NO. 20-_____

In the Supreme Court of the United States

ADVANTAGEOUS COMMUNITY SERVICES, LLC, ARMINDER KAUR, HARASPAL SINGH, AND HARCHI SINGH,

Petitioners,

v.

GARY KING, AMY LANDAU, ELIZABETH STALEY, MARC WORKMAN, CATHY STEVENSON, ORLANDO SANCHEZ, AND WALTER RODAS,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the doctrine of qualified immunity be limited to defenses at common law when the Civil Rights Act was adopted or should it be abolished by this Court?

2. If qualified immunity is not limited or abolished by this Court, are State Employees, including Attorneys and Investigator Employees of the Attorney General's Office and/or the New Mexico Human Services Department (State Employees) entitled to qualified immunity when they knowingly create and use false documents to prosecute a civil state court proceeding?

3. Are State Employees entitled to qualified immunity when they knowingly file that suit without probable cause and/or cause state court litigation to be prolonged because State Employees did not have vital documentation to support the case prior to its filing which is why State Employees created the false documents during the course of litigation?

4. Are State Employees entitled to qualified immunity when they further cause a deprivation of property rights without due process by termination or non-renewal of Petitioners' Medicaid contract based upon unsubstantiated allegations of Medicaid fraud?

5. Are State Employees entitled to qualified immunity when they cause a violation of due process, either substantive or procedural by withholding money due to Petitioner Advantageous Community Services LLC on a subsequent contract on a claim of fraud involving a prior contract?

6. Does the Tenth Circuit's holding conflict with *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), which

"expressly rejected a requirement that previous cases be 'fundamentally similar'" or involve "'materially similar' facts"?

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs/Appellants Below

- Advantageous Community Services, LLC
- Dr. Arminder Kaur
- Haraspal Singh
- Harchi Singh

Respondents and Defendants/Appellees Below

- Gary King
- Amy Landau
- Elizabeth Staley
- Marc Workman
- Cathy Stevenson
- Orlando Sanchez
- Walter Rodas,

CORPORATE DISCLOSURE STATEMENT

Advantageous Community Services, LLC has no parent corporation, is not publicly traded, and no public company owns 10% or greater of its stock.

LIST OF PROCEEDINGS

United States Court of Appeals
for the Tenth Circuit

No. 19-2211

Advantageous Community Services, LLC; Arminder Kaur; Haraspal Singh; Harchi Singh, *Plaintiffs-Appellants,* v. Gary King; Amy Landau; Elizabeth Staley; Marc Workman; Cathy Stevenson; Orlando Sanchez; Walter Rodas, *Defendants-Appellees*

Date of Final Order and Judgment: February 5, 2021

United States District Court
for the District of New Mexico

1:17-cv-00525-LF-KK

Advantageous Community Services, LLC; Arminder Kaur; Haraspal Singh and Harchi Singh, *Plaintiffs,* v. Gary King, Amy Landau, Elizabeth Staley, Marc Workman, Cathy Stevenson, Orlando Sanchez, and Walter Rodas, *Defendants*

Date of Opinion and Order: November 19, 2019

Court of Appeals of New Mexico

No. 31,782

State of New Mexico, ex rel. Gary King, Attorney General, *Plaintiff-Appellant,* v. Advantageous Community Services, LLC, a New Mexico Limited Liability Company, *Defendant-Appellee*

Date of Opinion: April 28, 2014

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Advantageous Community Services, LLC, Arminder Kaur, Haraspal Singh, and Harachi Singh (hereafter "Advantageous" or "Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Tenth Circuit dated February 5, 2021 (App.1a-12a) is not reported. The memorandum and order of the United States District Court for the District of New Mexico dated November 19, 2019 (App.13a-45a) is also unreported.

JURISDICTION

The U.S. Court of Appeals for the Tenth Circuit entered its judgment (App.1a) on February 5, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. XIV, § 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT OF THE CASE

This case concerns claims that the Attorney General for the State of New Mexico, Gary King, his assistants, Amy Landau, AAG, Elizabeth Staley, AAG, Marc Workman, his investigator, Cathy Stevenson, (Director of Developmental Disabilities Support Division for the New Mexico Department of Health, Orlando Sanchez and Walter Rodas, employees of the New Mexico Department of Health (herein State Employees)(App.3a.) violated Petitioners' constitutional rights by fabricating evidence and using that evidence in a civil court proceeding that had been brought by the State without probable cause (App.6a) and during that proceeding taking money due to Advantageous from the state for work performed for the State, in retaliation for reporting the use of the fabricated evidence to the state court. (App.2a).

Petitioner Advantageous Community Services, LLC provided home based mental health care to Medicaid recipients pursuant to contract with the State of New Mexico Department of Health. (App.2a, 4a). Petitioners Haraspal Singh and Harchi Singh were employed by Advantageous and as the sons of Dr. Kaur informally shared in ownership of Advantageous. (App.2a).

