No. _____

In The
Supreme Court of the United States

JACOB JONES AND BRYAN WRIGHT,

Petitioners,

vs.

WAYNE DUKE KALBAUGH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Tenth Circuit improperly focus on the knowledge and intentions of the suspect, rather than the facts knowable to the officers, in reversing the district court's grant of qualified immunity in an excessive force case?

II. Did the Tenth Circuit analyze clearly established law at too high a level of generality by relying on general statements of Fourth Amendment excessive force principles rather than identifying a case where officers acting under similar circumstances were held to have violated the Fourth Amendment?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Tenth Circuit, whose judgment is sought to be reviewed, are:

Wayne Duke Kalbaugh, as plaintiff and appellant below, and as respondent here.

Oklahoma City Police Officer Jacob Jones and former Oklahoma City Police Officer Bryan Wright,[1] in their individual capacity, as defendants and appellees below, and as petitioners here.

Respondent Kalbaugh's lawsuit also named the Oklahoma City Police Department and the officers in their official capacity, but these claims were dismissed, and are not part of this appeal. App. 3, 11.

No corporations are involved in this proceeding.

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[1] Between the time of the use of force at issue in this lawsuit and the time the lawsuit was filed, Officer Wright left the Oklahoma City Police Department to attend medical school.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jacob Jones and Bryan Wright respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals for the Tenth Circuit is recorded at 807 Fed. Appx. 826, and is attached in the Appendix at pp. 1-14. The order denying rehearing and rehearing *en banc* is attached in the Appendix at p. 38.

The order of the District Court for the Western District of Oklahoma, is attached in the Appendix at pp. 34-36. The report and recommendation of the magistrate judge, which was approved by the district court, is attached in the Appendix at pp. 15-33. The Judgment in favor of petitioners Jacob Jones and Bryan Wright is attached in the Appendix at p. 37.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). The order petitioners ask the Court to review was entered on March 30, 2020, and the Tenth Circuit denied a timely petition for rehearing or rehearing *en banc* on April 23, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent brought the underlying action under 42 U.S.C. §1983, which states:

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondent alleges that petitioners violated his rights under the Fourth Amendment to the United States Constitution, which states:

> 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.

STATEMENT OF THE CASE

On November 25, 2014, respondent Wayne Kalbaugh led police on a high-speed chase through rush hour traffic before wrecking his car trying to drive through a fence. App. 20. He then continued to flee on foot. Petitioners Jacob Jones and Bryan Wright are the OCPD officers who took Kalbaugh into custody after the pursuit. App. 21, 23. The pursuit began when another OCPD officer, Sgt. Kyle Dake, initiated a traffic stop of a red Toyota Corolla. The driver initially stopped but drove off as the officer approached the car. The driver then bailed out of the moving car and Kalbaugh, who had been in the passenger seat, jumped into the driver's seat and continued to drive. App. 20. Sgt. Dake followed the car for several miles before a police helicopter arrived at the scene and took over the pursuit for safety reasons. A local news station's helicopter also followed the car during the latter part of the pursuit. The news station's video of the pursuit shows Kalbaugh driving at a high speed in rush hour traffic, driving in the median, driving on the shoulder, and running red lights. App. 20.

Officer Jones heard and followed the pursuit. Officer Wright also heard the pursuit and followed Jones. App. 20. Officer Jones tried to stop the car by setting up stop sticks, but Kalbaugh was able to evade the stop

sticks by turning into a parking lot and cutting across the grass to a private road. The private road dead-ended at a chain-link fence surrounding a National Guard facility. App. 20. Kalbaugh stopped his vehicle, drove in reverse until his exit was blocked by police cars, and then accelerated forward and tried – unsuccessfully – to crash through the chain link fence. The crash incapacitated the vehicle. App. 20-21. When Kalbaugh stepped out of the car, one handgun fell out of his lap, and he put his hands in the air. App. 21.

Officer Jones ordered Kalbaugh not to move and to keep his hands up. In his summary judgment response, Kalbaugh did not dispute Officer Jones gave these commands but stated that all he heard was "'someone yelling shoot him." App. 21, n. 14. Instead, Kalbaugh pulled two guns from his waistband and dropped them on the ground. Then, with his hands once again in the air, Kalbaugh backed away from the officers just long enough to step over the downed fence. Kalbaugh did not dispute pulling the guns from his waistband, but stated he did so in a "non-threatening way." App. 21, n. 15. As soon as Kalbaugh stepped over the fence, he turned and ran toward the National Guard facility's parking lot. Officers Jones and Wright pursued Kalbaugh on foot, and Officer Wright continued to shout commands for him to stop. App. 21-22. All of this is captured on the news video. App. 2, 20-22, 35-36. Kalbaugh did not dispute Wright gave these commands but stated he "never heard" any commands. App. 22, n. 18.

