at *2 (W.D. Mo. 2011).

The Eighth Circuit affirmed, applying the same totality of the circumstances test applied by the Tenth Circuit here: whether, under the totality of the circumstances, the "officer has 'probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others.'" *Estate of Morgan*, 686 F.3d at 497 (quoting *Moore v. Indehar*, 514 F.3d 756, 762 (8th Cir. 2008)). The court noted that the man was holding a knife and trying to conceal it from the officer, that the distance separating the two men was "minimal," and that instead of complying with the repeated commands to drop the knife, Morgan stood up and moved toward the officer with it. *Id.*

The decision below poses no conflict with *Morgan*. To the contrary, the Eighth Circuit and the Tenth Circuit agree on the law governing the use of force by police under these circumstances. Both circuits look to the totality of the circumstances to answer the question whether the officer "had probable cause to believe that [the plaintiff] posed an immediate threat of serious physical harm." *Id.*; Pet. App. 9-10. That the two courts reached different conclusions regarding the application of that settled law to the specific facts of the particular cases before them does not reflect different approaches to the law, but only factual differences between the cases. Indeed, the district court's initial holding that the facts did not support summary judgment and its reversal on reconsideration based on evidence that Morgan moved toward the police officer with the knife after being ordered to drop the knife as many as fifteen times highlights that the factors pertinent to the analysis in the Eighth Circuit are no different than those considered by the Tenth Circuit.

The court of appeals in *Estate of Morgan* found it determinative that the man had moved toward the officer with the knife. *See Estate of Morgan*, 686 F.3d at 497. Here, however, Tenorio merely complied with Pitzer's command to step out of the kitchen; he did not make any sudden movements or advances toward Pitzer or the other officers. Moreover, the court in *Estate of Morgan* also emphasized that the officer told Morgan to drop the knife as many as fifteen times and gave him an opportunity to do so. *Id.* Here, "a reasonable jury could conclude that [Tenorio] did not 'refuse' to drop the knife;" rather, "he was not given sufficient time to comply." Pet. App. 54. Indeed, the commands and the shooting lasted only "two or three seconds." *Id.* at 6.

Tellingly, petitioner identifies no other decision that he believes poses a conflict with the decision below. And indeed, other courts of appeals to have considered similar factual circumstances have reached the same result as the Tenth Circuit did here. *See*, *e.g.*, *Williams v. Ind. State Police Dep't*, 797 F.3d 468 (7th Cir. 2015) (holding that a jury could reasonably find the use of lethal force to be objectively unreasonable where a man with a knife never threatened anyone but himself and only passively resisted officers' commands, whether he actually made any movement towards the officers with the knife was a disputed factual question, and the officer resorted to the use of lethal force as an initial matter, despite the possession of a taser by another officer); *Glenn v. Wash. Cnty.*, 673 F.3d 864, 880 (9th Cir. 2011) (denying summary judgment to officers who used lethal force against an intoxicated and suicidal teenager who was armed with a knife and refused to drop it after being repeatedly commanded to do so); *Mercado v. City of Orlando*, 407 F.3d 1152, 1161 (11th Cir. 2005) (holding that the use of lethal force was not reasonable where a suicidal man was sitting on the ground and holding a knife to his chest and refusing to comply with commands to drop the knife); *Russo v. City of Cincinnati*, 953 F.2d 1036, 1045 (6th Cir. 1992) (reversing the grant of summary judgment to officers who "may have shot [the plaintiff] even though he posed no serious threat of physical harm"); *see also Weinmann v. McClone*, 787 F.3d 444, 450 (7th Cir. 2015) (affirming the denial of summary judgment on qualified immunity grounds where police shot a man with a gun who was threatening to commit suicide but did not point the gun at the officers or actively resist arrest).

As these cases show, courts of appeals have consistently applied a totality of the circumstances test

to determine whether an officer had probable cause to believe that a person holding a knife posed a risk of harm to others. In doing so, the courts have reached remarkably consistent results. Review by this Court is therefore unwarranted.