Advantageous would contract with individual care givers to deliver services and bill the New Mexico administrator of Medicaid for the services performed. (App.2a).

On September 28, 2009, the State of New Mexico through the New Mexico Office of the Attorney General brought suit against Advantageous under the New Mexico Medicaid Fraud Act. The case was captioned *State of New Mexico ex rel. Gary K. King, Attorney General v. Advantageous Community Services, LLC*, D-202-CV-2009-11396. (App.5a). The state sought recovery of payments to six Advantageous caregivers, civil penalties and damages for breach of contract, claiming that required criminal background forms had not been completed prior to services performed. (App.5a).

The State claimed that between 2004 and 2007 six Advantageous caregivers billed and were paid for services while those caregivers lacked appropriate criminal history screening allegedly in violation of federal Medicaid statutes. (App.4a). None of these caregivers had any disqualifying criminal convictions, information readily available to the State. (App.5a) Further, although the state had some if not all of the criminal history screenings, the State could not locate the originals of those screenings for three health care providers. (App.5a).

The state then created new criminal history screenings to use in the state court civil proceeding against Advantageous. In the civil enforcement action, the State used "the date on the [NMDH's] clearance letter for each of the six [Advantageous] caregivers . . . to support its claims that the caregivers were providing services that were billed to Medicaid before' their background checks had been completed . . . Thus, "the clearance letter issued for each caregiver [was] critical to the State's theory of liability." (App.5a).

After their use in the civil judicial proceedings to impeach Dr. Arminder Kaur, Petitioners discovered that State Employees had fabricated certain of the criminal history screenings to support the State's case against Advantageous. Advantageous then brought this conduct to the attention of the Court by way of a motion for sanctions, (App.5a-6a) as well as a motion for summary judgment. (App.6a).

Additionally, the New Mexico Department of Health, through Stevenson terminated and refused to renew Advantageous' Medicaid contract, a decision in which Landau and King and Staley were involved which was part of the improper conduct intended to damage Advantageous. (App.4a).

To further retaliate against Advantageous for bringing fabrication of evidence to the attention of Court by way of appropriate motions, the State through King, Landau, Workman, Staley and Stevenson, in 2011 withheld substantial funds that were lawfully owed to Advantageous for Medicaid services rendered during the effective term of Advantageous' state contract. (App.42a).

The State through King, Landau, Workman, Staley and Stevenson thus effectuated improper recoupments from Advantageous before proving any claims against Advantageous even though those claims were pending in the state court proceeding. (App.5a, 40a).

The State through King, Landau, Workman, Staley and Stevenson had also applied in connection with the litigation the State pursued against Advantageous an improper moratorium on business with Advantageous before proving any claims against Advantageous. (App.4a, 16a). The factual review of the

matter as set out in the New Mexico Court of Appeals decision is instructive and was referenced by the District Court (App.31a-38a) and the Tenth Circuit Court of Appeals (App.3a, fn.1):

> [9] The district court then filed detailed findings of fact and conclusions of law. In pertinent part, the district court made findings of fact that Exhibit 15 is a purported letter from DOH to Imagine, care of Melissa McCue, but it is a false document, and was created by the State for this litigation. Specifically, the text of the letter, the addressee, and the signature line are inaccurate. Further, the district court found, while the investigator was told that Exhibit 15 is not a true and correct copy of the original document, the investigator did not disclose that information to the AAG, and the AAG failed to observe the obvious discrepancy in the document that Susana Martinez was not the Governor in 2006, which would have alerted her that it could not be an accurate copy of a 2006 document. The district court added that the investigator knew the document was false and that it was going to be used at Dr. Kaur's deposition, but he did not disclose his knowledge to the AAG, who then attempted to impeach Dr. Kaur with the document. Importantly, the district court also found that, "[c]onsidering his position as an investigator for the Attorney General's Office, [the investigator]'s testimony that he did not believe the information was important is not credible."

> [10] All of the investigator's actions were done in the course and scope of his employment with the Attorney General's Office of the State of New Mexico. Moreover, the district court found, "[c]onsidering the immense power of the Attorney General's Office, the public must be able to rely on the truth of documents produced in litigation by the Attorney General's office, its attorneys and investigators" and that "[a]n investigator allowing an assistant attorney general to utilize a document known to be false in discovery is an egregious offense subject to sanctions." (App.50a-51a).

Petitioners claim that the use of fabricated evidence is a violation of the Fourth and Fourteenth Amendments. (App.6a). Petitioners claim that the termination and refusal to renew Advantageous' contract was done in violation of Advantageous' substantive due process rights, in particular because the decision was arbitrary, irrational, and/or shocking to the contemporary conscience when it was made during pending litigation. (App.7a).