An Army reservist, Sgt. Kevin Deon, was in the National Guard facility's parking lot when Kalbaugh rammed the fence. He saw Kalbaugh get out of the car with a gun, and was concerned Kalbaugh might have another gun and that there would be a shoot-out between Kalbaugh and the police officers. Sgt. Deon was also concerned that, if Kalbaugh made it across the parking lot, he might enter the building with a weapon. App. 22. Officer Wright fell during the foot pursuit, and Kalbaugh encountered Sgt. Deon before Officer Wright caught up to Kalbaugh. Sgt. Deon put Kalbaugh on the ground, jumped on the back of Kalbaugh's neck, slammed his face into the concrete, and straddled Kalbaugh until Officers Wright and Jones arrived. App. 22-23. Approximately twenty seconds elapsed between the time Officers Wright and Jones reached Kalbaugh and the time Kalbaugh was sitting up and clearly under control. App. at 6, 24, n. 31.

Once Kalbaugh was in custody, he received medical treatment at the scene. App. 25. He was then transported to the hospital for medical clearance, as is required by OCPD policy, and was released back into the custody of the OCPD. App. 25. Kalbaugh was convicted of aggravated attempting to elude a police officer while endangering another, possession of a controlled dangerous substance (methamphetamine), possession of a firearm after former conviction of a felony, and possession of an offensive weapon while committing a felony. The convictions were upheld by the Oklahoma Court of Criminal Appeals. App. 18-19. At his criminal trial, Kalbaugh admitted he had smoked

methamphetamine shortly before the high-speed pursuit. App. 19. Kalbaugh initially testified his injuries were caused by Officers Jones and Wright, but then acknowledged he did not know if any of his injuries were caused by Sgt. Deon, rather than by Officers Jones and Wright, because "[e]verything happened so fast." App. 25. The events happened equally fast from the perspective of the officers.

Kalbaugh filed suit under 42 U.S.C. §1983, alleging Officers Jones and Wright violated his rights under the Fourth Amendment[2] by using excessive force to take him into custody after a high-speed pursuit and foot chase. App. 2, 16. Both Kalbaugh and the defendant officers moved for summary judgment. App. 16. The district court found the officers were entitled to qualified immunity because the facts, construed in the light most favorable to Kalbaugh, failed to establish that Officer Jones or Officer Wright violated Kalbaugh's constitutional rights. App. 35. The district court also found that clearly established law at the time of the arrest did not establish the force used against Kalbaugh violated the Fourth Amendment.

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[2] Plaintiff's Amended Complaint also alleged the petitioners' actions violated the Eighth Amendment. However, this Court has consistently held that all claims law enforcement officers have used excessive force in the course of an arrest or seizure should be analyzed under the objective reasonableness standard of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 388, 109 S.Ct. 1769, 167 L.Ed.2d 443 (1989); *Scott v. Harris*, 550 U.S. 372, 381, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007); *Plumhoff v. Rickard*, 572 U.S. 765, 774, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014).

App. 35. More specifically, the district court concluded that Kalbaugh presented a safety-threat and flight risk and that Officers Jones and Wright lacked sufficient time to recognize that Kalbaugh no longer posed a threat when they used force to subdue him; reasonable officers in the defendant officers' position could have concluded Kalbaugh was not subdued when the alleged excessive force was used. App. 35.

The only force at issue in this case is the strikes used by Officers Jones and Wright between the time they caught up with Kalbaugh and the time, approximately twenty seconds later, when he was sitting up and clearly under control. App. 3, 24, n. 31. While the specific number of strikes is disputed, see App. 23, n. 26, it is undisputed that all of the strikes occurred prior to the time Kalbaugh was in handcuffs. App. 3, 23. It is undisputed that, before the officers were able to handcuff Kalbaugh, Officer Wright observed a knife in Kalbaugh's pocket. App. 3. Kalbaugh admitted he was carrying a knife in his pocket, but stated "he did not remember he was carrying it." App. 3, 23, n. 28. Finally, it is undisputed Kalbaugh's hands were moving during this period. App. 24. Although Kalbaugh stated in his complaint that he was lying motionless, in his motion for summary judgment Kalbaugh stated he heard one of the petitioners say "cuff up" so he "attempted to put his hands behind his back." App. 6, 24.