II. The Tenth Circuit correctly applied this Court's Fourth Amendment jurisprudence.

In addition to being in accord with the decisions of other courts of appeals, the decision below is consistent with this Court's precedent regarding the use of deadly force by police officers. To analyze claims that police officers used excessive force in violation of the Fourth Amendment, courts ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham*, 490 U.S. at 397. Evaluating reasonableness involves "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." *Id.* at 396. In particular, "it is unreasonable for an officer to 'seize an unarmed, nondangerous suspect by shooting him dead'" *Brosseau v. Haugen*, 543 U.S. 194, 197 (2004) (quoting *Garner*, 471 U.S. at 11), but the use of deadly force is reasonable where "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11.

The court below faithfully applied that standard, stating that "the Fourth Amendment permits an officer to use deadly force only if there is 'probable cause to believe that there is a threat of serious physical harm to the officer or to others.'" Pet. App. 9-10 (citation and internal quotation marks omitted). As the Fourth Amendment requires, the court paid "careful attention to

the facts and circumstances" presented, *Graham*, 490 U.S. at 396, to determine "whether the totality of the circumstances justified" the use of deadly force, *Garner*, 471 U.S. at 11.

Petitioner is wrong to contend that the court of appeals' analysis was a "rigid and narrow application of the *Larsen* 'non-exclusive factors.'" Pet. 11. In fact, the Tenth Circuit specifically rejected the district court's reliance on only the four factors from *Larsen*, explaining that those factors "are only aids in making the ultimate determination, which is 'whether, from the perspective of a reasonable officer on the scene the totality of the circumstances justified the use of force.'" Pet. App. 10 (quoting *Larsen*, 511 F.3d at 1260).

Petitioner also wrongly contends that the court of appeals' reasonableness analysis conflicts with *City of San Francisco v. Sheehan*, —U.S.—, 135 S. Ct. 1765 (2015), where this Court held that the shooting of a mentally ill woman who attacked police officers with a knife was reasonable under the Fourth Amendment. There, when two officers entered Sheehan's room, she "grabbed a kitchen knife with an approximately 5-inch blade and began approaching the officers, yelling something along the lines of 'I am going to kill you. I don't need help. Get out.'" *Id.* at 1770. Although the woman had reacted violently, the officers did not shoot her and instead regrouped outside of the room. *Id.* They then opened the door a second time and sprayed pepper spray at Sheehan to try to subdue her, but Sheehan would not drop the knife and continued to advance toward the officers. *Id.* at 1771. When Sheehan was "only a few feet away" with the knife, one of the officers shot her. *Id.*

Unlike Pitzer, the officers in *Sheehan* used deadly force only as a last resort and only after Sheehan, who had refused to drop the knife and was threatening to kill them, was close enough to injure them. Here, before shooting Tenorio, the officers made no attempts to subdue him or to get him to relinquish the knife. The entire encounter between Tenorio and the officers took only a few seconds, during which Tenorio was never close to the officers. Tenorio also did not threaten to hurt the officers or make any aggressive movements with the knife.

Petitioner has failed to identify any tension between decisions of this Court and the decision below, and the application of settled law to the facts of this case does not warrant review.

III. The Fourth Amendment violation was clearly established.

The Tenth Circuit also correctly held that petitioner was not entitled to qualified immunity because the evidence reasonably supports a finding that he violated a right that was clearly established at the time he acted. "The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, —U.S.—, 136 S. Ct. 305, 308 (2015) (internal quotation marks omitted). 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." *Id.* (quoting *Reichle v. Howards*, 566 U.S. —, 132 S. Ct. 2088, 2093 (2012)).

This Court has emphasized that courts must undertake the clearly established inquiry "in light of the specific context of the case, not as a broad general

proposition." *Id.* (quoting *Brosseau*, 543 U.S. at 198). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Id.* (quoting *Ashcroft v. Al-Kidd*, 563 U.S. 731, 742 (2011)). The Tenth Circuit followed that instruction here by identifying particular circuit precedent with facts almost identical to the facts in this case. Rather than pointing to general principles of Fourth Amendment law, the court cited two cases that were directly on point and that would put a reasonable officer on notice that using deadly force under the circumstances presented was unreasonable under the Fourth Amendment.