Petitioners further claimed that, the State and State Employees who were involved in the prosecution of the suit did not have a factual or legal basis to pursue the claims brought under the New Mexico Medicaid Fraud Act against Advantageous because when the case was initiated the State did not have original or copies of the criminal screenings, the predicate for the action. This constitutes malicious prosecution and abuse of process. (App.6a).

In the underlying action brought by the State of New Mexico, the Honorable Valerie Huling, District

Judge for the Second Judicial District Court, State of New Mexico ultimately entered summary judgment against the State's with prejudice based on: (1) the lack of evidence supporting the States' claims; and (2) the State's fabrication of evidence submitted in connection with that proceeding. (App.6a).

Through the State's own shoddy system of maintaining deficient paper and electronic records, the State could not present competent evidence supporting any claims against Advantageous. The State also had no legal basis to pursue any such claim under the Medicaid Fraud Act or otherwise against Advantageous because the criminal history form was not a prerequisite for payment. (App.28a). The regulations which the State accused Advantageous of violating were at no point an appropriate basis to bring claims against Advantageous including under the Medicaid Fraud Act because, among other reasons, the regulations were in no way a condition of payment for moneys owed to Advantageous. (App.28a).

District Judge Huling as a sanction dismissed the suit and additionally entered summary judgment against the State with prejudice, a decision which the State appealed and lost on April 28, 2014 because of the fabricated documentation used by State Employees. *See State v. Advantageous Community Services, LLC*, 2014-NMCA-076, 329 P.3d 738. (App.46a).

In the United States District Court for the District of New Mexico action, Respondents (who had removed the action from New Mexico State District Court) asserted jurisdiction pursuant to 28 U.S.C. 1331 (Federal Question) with relief pursuant to 42 U.S.C. 1983.

REASONS FOR GRANTING THE PETITION

I. THE DEFENSE OF QUALIFIED IMMUNITY SHOULD BE ABOLISHED OR SUBSTANTIALLY LIMITED IN ACCORDANCE WITH THE COMMON LAW EXISTING AT THE TIME THE CIVIL RIGHTS ACTS WERE ADOPTED.

The defense of qualified immunity should be limited or abolished by this Court which created it forty years ago. As stated by Justice Clarence Thomas in *Ziglar v. Abbasi*, 582 U.S. ___, 137 S.Ct. 1843, 198 L.Ed.2d 290 (2017), this Court has diverged from the historical common law inquiry mandated by the Civil Rights Act by the creation of the current qualified immunity defense which historically was limited to legislators, judges and those acting in good faith:

> In further elaborating the doctrine of qualified immunity for executive officials, however, we have diverged from the historical inquiry mandated by the statute. *See Wyatt*, *supra*, at 170, 112 S.Ct. 1827 (KENNEDY, J., concurring); accord, *Crawford-El v. Britton*, 523 U.S. 574, 611, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) (SCALIA, J., joined by THOMAS, J., dissenting). In the decisions following Pierson, we have "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson v. Creighton*, 483 U.S. 635, 645, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (discussing *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Instead of asking whether the common law in 1871 would have accorded immunity

to an officer for a tort analogous to the plaintiff's claim under § 1983, we instead grant immunity to any officer whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 577 U.S. ___, ___, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015) (per curiam) (internal quotation marks omitted); *Taylor v. Barkes*, 575 U.S. ___, ___, 135 S.Ct. 2042 2044, 192 L.Ed.2d 78 (2015) (a Government official is liable under the 1871 Act only if "'existing precedent . . . placed the statutory or constitutional question beyond debate'" (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011))). We apply this "clearly established" standard "across the board" and without regard to "the precise nature of the various officials' duties or the precise character of the particular rights alleged to have been violated." *Anderson, supra*, at 641-643, 107 S.Ct. 3034 (internal quotation marks omitted).* We have not attempted to locate that standard in the common law as it existed in 1871, however, and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine. *See generally,* Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. (forthcoming 2018) (manuscript, at 7-17), online at https://papers.ssrn.com/abstract=2896508 (as last visited June 15, 2017).

Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in "interpret[ing] the intent of Congress in enacting" the Act. *Malley, supra*, at 342, 106 S.Ct. 1092; *see Burns, supra*, at 493, 111 S.Ct. 1934. Our qualified immunity precedents instead represent precisely the sort of "freewheeling policy choice[s]" that we have previously disclaimed the power to make. *Rehberg v. Paulk*, 566 U.S. 356, 363, 132 S.Ct. 1497, 182 L.Ed.2d 593 (2012) (internal quotation marks omitted); *see also Tower, supra*, at 922-923, 104 S.Ct. 2820 ("We do not have a license to establish immunities from" suits brought under [137 S.Ct. 1872] the Act "in the interests of what we judge to be sound public policy"). We have acknowledged, in fact, that the "clearly established" standard is designed to "protec[t] the balance between vindication of constitutional rights and government officials' effective performance of their duties." *Reichle v. Howards*, 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012) (internal quotation marks omitted); *Harlow, supra*, at 807, 102 S.Ct. 2727 (explaining that "the recognition of a qualified immunity defense . . . reflected an attempt to balance competing values"). The Constitution assigns this kind of balancing to Congress, not the Courts.