Both the district court and the Tenth Circuit relied on the news video of this incident. The district court held the video showed Kalbaugh continued to fight even after he was stopped by Sgt. Deon. App. 36. The

video also showed that at the time the force in question was used by Officers Jones and Wright, Kalbaugh was in motion with free use of his legs rather than, as Kalbaugh claimed, passive, compliant, and in the control of the officers. App. 24. Therefore, the video, combined with Kalbaugh's admission that he was moving his hands behind his back, demonstrated Kalbaugh was not subdued at the time Officers Jones and Wright used force. App. 24-25. The Tenth Circuit held the district court erred in relying on the video because the position of one of the officers obstructed the view of Kalbaugh's torso, thus making it impossible to see if Kalbaugh was "moving his upper body and arms to resist arrest." App. 7. However, the Tenth Circuit ignored the effect of Kalbaugh's own statement, in his motion for summary judgment, that he was moving his arms because he was attempting to put his hands behind his back. See App. 6 ("Plaintiff argues that during this period, if he was moving at all, it was only in response to the officers' order to 'cuff up' "). With its focus on the intent of Kalbaugh, rather than the information knowable to the officers, this sentence illustrates the Tenth Circuit's analytical errors in reviewing the district court's grant of summary judgment.

The district court analyzed the incident under the standard outlined in *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1769, 167 L.Ed.2d 443 (1989), focusing on the perspective of a reasonable officer at the scene. The situation facing the officers, as described by the district court, included the following facts: 1) Kalbaugh had just led police on a high-speed car chase; 2) when

cornered, Kalbaugh accelerated off a dead-end road in an attempt to crash his car through a chain-link fence; 3) the officers had observed firearms on Kalbaugh's person; 4) although Kalbaugh put his hands in the air, he ran from Officers Jones, Wright and the other officers at the scene who were moving toward him with their weapons drawn; and 5) Kalbaugh ignored commands to stop during the ensuing foot pursuit. App. 27. Thus, when Officers Jones and Wright caught up with Kalbaugh, seconds after Sgt. Deon had taken Kalbaugh to the ground, they were apprehending an individual who had just committed a life-endangering offense, who was unpredictable and possibly armed, and who had used extreme and irrational measures to elude the officers and avoid capture. App. 28. The district court recognized Kalbaugh had dropped some weapons when he exited his car, but held this did not establish he was no longer a threat because Officers Jones and Wright could not see what other weapons Kalbaugh might have stashed elsewhere on his person. App. 27, n. 34, App. 35. Based on these facts, the district court concluded that each of the three *Graham* factors weighed in favor of Officers Jones and Wright, and that the officers' use of force was objectively reasonable under the circumstances. App. 28.

The Tenth Circuit agreed the first *Graham* factor was met because Kalbaugh led officers on a high-speed chase, had weapons on his person, and ran from the arresting officers. App. 7. However, the Tenth Circuit found questions of fact regarding the second and third *Graham* factors. Based on Kalbaugh's explanation of

why he ran from the police, see App. 6, and his version of events stating he was trying to lie down with his hands out to show he was not resisting, see App. 7, the Tenth Circuit found Kalbaugh did not pose an immediate threat to the safety of the officers or others. App. 7. The Tenth Circuit did not explain why it was appropriate to credit Kalbaugh's version of events as set out in his appellate brief, in which Kalbaugh stated he was trying to put his hands out to show he was not resisting, over the version of events Kalbaugh set out in his summary judgment brief, in which he stated he was trying to reach behind his back to allow the officers to cuff him. See App. 24.

Although the district court found the force used by Officers Jones and Wright was objectively reasonable under the circumstances, the court also addressed the second prong of the qualified immunity analysis. App. 28. The district court held no reasonable jury could conclude Kalbaugh was effectively subdued when Officers Jones and Wright used force, and that preexisting precedent would not have made it clear to every reasonable officer that using the force at issue on a potentially dangerous individual – who had not yet been effectively subdued – violates the Fourth Amendment. App. 28. At the time Officers Jones and Wright were in full pursuit of Kalbaugh, he undeniably posed a safety-threat and flight-risk. App. 30. The few seconds that elapsed between the time Sgt. Deon took Kalbaugh to the ground, and the time the officers caught up with him, was not enough time for the officers to recognize

Kalbaugh no longer posed a threat and react to the changed circumstances. App. at 30, 35.

