No. 19-626

In the Supreme Court of the United States

ROBERT HUFF, JUSTIN MOHNEY AND JEFF BRENEMAN,

Petitioners,

v.

MICHELE CHOATE, individually and on behalf of the heirs of Deanne Choate and as Administrator of the Estate of Deanne Choate

Respondent.

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

BRIEF IN OPPOSITION

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December 16, 2019

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QUESTIONS PRESENTED

In the decision below, the Tenth Circuit held that it lacked appellate jurisdiction over two of the petitioners' appeals, and granted qualified immunity as to the third petitioner. The two petitioners, whose appeals were dismissed, now seek this Court's review of their two merit-based questions that were not addressed by the court below. The third petitioner seeks review on a question whose answer would not alter the judgment below. The questions presented in the petition are:

Question 1: In viewing the facts most favorable to respondent, whether the Tenth Circuit's "reckless creation" theory, which may create liability where an officer's reckless conduct is immediately connected to a suspect's threat of force, should be barred because it conflicts with *Graham v. Connor* regarding the manner in which a claim of excessive force against an officer should be determined and has been rejected by a few Courts of Appeals.

Question 2: Whether, if the "reckless creation" theory is upheld, the qualified immunity analysis must be tailored to require a reviewing court to determine whether every reasonable officer in the defendants' position would have known that, (a) refraining from physically restraining an emotionally disturbed and/or intoxicated, suicidal person and (b) inviting her multiple times to produce a gun, can result in constitutional liability under the Fourth Amendment where the encounter results in a later need to use force, even though the officer's use of force has <u>not</u> been found to be objectively reasonable and there remain genuine

issues of fact about a gun found in decedent's bed after the shooting.

Question 3: Despite this Court's holding in *Pearson v. Callahan*, 555 U.S. 223 (2009), should it be mandatory for a Court of Appeals to rule on the basis of lack of a constitutional violation when "a discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all."

STATEMENT OF RELATED PROCEEDINGS

The Tenth Circuit Court of Appeals' unpublished opinion (a) dismissing Officer Mohney's and Officer Huff's appeal for lack of jurisdiction, and (b) granting Officer Breneman's Motion for Summary Judgment on Respondent's § 1983 claim on the basis of qualified immunity may be found at 773 Fed. Appx. 484 (10th Cir. 2019). *See also* Pet. App. 1a-8a.

Also unpublished is the District Court of Kansas' Memorandum and Order denying Petitioners' Motion for Summary Judgment on the basis of qualified immunity. Pet. App. 9a-25a.

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INTRODUCTION

It is well established that only abstract legal issues may be asserted on interlocutory appeal from a district court's denial of a qualified immunity claim. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). This means that orders denying qualified immunity are generally improper for interlocutory appeal when the district court's order "determines only a question of evidence sufficiency, *i.e.*, which facts a party may, or may not, be able to prove at trial." *Johnson v. Jones*, 515 U.S. 304, 313 (1995) (internal quotations omitted).

In this case, the District Court denied the Petitioners' claim of qualified immunity on two grounds. First, the District Court addressed the reasonableness of Officer Mohney's and Officer Huff's actions at the time they shot Deanne Choate ("decedent"). Pet. App. 13a. On this issue, the District Court held, "Because a question of fact remains concerning whether decedent pointed a gun at the officers, the Court cannot conclude as a matter of law that, at the time of the shooting, Officer Mohney and Officer Huff acted reasonably in firing on decedent." *Id.* at 14a.

The District Court next addressed whether the officers' conduct immediately connected to the use of force recklessly created the need to use force. *Id.* In addressing the officers' pre-seizure conduct, it was *assumed* the use of force at the time of the shooting was reasonable. *Id.* ("[E]ven if the officers acted reasonably at the exact moment of the shooting, they recklessly created their need to use force[.]"). The District Court then determined that "a jury could

reasonably find that defendant officers acted recklessly immediately prior to the shooting and that such conduct created any eventual need to use force against decedent." *Id.* at 16a. Petitioners appealed the District Court's denial of their qualified immunity claim. *Id.* at 1a.