In today's decision, we continue down the path our precedents have marked. We ask "whether it would have been clear to a reasonable officer

> that the alleged conduct was unlawful in the situation he confronted," *ante*, at 1867 (internal quotation marks omitted), rather than whether officers in petitioners' positions would have been accorded immunity at common law in 1871 from claims analogous to respondents'. Even if we ultimately reach a conclusion consistent with the common-law rules prevailing in 1871, it is mere fortuity. Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence.

Excerpt from Thomas concurrence in *Ziglar v. Abbasi*, 582 U.S. ___, 137 S.Ct. 1843, 198 L.Ed.2d 290 (2017)

This Court should heed the words of Justice Thomas in *Ziglar* and reevaluate its qualified immunity doctrine and return the courts to the common law defenses existing at the time the Civil Rights laws were enacted.

II. GENERAL CONSTITUTIONAL RULES MAY SUFFICE TO ALLOW THE ACTION TO PROCEED EVEN WHEN THERE IS NO CASE DIRECTLY ON POINT AND EVEN UNDER CURRENT QUALIFIED IMMUNITY ANALYSIS.

Even if not abolished, this Court in *Taylor v. Riojas*, 592 U.S. ___ (11-2-2020) (*per curiam*), held that general constitutional rules may suffice to allow an action to proceed even when there is no case directly on point: "*See Hope*, 536 U.S., at 741 (explaining that "a general constitutional rule already identified in the decisional law may apply with

obvious clarity to the specific conduct in question'" (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)) 271 (1997))); 536 U.S., at 745 . . . "

If the defense of qualified immunity is not limited or abolished, this Court should hold that the Tenth Circuit's decision fundamentally misapprehended this Court's qualified-immunity jurisprudence. The District Court granted qualified immunity because " . . . Appellees were entitled to qualified immunity because no clearly established law showed that the State's alleged withholding of Medicaid reimbursements from Advantageous was a property seizure under the Fourth Amendment."[1] The Tenth Circuit did not address the use of falsified evidence to support an action by the State, a central theory of the action, nor did the Tenth Circuit address the malicious prosecution claims that since the State had no foundational documents, it could not proceed. And Petitioner did provide the Tenth Circuit with cases supporting Petitioners' theories as will again be set out herein.[2]

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[1] App.11a and 21a-23a. ("Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.") App.22a.

[2] "The only remaining claim in this case—Count I of the complaint, brought under 42 U.S.C. § 1983—alleges that the State Defendants violated Advantageous' Fourth Amendment rights by maliciously prosecuting it and misusing judicial proceedings. Doc. 1-1 ¶¶ 46-60. This claim is based on Advantageous' allegation that the State Defendants4 lacked probable cause to initiate and continue to pursue the State's lawsuit against it, and that the State Defendants fabricated evidence to support their prosecution. *See id.* Count I further alleges that the State Defendants used extra-judicial forfeiture proceedings against Advantageous to

This Court has "expressly rejected a requirement that previous cases be 'fundamentally similar'" or even involve "'materially similar' facts." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Instead, the "'salient question . . . is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" *Tolan v. Cotton*, 134 S.Ct. 1861 (2014) at 1866 (alterations in original) (quoting *Hope*, 536 U.S. at 741).

Second, the decision below sharply deviates from the Court's qualified immunity doctrine. For decades, the Court has warned government officials that the absence of analogous precedent does not guarantee immunity for egregious constitutional violations. *See*, *e.g.*, *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Hope v. Pelzer*, 536 U.S. 730, 741, 745-46 (2002); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377-78 (2009); *D.C. v. Wesby*, 138 S.Ct. 577, 590 (2018); *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018); *City of Escondido v. Emmons*, 139 S.Ct. 500, 504 (2019).

As these cases establish, for conduct sufficiently beyond the pale, the notice necessary to defeat a claim of qualified immunity is inseparable from the violation itself. In such a "rare obvious" case, in other words, "the unlawfulness of the officer's conduct is sufficiently clear" to defeat qualified immunity "even though existing precedent does not address similar circumstances." *City of Escondido*, *Id.*, at 504 (quoting *Wesby*, 138 S.Ct. at 581). In the case at bar, the use of

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withhold and recoup funds owed to Advantageous for Medicaid services it had provided. *Id.* ¶ 59. App.23a.

false evidence in a judicial proceeding by the State Employees is just such a "rare obvious" case.