In the first case, *Zuchel v. City and County of Denver*, officers believed that Zuchel had a knife in his hand as they approached him from behind with their weapons drawn. *See* 997 F.2d at 735. When the officers were ten to fifteen feet away, Zuchel turned around and began to move in the direction of the officers. *See id.* at 736. One of the officers yelled, "Drop it. Drop it," but he continued to walk forward. *Id.* When Zuchel was four to five feet from the closest officer, that officer shot him. *See id.* In the context of a sufficiency of the evidence challenge, the court held that the evidence was sufficient for a jury to find that the use of deadly force was not objectively reasonable. *See id.* at 737.

The events in *Zuchel* are virtually identical to what transpired in this case, where Tenorio was passively holding a knife at his side and did not advance towards the officers, other than to exit the kitchen as they requested. Like Tenorio, Zuchel was out of striking range of the officers when they shot him, and he was shot immediately after being told to drop the knife. *Zuchel* thus put a reasonable officer in the Tenth Circuit on

notice that deadly force should not be used in the circumstances of this case.

More recently, in *Walker v. City of Orem*, the Tenth Circuit stated that *Zuchel* "specifically established that where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him, that it was unreasonable for the officer to use deadly force against the suspect." 451 F.3d at 1160. *Walker* thus reiterated the holding in *Zuchel*, affirming the established law that shooting a person under the circumstances of this case would be unreasonable.

Petitioner contends that the Tenth Circuit's opinion in *Larsen* created conflicting precedent within the circuit that would make a reasonable officer believe that the use of deadly force under these circumstances was justified. However, several crucial facts that justified the use of deadly force in *Larsen* were absent here (and in *Zuchel*). In particular, the officers in *Larsen* gave the plaintiff a significant opportunity to drop the foot-long knife that he was holding, watching as he bent to put the knife down on the ground but suddenly rose again with the knife still in his hand. *See Larsen*, 511 F.3d at 1258-59. Even when he continued to refuse to drop the knife, the officers gave him further opportunities to do so. *Id.* at 1258. Only after he raised the knife above his shoulder, pointed it at one of the officers, and advanced towards that officer did the officers fire at him. *Id.* As the Tenth Circuit recognized in *Larsen* and again in this case, those facts distinguish *Larsen* from *Walker* and *Zuchel*, where the plaintiffs did not make any "hostile actions" toward an officer. *See id.*

The case law in the Tenth Circuit therefore clearly established that the use of force under the circumstances

here, where Tenorio did not take any hostile actions, was unreasonable.

IV. 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 a 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 v. Cotton*, —U.S.—, 134 S. Ct. 1861, 1865 (2014) (internal quotation marks and alterations omitted). Thus, the Tenth Circuit's analysis was based on the facts in the summary judgment record read favorably to respondent and drawing "all justifiable inferences" in his favor. *See id.* at 1863 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Moreover, pursuant to this Court's opinion in *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995), the court of appeals recognized that it "cannot second guess the district court's assessment of the evidence on this interlocutory appeal." Pet. App. 11.

If at trial, however, the jury finds that the circumstances of the shooting were significantly different than those described by the district court for the purposes of summary judgment, the court might then decide that petitioners are entitled to qualified immunity. As the court of appeals specifically recognized, "because our review is predicated on the district court's assessment of the evidence in the light most favorable to Tenorio, a contrary judgment may be permissible after a trial to a jury." *Id.* at 14. Similarly, if the jury finds no

Fourth Amendment violation, there would be no need for the qualified immunity analysis at all.

Additionally, the district court relied on two distinct theories in denying the motion for summary judgment, and the court of appeals reached only one of those theories. *See* Pet. App. 2 (stating that, because the court affirmed on the first theory, it "need not address the second theory"). Even if this Court reverses the denial of summary judgment on the first theory—that Pitzer lacked probable cause to believe that Tenorio would harm him or others—the district court may still deny summary judgment to Pitzer based on the second theory—that Pitzer recklessly created a situation requiring the use of deadly force. Given the possibility of such an outcome, this case does not warrant review.

CONCLUSION

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

Respectfully submitted,

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