On interlocutory appeal, the Tenth Circuit dismissed Officer Mohney's and Officer Huff's appeal for lack of jurisdiction because their arguments regarding reasonableness and pre-seizure conduct were "all premised on factual allegations outside the facts that the District Court ruled a reasonable jury could find." *Id.* at 4a. As to Officer Breneman, the Tenth Circuit held that he was entitled to qualified immunity as to respondent's § 1983 claim because respondent failed to satisfy her "burden of identifying cases that constitute clearly established law on these facts." *Id.* at 8a.

Petitioners now seek certiorari review on three questions—two of which relate to what petitioners have identified as the "reckless creation" theory, and the third question relates to whether Officer Breneman is entitled to a finding that his actions did not constitute a violation of decedent's Fourth Amendment rights.

The first two questions presented by petitioners relating to the "reckless creation" theory are not properly before this Court for several reasons. First, petitioners completely ignore the Tenth Circuit's holding that it lacked appellate jurisdiction over Officer Mohney's and Officer Huff's interlocutory appeal. In fact, none of their questions address the issue of jurisdiction. *See* Pet. i-ii. Without first finding

jurisdiction, this Court cannot decide whether to address petitioners' merit-based questions. *See Plumhoff v. Rickard*, 572 U.S. 765 (2014) (finding first that Court of Appeals had jurisdiction to review district court's order before determining that officers' acted reasonably in shooting suspect).

Second, the genuine issues of fact relating to the gun preclude this Court from addressing the "reckless creation" theory. There must first be a finding that decedent threatened force before the officers' pre-seizure conduct becomes relevant under the "reckless creation" theory. *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997); *Thomson v. Salt Lake County*, 584 F.3d 1304, 1320 (10th Cir. 2009). There has been no finding that decedent threatened force before the officers' shot and killed her. *See* Pet. App. 11a-14a.

Third, neither of the first two questions presented furthers the purpose of qualified immunity, which is to protect public officials from liability and from standing trial. *Mitchell*, 472 U.S. at 530. Indeed, none of the questions address the District Court's primary holding—because there is a genuine issue of fact regarding the gun, the District Court cannot conclude as a matter of law that Officer Mohney and Officer Huff acted reasonably when they shot decedent. *See* Pet. i-ii. Thus, Officer Mohney and Officer Huff will be subject to liability and will stand trial even if the writ is granted.

Fourth, because there has been no finding that the officers' conduct was reasonable, this Court's decision in *County of Los Angeles v. Mendez*, 137 S. Ct. 1539

(2017) and *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2018) is inapplicable.

Fifth, this case is a poor vehicle in which to address the alleged conflict between the Courts of Appeals because there remain genuine issues of fact relating to the gun, and neither the District Court nor the Tenth Circuit has found that Officer Mohney and Officer Huff acted objectively reasonable in shooting decedent.

The final question presented by petitioners relating to Officer Breneman's actions is also not properly presented to this Court for review. This Court has recognized that no appeal right exists for petitioners' third question because the Tenth Circuit did not address the first prong—whether Officer Breneman's actions violated a constitutional right. *See Pearson v. Callahan*, 555 U.S. 223, 240 (2009); *see also Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) ("When, however, a court of appeals does address both prongs of qualified-immunity analysis, we have discretion to correct its errors of each step."). Had the Tenth Circuit determined that Officer Breneman's actions violated a constitutional right but, nonetheless, granted him qualified immunity, then Officer Breneman would have a right to appeal the constitutional finding. *See id.* However, without a specific finding by the Tenth Circuit as to the first prong, the third question presented is improper.