Had the Tenth Circuit applied the correct standard, it would have denied qualified immunity because any state employee would have known that using fabricated evidence in a judicial proceeding and then retaliating against Petitioner for bringing that use to the attention of the Court by withholding funds due pursuant to a subsequent contract between the state and Petitioner and terminating Petitioner's contract with the state was unconstitutional.

In *Hope*, this Court reversed the Eleventh Circuit for making precisely the same error that the Tenth Circuit made here: granting qualified immunity because there were no "earlier cases with 'materially similar' facts." 536 U.S. at 733, 739 ("This rigid gloss on the qualified immunity standard . . . is not consistent with our cases."). As this Court explained, it reversed because it had both "expressly rejected a requirement that previous cases be 'fundamentally similar'" and made clear "that officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741 (emphasis added).

See also United States v. Lanier, 520 U.S. 259, 269, 272 (1997) (by requiring "a factual situation that is 'fundamentally similar' . . . the Court of Appeals used the wrong gauge in deciding whether prior judicial decisions gave fair warning that [defendants'] actions violated constitutional rights").

Here, the Tenth Circuit misinterpreted this Court's recent precedents as requiring it to grant qualified immunity because Petitioner could not identify a single case that was similar to the pending action. (App.10a).

The Tenth Circuit did not cite *Hope*, let alone grapple with its admonition that qualified immunity can be defeated "even in novel factual circumstances . . . "

The Tenth Circuit's ruling reflects a clear misapprehension of this Court's qualified-immunity jurisprudence. *Cf. Hope*, 536 U.S. at 741 (no qualified immunity if officers had "fair warning that their alleged [conduct] was unconstitutional").

The purpose of qualified immunity is "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001). Accordingly, the "'salient question . . . is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" *Tolan*, 134 S.Ct. at 1866 (alterations in original) (quoting *Hope*, 536 U.S. at 741). *See also Reichle v. Howards*, 566 U.S. 658, 664-65 (2012) (asking whether "every 'reasonable official would [have understood] that what he is doing violates that right'") (alteration in original).

As this Court emphasized in *Hope*, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." 536 U.S. at 741 (emphasis added). "Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with 'materially similar' facts." *Ibid.*

This is true because "general statements of the law are not inherently incapable of giving fair and clear warning." *Ibid.* Similarly, "a general constitutional rule already identified in the decisional law may apply

with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *Ibid.* (alteration in original) (quoting *Lanier*, 520 U.S. at 270-71).

The decision of the Tenth Circuit glosses over, and does not dispute, State Employees' fabrication of evidence. State Employees are not entitled to qualified immunity because they violated a clearly established right when they prosecuted Advantageous based on fabricated evidence and that prosecution continued until the decision of the New Mexico Court of Appeals dismissing the State's appeal. See, *e.g.*, *Pierce v. Gilchrist*, 359 F.3d 1279, 1284 (10th Cir. 2004) (no qualified immunity where prosecution based on fabricated evidence).

Advantageous also has a Fourth Amendment malicious prosecution claim at least to the extent State Employees prolonged litigation based on falsified evidence and to the extent that State Employees took money belonging to Advantageous in conjunction with a lawsuit based on fabricated evidence. And the trial court recognized that State Employees took money belonging to Advantageous during the pendency of the state action and after the creation of false evidence. (App.42a). The continuation of the suit and the taking of the money is a Fourth Amendment violation.

The "Fourth Amendment prohibits officers from knowingly or recklessly relying on false information to institute legal process when that process results in an unreasonable seizure." *Sanchez v. Hartley*, 810 F.3d 750, 754 (10th Cir. 2016); "[B]ringing suit without a factual basis and which results in an unreasonable seizure has been held to violate the Fourth Amendment." (citing *Pierce*, 359 F.3d at 1291-97)).

It is "clearly established that false evidence cannot contribute to a finding of probable cause." *Wilkins v. DeReyes*, 528 F.3d 790, 805 (10th Cir. 2008). And liability attaches even where the lack of probable cause was not known at the outset of litigation. *Pierce*, 359 F.3d at 1291-92, 1297 (reasoning that liability for malicious prosecutions "extends to those who continue prosecutions" when they obtain "knowledge that there is no probable cause to proceed against the" defendant, so continued prosecution after discovery of lack of probable cause is actionable).

In any event, the question of whether probable cause existed typically cannot be resolved at summary judgment because it is a question of fact to be decided by the jury. *United States v. Gaudin*, 515 U.S. 506, 521 (1995); *DeLoach v. Bevers*, 922 F.2d 618, 623 (10th Cir. 1990).

Given the clear and alarming egregiousness of the state employees misconduct in fabricating evidence, it is unsurprising that no court has had occasion to declare it unconstitutional. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) ("The unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason . . . that '[t]he easiest cases don't even arise.'") (quoting *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)).

Yet the Tenth Circuit ruled that the Respondents were entitled to qualified immunity precisely because Petitioner did not identify a case holding that taking of money due the state to Petitioner for a subsequent contract and in retaliation for bringing the use of falsified evidence to the attention of the trial court was unconstitutional.