For these reasons, this Court should deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On March 26, 2015, police officers for the City of Gardner, Kansas, including Officers Robert Huff, Justin Mohney, and Jeff Breneman, responded to a 911 call from a Gardner residence shared by decedent and her boyfriend. Pet. App. 9a. The boyfriend made the 911 call and told the dispatcher that decedent had been drinking, had fired a gun, and was possibly suicidal. *Id.* at 9a. After arriving at the residence, the officers removed the boyfriend from the residence and located decedent in bed, naked and intoxicated or groggy. *Id.* at 2a. The officers asked decedent about the gun and issued various commands, including inviting decedent to produce the gun. *Id.*

Even though the officers' training advised them to physically restrain decedent and control the situation, the officers opted not to physically restrain decedent because she was naked. *Id.* at 2a, 15a. After several minutes of interactions with decedent, including multiple invitations to produce the gun, decedent stated, "It's right here." *Id.* at 2a. After making this statement, decedent did not remove the gun from underneath the covers or point the gun at any of the officers. *Id.* at 2a-3a.

Nevertheless, within a few seconds after decedent made the statement about the gun, Officer Mohney and Officer Huff opened fire on decedent. *Id.* Decedent died from these gunshot wounds. *Id.* In deciding to shot decedent, Officer Mohney and Officer Huff reacted to decedent's statement about the gun, even though on multiple occasions the officers invited decedent to produce the gun. *Id.* at 3a.

REASONS FOR DENYING THE WRIT

I. This Writ completely ignores the Tenth Circuit's holding that it lacked jurisdiction over Officer Mohney's and Officer Huff's appeal.

Under the collateral order doctrine, a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision." *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009). But a district court's denial of a qualified immunity claim is not appealable if the district court's order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial. *Johnson*, 515 U.S. at 319-20.

In this case, questions of fact remain surrounding the fatal shooting of decedent, which questions prohibited the District Court from concluding as a matter of law that Officer Mohney and Officer Huff acted reasonably when shooting and killing decedent. *See* Pet. App. 14a. In other words, a jury could conclude that Officer Mohney and Officer Huff acted unreasonably when they shot decedent. *See id.* at 3a, 14a. Because of the genuine issues of fact, particularly as to the gun, the Tenth Circuit dismissed Officer Mohney's and Officer Huff's interlocutory appeal for lack of jurisdiction. *Id.* at 4a ("Officer Mohney and Officer Huff do not raise 'abstract legal questions' based on the facts identified by the district court, but rather asks us, in essence 'to canvass the record' to resolve 'factual controversies that, before trial, may seem nebulous'") (internal citations omitted).

Officer Mohney and Officer Huff now seek review from this Court not on the issue of jurisdiction, but on merit-based issues that were never adjudicated by the Tenth Circuit. This Court does not generally review issues that have not been addressed by the Court of Appeals below. *See e.g., McLane Co. v. EEOC*, 137 S. Ct. 1159, 1170 (2017); *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 562 U.S. 277, 284, n. 5 (2011); *see also* Sup. 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."). In *McLane*, this Court granted certiorari review to resolve a disagreement amongst the Courts of Appeals as to whether a district court's decision to enforce or quash an EEOC subpoena should be reviewed for abuse of discretion or *de novo*. *McLane*, 137 S. Ct. at 1166. This Court ultimately determined that a district court's decision to enforce an EEOC subpoena should be reviewed for abuse of discretion, not *de novo*. *Id.* at 1170. The United States also sought this Court's review on the merits; specifically, that the judgment below should be affirmed because it was clear that the District Court abused its discretion. *Id.* However, this Court declined to decide this merit-based question, finding that this Court is a "court of review, not of first, view." *Id.; see also Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005) (holding "[b]ecause these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first review, we do not consider them here"). Therefore, without the Tenth Circuit addressing the very questions Officer Mohney and Officer Huff now seek to be reviewed (i.e., their pre-seizure conduct and the "reckless creation"

theory),[1] this Court should not review these merit-based arguments for the first time on certiorari review.

Furthermore, in cases where the Court of Appeals rules only on jurisdictional grounds, this Court generally limits its review to the issue of jurisdiction—it does not address merit-based arguments. *See, e.g., Johnson*, 515 U.S. at 308-309 (granting certiorari review only to address the issue of jurisdiction, as the Seventh Circuit dismissed the appeal for lack of jurisdiction). Thus, while Officer Mohney and Officer Huff could have petitioned this Court to review the Tenth Circuit's decision to dismiss their appeal for lack of jurisdiction, but elected not to do so, they cannot ignore the Tenth Circuit's jurisdictional holding in hopes this Court will grant review solely on their merit-based questions.

Nevertheless, in rare cases, this Court may address arguments that were not addressed by the below court, if this Court finds that the below court had jurisdiction over the claim. *See, e.g.*, *Mitchell*, 472 U.S. at 530 (holding that where the Court of Appeals had jurisdiction over the claim, it was "appropriate for our immediate resolution" notwithstanding that it was not addressed by the Court of Appeals"); *see also Plumhoff*, 572 U.S. at 773, 778 (finding that Court of Appeals had jurisdiction to review district court's order and determined that officers' acted reasonably in shooting

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[1] The term "reckless creation" is not even used in the Tenth Circuit's opinion. *See* Pet. App. 1a-8a. And the opinion does not address the pre-seizure conduct of Officer Mohney and Officer Huff. *See id.*

suspect).[2] But Officer Mohney and Officer Huff completely ignore the Tenth Circuit's jurisdictional holding and, in fact, do not even dispute this holding. Accordingly, this Court should deny the Petition for Writ of Certiorari.

Moreover, even if they had addressed the Tenth Circuit's jurisdictional finding, the Tenth Circuit correctly held that it did not have jurisdiction over Officer Mohney's and Officer Huff's appeal. The Tenth Circuit held it lacked jurisdiction over Officer Mohney's and Officer Huff's appeal because their arguments on appeal were all premised on factual allegations outside the facts that the District Court ruled a reasonable jury could find. Pet. App. 4a. Indeed, all of Officer Mohney's and Officer Huff's arguments on appeal centered on a gun found (after the shooting) under the covers in decedent's bed. *Id.* at 3a-4a. As the Tenth Circuit noted, "the jury could find that Ms. Choate never removed her gun from under the covers of her bed and the officers instead reacted to her statement about the gun." *Id.* at 3a.

Because of the factual uncertainty surrounding the gun, the Tenth Circuit lacked jurisdiction on appeal as to all of Officer Mohney's and Officer Huff's arguments

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[2] Notably, in *Mitchell* and *Plumhoff*, the Court's determination that the Court of Appeals had jurisdiction, and petitioner was entitled to qualified immunity, essentially terminated the case against petitioner. That is not the case here. Even if Officer Mohney and Officer Huff are successful on their questions presented to this Court, they will still stand trial as to whether their use of deadly force was objectively reasonable.

on appeal,[3] including the "reckless creation" arguments they advance in this writ. Petitioners' self-proclaimed "reckless creation" theory only applies to "an officer's conduct prior to the [victim]'s threat of force if the conduct is 'immediately connected' to the [victim]'s threat of force" *Allen*, 119 F.3d at 840 (emphasis added), quoting *Romero v. Bd. of County Comm'rs*, 60 F.3d 702, 705 n.5 (10th Cir. 1995). Even then, however, the officer's conduct prior to a victim threatening force must "rise[] to the level of recklessness." *Thomson*, 584 F.3d at 1320 (emphasis added).