The Tenth Circuit believed its ruling was compelled by this Court's precedents, which it erroneously interpreted as requiring a court to grant qualified immunity unless Petitioner can identify a case where an officer acting under similar circumstances as the defendant was held to have violated the relevant constitutional right.

The Tenth Circuit failed to recognize *Hope*'s admonition that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." 536 U.S. at 741.

In *Pierce v. Gilchrist*, 359 F.3d 1279, 1284 (10th Cir. 2004) the Tenth Circuit itself reasoned that liability for malicious prosecutions "extends to those who continue prosecutions" when they obtain "knowledge that there is no probable cause to proceed against the" defendant, so continued prosecution after discovery of lack of probable cause is actionable. In this case, the State's investigator was found to have used false evidence to assist in the prosecution of the case against Advantageous. But even after that finding, the State appealed the sanction against the State of dismissal of the action to the New Mexico Court of Appeals.

This Court has held that the Fourth Amendment prohibits unreasonable seizures of property. *E.g.*, *Horton v. California*, 496 U.S. 128, 133 (1990) ("[A] seizure deprives the individual of dominion over his or her person or property." (emphasis added)); *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993) (recognizing that the Fourth Amendment places restrictions on seizures conducted for purposes of civil forfeiture). Such a seizure occurs where "there is some meaningful interference with an individual's

possessory interests in that property." *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992). Accordingly, a plaintiff may maintain a § 1983 action based on a seizure of property in violation of the Fourth Amendment. *Id.* at 72.

A right is clearly established if the contours of the right are "sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The degree of specificity required depends on the egregiousness of the challenged conduct; "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Pierce*, 359 F.3d at 1298.

The rights State Employees violated were clearly established. Indeed, the Tenth Circuit itself recognized no later than 2004 that "it was a Fourth Amendment violation to knowingly or recklessly use false information to initiate legal process when that process leads to an unreasonable seizure." *Sanchez v. Hartley*, 810 F.3d 750, 760 (10th Cir. 2016) (citing *Pierce*, 359 F.3d at 1298-99). It was also "clearly established that false evidence cannot contribute to a finding of probable cause" because "[p]robable cause depends on 'reasonably trustworthy information.'" *Wilkins v. DeReyes*, 528 F.3d 790, 805 (10th Cir. 2008); *see also Hardwick v. County of Orange*, 844 F.3d 1112, 1118-19 (9th Cir. 2017) (reasoning that "[n]o official with an IQ greater than room temperature . . . could claim that he or she did not know that the conduct at the center of this case violated both state and federal law" where the officials used false evidence).

Here, as was true in *Pierce*, the case theories State Employees relied upon were a result of the evidence fabrication and "became one of the inseparable bases for the charges" against Advantageous. *See Pierce*, 359 F.3d at 1295-96; *see also id.* at 1291-92, 1297 (holding that liability for malicious prosecutions "extends to those who continue prosecutions" when they obtain "knowledge that there is no probable cause to proceed against the" defendant, so continued prosecution after discovery of lack of probable cause is actionable).

Petitioners believe that the trial court and the Tenth Circuit framed "the inquiry into the right that must be clearly established . . . much too narrowly." *Makin v. Colorado Dept. of Corr.*, 183 F.3d 1205, 1210 (10th Cir. 1999) (framing the right at issue in the case at bar as "the reasonable opportunity to exercise one's religion"). Indeed, "[s]tructuring the inquiry [into what right must be clearly established] too narrowly would render the defense [of qualified immunity] available to all public officials except in those rare cases in which a precedential case existed which was 'on all fours' factually with the case at bar." *Id.* (quoting *Melton v. City of Oklahoma City*, 879 F.2d 706, 729 n.37 (10th Cir. 1989).

In this case, the issue for the determination of qualified immunity is whether the state may continue a prosecution when it knowingly uses false evidence to support the prosecution. Further may it take money due Advantageous after the State's conduct has been brought to the attention of the appropriate Court. It may not.

Even if the Court were to ignore the evidence fabrication, as the trial court did, the New Mexico

Court of Appeals reasoned that the plain language of the Medicaid statute prohibited the State from withholding payment from providers who fail to complete background clearances. *State ex rel. King v. Behavioral Home Care, Inc.*, 346 P.3d 377, 383 (N.M. App. 2014) (citing NMSA § 30-44-7(A)(3)). The court observed that the statute required the State to establish that the provider "presented false or fraudulent claims for payment to HSD" and that the provider "intended for HSD to rely on the false or fraudulent claims for purposes of reimbursement." *Id.* (citing NMSA § 30-44-7(A)(3)).