With the District Court finding that a genuine issue of fact remains as to whether decedent removed the gun from under the covers and pointed the gun at an officer, there was no factual finding that decedent threatened an officer with force. Pet. App. at 2a-3a, 14a. Simply put, if a jury finds that decedent did not raise the gun above the covers and point it at an officer, then there was no threat of force by decedent. Without a threat of force by decedent, the officers' conduct leading up to the shooting is irrelevant. *See Allen*, 119 F.3d at 840; *Thomson*, 584 F.3d at 1320. Of course,

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[3] The Tenth Circuit recently admonished practitioners to stop flaunting the jurisdictional limitations set out in *Johnson* by arguing matters that clearly rely on genuine issues of fact. *Ralston v. Cannon*, 884 F.3d 1060 (10th Cir. 2018) ("It certainly follows…that appeals like the instant one that flaunt the jurisdictional limitations set out in *Johnson* serve only to delay the administration of justice. That being said, this court expects practitioners will be cognizant of, and faithful to, the jurisdictional limitation set out in *Johnson*."). The Tenth Circuit cited the *Ralston* case in its opinion dismissing Officer Mohney's and Officer Huff's appeal for lack of jurisdiction. Pet. App. 4a.

should a jury later determine that decedent threatened force by pointing the gun at an officer then the pre-seizure conduct would become relevant, so long as it is immediately connected to the threat of force. *See id.* But this later scenario is not appropriate for interlocutory appeal because of the genuine issues of fact regarding the gun. *See Johnson*, 515 U.S. at 313, 316-320. Therefore, because the reasonableness inquiry and the "reckless creation" theory are dependent upon disputed facts relating to the gun, the Tenth Circuit correctly dismissed Officer Mohney's and Officer Huff's appeal for lack of jurisdiction. Accordingly, this Court should deny the Petition for Writ of Certiorari.

II. This Writ does not further the purpose of allowing interlocutory appeal after a district court's denial of a qualified immunity claim.

This Court noted in *Johnson v. Jones* that allowing too many interlocutory appeals risks additional, and unnecessary, appellate court work "when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary." 515 U.S. at 309. Of course, an important purpose of qualified immunity is to protect public officials, not simply from liability, but also from standing trial. *Mitchell*, 472 U.S. at 525-27. To further that purpose, public officials, including police officers, are allowed to appeal a district court's denial of a claim of qualified immunity to the extent that it turns on an issue of law. *Id.* at 530.

This writ would not further the purpose of qualified immunity because, even a finding that Officer Mohney's and Officer Huff's reckless pre-seizure

conduct may not be used in determining the reasonableness in shooting decedent, such a finding does not protect these officers from liability or standing trial. As the District Court found, a jury could conclude that Officer Mohney's and Officer Huff's actions in shooting decedent were objectively unreasonable *without* regard to their reckless pre-seizure conduct. *See* Pet. App. 3a, 14a. In fact, the District Court's opinion first addressed whether Officer Mohney and Officer Huff acted reasonably as a matter of law at the time they shot and killed decedent. *Id.* at 13a-14a. To this first question, the District Court found that it could not conclude as a matter of law that, at the time of the shooting, Officer Mohney and Officer Huff acted reasonably in shooting decedent. *Id.* at 14a.

It was only after addressing the reasonableness question that the District Court considered whether the officers' conduct prior to the shooting recklessly created the need to use the force and, thus, acted unreasonably in the totality of the circumstances. *Id.* Even then, however, it was based upon the *assumption* that Officer Mohney and Officer Huff acted reasonably at the exact moment of the shooting. *Id.* ("[E]ven if the officers acted reasonably at the exact moment of the shooting, they recklessly created their need to use force[.]"). As a result, the District Court's finding on the issue of the officers' pre-shooting conduct was merely an additional basis for denying the qualified immunity claim and was based upon an assumption that Officer Mohney and Officer Huff acted reasonably when they shot decedent. *See id.* at 15a-16a. Thus, this writ does not further the purpose of qualified immunity—to protect public officials from liability and standing

trial—because this writ does not address the primary holding of the District Court. Therefore, Officer Mohney and Officer Huff will be subject to liability and will stand trial, even if this writ is granted. Accordingly, this Court should deny the Petition for Writ of Certiorari.

III. This Court's decisions in *Mendez* and *Sheehan* are inapplicable to this case because of the remaining genuine issues of fact regarding decedent and the gun.

The jurisdictional shortfalls of the writ are further illustrated by petitioners' reliance on *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017) and *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2018) in arguing that the Tenth Circuit's "reckless creation" theory cannot stand in light of these decisions.[4] Pet. 6. Both of these cases are inapplicable

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[4] Petitioners also rely on *Graham v. Connor*, 490 U.S. 386 (1989) to support their argument that the "reckless creation" theory is inconsistent with this Court's precedent. Pet. 6. In *Graham*, the Court determined that an officer's actions must be analyzed under the "totality of the circumstances." *Id.* at 396. Such an analysis, however, would necessarily require this Court to consider (and resolve) the genuine issues of fact regarding decedent and the gun. Clearly any reasonableness analysis would require a fact finder to determine whether decedent removed the gun from under the covers and pointed the gun at an officer. Without such findings, determining whether the "reckless creation" theory is consistent with this Court's decision in *Graham* would be purely academic and require an unfounded assumption—that decedent removed the gun from under the covers, pointed it at an officer, and threatened the officers with it. Thus, as this case is currently constituted, determining whether the "reckless creation" theory is consistent with this Court's decision in *Graham* is premature.

because of the remaining genuine issues of fact regarding decedent and the gun.

In *Mendez,* this Court held:

> Respondents do not attempt to defend the provocation rule. Instead, they argue that the judgment below should be affirmed under *Graham* itself. *Graham* commands that an officer's use of force be assessed for reasonableness under the "totality of the circumstances." […] On respondents' view, that means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it…All we hold today is that *once* a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation.

Mendez, 137 S. Ct. at 1547, n.* (underline added). Thus, the holding in *Mendez* is contingent upon an initial determination that the use of force is reasonable—a determination that has not been made in this case by either the District Court or the Tenth Circuit. *See* Pet. App. 3a-4a, 11a-14a.

The *Sheehan* case is also inapplicable to this case. Under *Sheehan*, while this Court ultimately decided the issue of qualified immunity on the clearly established prong, this Court agreed with the Ninth Circuit's determination that the officers' use of deadly force was reasonable under the circumstances. *Sheehan*, 135 S. Ct. at 1775 (holding "[w]e also agree with the Ninth Circuit that after the officers opened

Sheehan's door the second time, their use of force was reasonable"). Here, neither the District Court nor Tenth Circuit has concluded that Officer Mohney and Officer Huff acted objectively reasonable in using deadly force on decedent. Additionally, the District Court and Tenth Circuit have not found that Officer Mohney's and Officer Huff's alleged constitutional violation was not clearly established at the time of the shooting. To the contrary, it has been clearly established for many years that an officer may not use deadly force unless certain factors have been met. *See Graham*, 490 U.S. at 396 (setting forth factors to consider in determining whether force was reasonable); *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255 (10th Cir. 2008) (establishing factors to consider when determining whether use of deadly force was reasonable). Accordingly, without such findings by the District Court or Tenth Circuit, this Court's holding in *Sheehan* is inapplicable to this case.

Therefore, *Mendez* and *Sheehan* are inapplicable to this case because of the remaining genuine issues of fact regarding decedent and the gun. Thus, this Court should deny the Petition for Writ of Certiorari.

IV. No appeal right exists as to the third question presented because the Tenth Circuit did not address the reasonableness prong.

The third question presented also suffers from jurisdictional defects like the other two questions presented. In the third question presented, Officer Breneman seeks a finding that his actions were reasonable in that they did not violate decedent's

Fourth Amendment rights.[5] Pet. 28-29. But this Court has recognized that no appeal right exists where the Court of Appeals below did not address the reasonableness prong. *See Pearson*, 555 U.S. at 240; *see also Ashcroft*, 563 U.S. at 735 ("When, however, a court of appeals does address both prongs of qualified-immunity analysis, we have discretion to correct its errors of each step."). Indeed, "[c]ourts should think carefully before expending 'scare judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will have no effect on the outcome of the case." *Ashcroft*, 563 U.S. at 735; *Pearson*, 555 U.S. at 237 ("Unnecessary litigation of constitutional issues also wastes the parties' resources.").