The court reasoned that there was already guidance on this issue: the federal False Claims Act and cases interpreting it, which State Employees relied on in pursuing claims against providers. *Id.* at 384. Like the False Claims Act, N.M. Stat. § 30-44-7(A)(3) "imposes a materiality element which requires that the false or fraudulent certification be integral to the government's payment decision." *Id.* at 384-85. This requirement plainly was not met where the State withheld and seized funds from Advantageous and its providers who had rendered services without completing a background clearance because payment was not expressly conditioned on background clearances. *Id.* at 384-389. In reaching this conclusion, the court of appeals affirmed a trial court decision from September 30, 2011 that reached the same conclusion.

Despite having notice that the claims against Advantageous were meritless, State Employees continued the prosecution of Advantageous in the courts until the New Mexico Court of Appeals dismissed the action on April 28, 2014. *Advantageous Cmty. Services, LLC*, 329 P.3d at 745. Compounding the violation of a

clearly established constitutional right is the fact that State Employees seized Advantageous' funds before the court was able to rule on the State's claim for relief. Even though the State asserted a recoupment claim in its lawsuit against Advantageous, State Employees took the law into their own hands and made multiple seizures before the court ruled on the claim by dismissing the recoupment claim.

The qualified immunity inquiry should not and is not "a scavenger hunt for prior cases with precisely the same facts" but rather a determination "whether the law put officials on fair notice that the described conduct was unconstitutional." *Pierce*, 359 F.3d at 1298. "In determining whether the right was 'clearly established,' a court assesses the objective legal reasonableness of the action at the time of the alleged violation and asks whether 'the contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1186 (10th Cir. 2001) (alteration in original).

III. THE RIGHTS STATE EMPLOYEES VIOLATED WERE CLEARLY ESTABLISHED.

Petitioners' claims rely on long established principles that far predate the actions at issue in this lawsuit. For example, the Fourth Amendment standards on which Petitioners rely established legal principles generally before the year 2000. In particular: (1) seizure of property without a warrant is presumed unreasonable, *see United States v. Place*, 462 U.S. 696, 701, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); and (2) retaining property after litigation concludes, especially when that litigation concludes unfavorably to the state

actors, exposes those actors to constitutional violations, *see Rodriguez-Aguirre*, 264 F.3d 1195, (10th Cir. 2001) at 1212, 1214 & n.15.

As to fabrication of evidence which implicates various constitutional rights including substantive due process, the Tenth Circuit concluded in *Pierce* that "[n]o one could doubt that the prohibition on falsification or omission of evidence, knowingly or with reckless disregard for the truth, was firmly established as of 1986, in the context of information supplied to support a warrant for arrest." *Pierce*, 359 F.3d at 1298.

Furthermore, as of at least a decade ago "it was clearly established that false evidence cannot contribute to a finding of probable cause" because "[p]robable cause depends on 'reasonably trustworthy information.'" *Wilkins v. DeReyes*, 528 F.3d 790, 805 (10th Cir. 2008). The Tenth Circuit elaborated:

> Even if there were no case directly on point imposing liability on officials whose falsification of evidence occurred at the post-arrest stage, an official in Ms. Gilchrist's position could not have labored under any misapprehension that the knowing or reckless falsification and omission of evidence was objectively reasonable.

Id. at 1299.

Given the egregious nature of fabricating evidence, government officials need limited specific notice from case law that such conduct violates clearly established law. *See id.* "In deciding the 'clearly established law' question this court employs a 'sliding scale' under which 'the more obviously egregious the conduct in light of

prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'" *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015). As the Tenth Circuit has explained:

> After all, some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt.

Id. at 1082-83.

State Employees have no plausible argument that they did not have "fair notice" that such "conduct was unlawful." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

IV. State Employees' Violated Petitioners' Procedural Due Process Rights.

In addition to malicious prosecution, State Employees through what can accurately be described as extrajudicial forfeiture seized funds from Advantageous without ever returning them even after a district judge dismissed their claims. "The Fourth Amendment does place restrictions on seizures conducted for purposes of civil forfeiture, but it does not follow that the Fourth Amendment is the sole constitutional provision in question when the Government seizes property subject to forfeiture." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993) (citation omitted).

The Tenth Circuit applies "a two-step inquiry in determining whether an individual's procedural-due-process rights were violated," specifically: "(1) Did the individual possess a protected property interest to which due process protection was applicable?" and "(2) Was the individual afforded an appropriate level of process?" *Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1219 (10th Cir. 2006).

Through improper seizure of previously made payments to Advantageous through recoupments, State Employees used their powers to serve as both prosecutor and jury without proving any claims to anyone. If a judicial forfeiture proceeding requires some level of procedural due process, it would be strange indeed if a governmental entity could bypass the court system without affording procedural due process protections. *See U.S. v. James Daniel Good Real Property, et al.*, 510 U.S. 43, 49, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) ("The Fourth Amendment does place restrictions on seizures conducted for purposes of civil forfeiture. . . . "). Governmental conduct that occurs outside the court-room is equally subject to procedural due process. *See Rock v. Arkansas*, 483 U.S. 44, 51 n.9 (1987) (discussing the "procedural due process constitutionally required in some extrajudicial proceedings").