In this case, the Tenth Circuit did not address whether Officer Breneman's actions violated decedent's constitutional rights. *See* Pet. App. 1a-4a. Rather, the Tenth Circuit determined that Officer Breneman was entitled to qualified immunity because Plaintiff failed to satisfy "her burden of identifying cases that constitute clearly established law on these facts." *Id.* at 8a (internal quotations omitted). Had the Tenth Circuit determined that Officer Breneman's actions violated a

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[5] Notably, the first prong of *Saucier* that Officer Breneman seeks a determination "is intended to further the development of constitutional precedent." *Pearson*, 555 U.S. at 237. However, there is no such constitutional development where, as here, the Tenth Circuit's opinion has no precedential value. *Id.* at 819 (finding that opinions marked as not precedential fail to make a meaningful contribution to the development of constitutional development); Pet. App. 1a, n* ("This order and judgment is not binding precedent…").

constitutional right but, nonetheless, granted him qualified immunity, then Officer Breneman would have a right to appeal the constitutional finding. *See Pearson*, 555 U.S. at 240; *Ashcroft*, 563 U.S. at 735.

Nevertheless, Officer Breneman encourages the Court to engage in a mere academic exercise on the abstract question of whether his conduct amounted to a constitutional violation, a fact dependent inquiry, when a Court of Appeals has already granted him qualified immunity itself, which is "an immunity from suit rather than a mere defense from liability." *Mitchell*, 472 U.S. at 527. This Court need not engage in this academic exercise by wasting both scare judicial resources and the parties' resources. *See Ashcroft*, 563 U.S. at 735; *Pearson*, 555 U.S. at 237. This is particularly true as the parties acknowledge that the Tenth Circuit was not required to address both prongs under *Saucier v. Katz*, 533 U.S. 194 (2001).[6] *See* Pet. 12 ("focusing solely on the 'clearly established' prong of the qualified immunity inquiry is not improper"). And no such reasonableness finding will impact the outcome of this case, as Officer Breneman is not subject to liability under respondent's § 1983 claim. Therefore, because no appeal right has been recognized when a Court of

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[6] In *Pearson*, this Court ultimately held that the *Saucier* two-step rule was no longer mandatory and that lower courts have discretion in deciding upon which ground(s) qualified immunity is appropriate. 555 U.S. at 227, 236. In making this determination, this Court recognized that the two-step rule may still be beneficial, *id.* at 236, but found "the judges of the district court and the courts of appeals are in the best position to determine the order of decision-making that will facilitate the fair and efficient disposition of each case." *Id.* at 242.

Appeals does not address both prongs under *Saucier*, and the parties agree that a below court need not address both prongs, this Court should deny the Petition for Writ of Certiorari.

V. This case is a poor vehicle in which to consider any alleged conflict between the Courts of Appeals regarding pre-seizure conduct.

The Fourth Amendment forbids unreasonable seizures, including the use of excessive force. *Casey v. City of Federal Heights*, 509 F.3d 1278, 1281 (10th Cir. 2007). To determine whether the force used in a particular case is excessive "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." *Graham*, 490 U.S. at 396 (internal quotation mark omitted). The ultimate question "is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them." *Id.* at 397 (internal quotation marks omitted). This determination "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers and others, and whether [s]he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