State Employees never afforded Petitioners any meaningful opportunity through pre-deprivation or post-deprivation protections to challenge their unilateral decisions about the validity of their claims. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 536 (1985). "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Id.* at 542. (emphasis added)

V. STATE EMPLOYEES' VIOLATED PETITIONERS' SUBSTANTIVE DUE PROCESS RIGHTS.

As the Tenth Circuit has explained: "The Supreme Court has described two strands of the substantive due process doctrine." *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008). "One strand protects an individual's fundamental liberty interests, while the other protects against the exercise of governmental power that shocks the conscience." These two means of proving a substantive due process violation are separate as, "[c]learly, there is no hard and-fast rule requiring lower courts to analyze substantive due process cases under only the fundamental rights or shocks the conscience standards." *See id.* at 768.

"[A] substantive-due-process claim . . . requires assessing whether a governmental action is arbitrary, irrational, or shocking to the contemporary conscience." *Darr v. Telluride*, 495 F.3d 1243, 1257 (10th Cir. 2007). "This strand of substantive due process is concerned with preventing government officials from 'abusing their power, or employing it as an instrument of oppression.'" *Seegmiller*, 528 F.3d at 767. "[C]onduct deliberately intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 834 (1988).

A protected liberty interest arises from the significant financial harm Petitioners suffered along with the information published about them as a result of the State Employees' actions. *See Koerpel v. Heckler*, 797 F.2d 858 (10th Cir. 1986) at 865. The funds owed to Advantageous, the funds previously paid to them which were recouped as a result of State Employees'

conduct, and the eligibility for providing Medicaid services under a contract with the State are likewise protected property interests subject to substantive due process protection. *See id.*; *Brenna v. S. Colo. State Coll.*, 589 F.2d 475, 476 (10th Cir. 1978) ("Professor Brenna was tenured and thus had a property interest deserving of the procedural and substantive protections of the Fourteenth Amendment.").

State Employees engaged in serious misconduct including pursuing baseless claims and fabricating evidence to support those claims. These were not accidental decisions, including intentional fabrication of evidence and intentional pursuit of claims with both a flawed factual and legal basis. When viewing these allegations in the light most favorable to Petitioners, all Petitioners adequately alleged that State Employees engaged in egregious misconduct. Federal courts have expressly recognized that fabrication of evidence constitutes conscience shocking behavior given that "government perjury and the knowing use of false evidence are absolutely and obviously irreconcilable with the Fourteenth Amendment's guarantee of Due Process in our courts." *Hardwick*, 844 F.3d at 1119.

For instance, the Ninth Circuit when faced with an argument that "an investigator's deliberate fabrication of evidence does not shock the conscience" responded as follows: We join our sister circuits in rejecting that assertion as inconsistent with the Fourteenth Amendment's guarantee of due process: 'Even if we agreed [that probable cause existed], we believe that no sensible concept of ordered liberty is consistent with law enforcement cooking up its own evidence.'" *Spencer v. Peters*, 857 F.3d 789, 801 (9th Cir. 2017).

Because the Tenth Circuit's decision fundamentally misapprehended this Court's qualified-immunity precedents, the Court should not allow it to stand. Additionally, the Court should take this opportunity as suggested by Justice Thomas to reevaluate the qualified immunity defense.

CONCLUSION

In *State ex rel. King v. Advantageous Cmty. Services, LLC*, 329 P.3d 738, 743 (N.M. Ct. App. 2014), the New Mexico Court of Appeals held that "[t]he constitutional integrity of our courts demands that no party may fabricate 'evidence,' represent it to be something which it is not, and then use it in connection with a judicial proceeding." *Id.* at 744. (App.59a ¶ 25).

The significance of the State's fabrication of the evidence cannot be overstated. As the New Mexico Court of Appeals recognized, the "clearance letter issued for each caregiver [was] critical to the State's theory of liability" because the case was founded on a comparison "of the date on the clearance letter for each of the six caregivers to the date each caregiver was hired to support its claims that caregivers were providing services that were billed to Medicaid before DOH confirmed that they had a clear criminal history." *Id.* at 740.

The court found that "[t]he circumstances are ironic in that the State was prosecuting a claim of fraud using created, false documents to do so." *Id.* at 745. As was true in *Pierce*, the case theories State Employees relied upon were a result of the evidence

fabrication and "became one of the inseparable bases for the charges" against Advantageous. *See Pierce*, 359 F.3d at 1295-96.

The Court should grant the petition for a writ of certiorari, set the case for full merits briefing, and then reverse the judgment below.

Respectfully submitted,

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