The most disputed fact in this case is whether decedent brought the gun above the covers and pointed

the gun at one of the officers.[7] In fact, both the Tenth Circuit and the District Court focused on the factual dispute regarding the gun in their opinions. The Tenth Circuit determined that, because there was a disputed fact as to the gun, it lacked jurisdiction as to Officer Huff's and Officer Mohney's appeal. Pet. App. 4a. Indeed, the Tenth Circuit reviewed the officers' body cameras and found the footage to be unclear about a gun and "far from satisfying the blatant-contradiction standard for de novo appellate review." *Id.*

In its Memorandum & Order denying Petitioners' Motion for Summary Judgment as to qualified immunity, the District Court concluded there remained a genuine issue of material fact as to whether decedent pointed a gun at the officers, thereby precluding the court from finding as a matter of law that Officer Mohney and Officer Huff acted reasonably in firing on decedent. *Id.* at 14a. In making this determination, the District Court looked at evidence in the record, viewing the evidence in the light most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372 (2007).

For example, the District Court found that the body cameras of Officers Mohney, Huff and Breneman did "not show decedent pointing a gun." *Id.* at 13a. The District Court further noted that Officer Breneman testified he did not see a weapon, even though he was

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[7] This is true even though Tenth Circuit precedent has declined to adopt a "*per se*" rule of objective reasonableness where a person points a gun at a police officer. *Pauly v. White*, 874 F.3d 1197, 1271 (10th Cir. 2017) (holding "none of our cases have created a per se rule of objective reasonableness where a person points a gun at a police officer").

only a couple of feet away from decedent when the shooting started. *Id.* Additionally, the District Court found that the gun was discovered under the covers by decedent's knee after the shooting. *Id.* Finally, the District Court noted the officers' inconsistencies in their testimony about the gun, including their perception of the positioning of decedent's hands and whether she held the gun with one or two hands. *Id.* at 13a-14a. Thus, the District Court concluded such evidence supports the allegation that decedent "did not in fact remove [the] gun from under the covers (and that the officers may have instead reacted, for instance, to decedent's *statement* about the gun)." *Id.* at 14a.

Despite (a) the genuine issue of material fact regarding whether decedent removed the gun from underneath the covers and pointed the gun at an officer, and (b) a lack of finding that Officer Mohney and Officer Huff acted objectively reasonable when they shot and killed decedent, Officer Mohney and Officer Huff seek review on the unfounded assumption that their actions in shooting decedent were objectively reasonable. Pet. 5 ("This case presents questions of whether law enforcement officers may be liable for damages under § 1983 for shooting an emotionally disturbed and/or intoxicated person, even if the shooting is objectively reasonable at the exact moment of the shooting, if a jury could conclude that bad tactics or failure to adhere to police procedure 'recklessly created' the later need to use deadly force.") (underline added).

However, should the trier of fact determine that Officer Mohney and Officer Huff acted unreasonably in

shooting decedent then it is irrelevant whether their conduct "immediately connected" to the shooting recklessly created the need to use deadly force. *See Thomson*, 584 F.3d at 1320 (holding first that the use of force was not excessive before determining whether the officers recklessly created the need to use deadly force); *cf Tennessee v. Gardner*, 471 U.S. 1, 11 (1985) (noting that the use of deadly force is not justified "[w]here the suspect poses no immediate threat to the officer and no threat to others").

Simply put, Officer Mohney and Officer Huff seek to put the proverbial cart before the horse by having this Court consider Officer Mohney's and Officer Huff's pre-seizure conduct without first finding as a matter of law that they acted reasonably in shooting decedent—a finding that cannot be made without first resolving an genuine issue of fact whether decedent removed the gun from underneath the covers and pointed the gun at an officer. Pet. App. 3a ("[T]he jury could find that Ms. Choate never removed her gun from under the covers of her bed and the officers instead reacted to her statement about the gun".). Therefore, because of the genuine issues of fact, and absent a finding that Officer Mohney and Officer Huff acted objectively reasonable in shooting decedent, this case is a poor vehicle in which to address the alleged conflict between the Courts of Appeals. Accordingly, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth above, this Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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