The Tenth Circuit reversed, holding force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated. App. 9. Officers Jones and Wright violated clearly established law if they continued beating Kalbaugh after it would have been clear to a reasonable officer that Kalbaugh had been effectively subdued. App. 9. The Tenth Circuit remanded for a jury trial on the issue of whether Kalbaugh was subdued. App. 7, 9. Petitioners Jones and Wright then sought rehearing and rehearing *en banc* in the Tenth Circuit, which were denied. App. 38.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because, in reversing summary judgment for the petitioners, the Tenth Circuit misapplied the qualified immunity standard in two important ways. First, the Tenth Circuit focused on facts related to the intent of the respondent which were not knowable to the petitioners. Second, the Tenth Circuit failed to identify a case with similar circumstances, and instead defined clearly established law at a level too general to provide clear guidance to officers. This approach is in conflict with numerous decisions of this Court, including *White v. Pauly*, ___ U.S. ___, 137 S.Ct. 548, 196 L.Ed.2d 463 (2017).

I. REVIEW IS WARRANTED BECAUSE THE TENTH CIRCUIT DECISION REVERSING QUALIFIED IMMUNITY IMPROPERLY FOCUSES ON THE KNOWLEDGE AND INTENTIONS OF THE SUSPECT RATHER THAN THE FACTS KNOWABLE TO THE OFFICERS

In 1989, in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), this Court held that all claims that law enforcement officers have used excessive force in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the objective reasonableness standard of the Fourth Amendment. *Id.* at 394. The question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *Id.* at 397. While the reasonableness standard is an objective standard, it is judged from the perspective of a reasonable officer at the scene rather than with the 20/20 vision of hindsight. *Id.* at 396. A defendant officer's subjective motivations are not relevant, but the fact that the officer is faced with a tense and rapidly-changing situation should be considered in determining reasonableness. *Id.* at 397. The calculus of reasonableness must allow for the reality that police officers are often forced to make split-second judgments about the force warranted in a particular situation. *Id.* at 396-397. *Graham* was not decided on qualified immunity grounds, see *Graham* at 398, n. 12, but the Court's qualified immunity cases addressing claims of excessive force have consistently cited the

Graham standard. See for example, *Saucier v. Katz*, 533 U.S. 194, 204-205, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *Brousseau v. Haugen*, 543 U.S. 194, 198-199, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004); *Ryburn v. Huff*, 565 U.S. 469, 477, 132 S.Ct. 987, 181 L.Ed.2d 966 (2012); *Plumhoff v. Rickard*, 572 U.S. 765, 775, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014); and *Kisela v. Hughes*, 584 U.S. ___, 138 S.Ct. 1148, 1152, 200 L.Ed.2d 449 (2018).

The Tenth Circuit decision in this case cites *Graham* and *Lindsey v. Hyler*, 918 F.3d 1109, 1113 (10th Cir. 2019) for the proposition that "the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer at the scene, and not with perfect hindsight," see App. 5, but then proceeds to analyze the reasonableness of the force used by Officers Jones and Wright based on the assumption that the defendant officers should have somehow understood Kalbaugh was reaching behind his back to surrender rather than to access the knife he was admittedly carrying in his back pocket. See App. 6 ("And although [Kalbaugh] admits he was carrying a knife in his trouser pocket, he did not remember he was carrying it and he would have needed both hands to unsheathe it"). The Tenth Circuit rejected this type of analysis 25 years ago in *Wilson v. Meeks*, 52 F.3d 1547, 1553 (10th Cir. 1995), in which the plaintiff attempted to define the relevant factual dispute regarding summary judgment as whether the decedent was attempting to surrender, rather than use, the gun he was holding at the time he was shot. *Wilson* stated:

> Perhaps Mr. Wilson intended to surrender. If so, his death is particularly tragic. However, the inquiry here is not into Mr. Wilson's state of mind or intentions, but whether, from an objective viewpoint and taking all factors into consideration, Officer Meeks reasonably feared for his life. Qualified immunity does not require that the police officer know what is in the heart or mind of his assailant. It requires that he react reasonably to a threat. Officer Meeks did so. *Wilson* at 1553-1554.

Like the officer in *Wilson*, Officers Jones and Wright reacted reasonably to a threat. More importantly, this Court's decision in *White* precludes consideration of information known only to a suspect. When the defense of qualified immunity is raised, the Court considers only the facts that were knowable to the officers. *White* at 550, citing *Kingsley v. Hendrickson*, 576 U.S. ___, 135 S.Ct. 2466, 2474, 192 L.Ed.2d 416 (2015). In the Fourth Amendment context, this Court has "almost uniformly rejected invitations to probe subjective intent" because "a state of mind is easy to allege and hard to disprove." *Nieves v. Bartlett*, 139 S.Ct. 1715, 1724-1725, 204 L.Ed.2d 1 (2019).

In the instant case, Officers Jones and Wright knew Kalbaugh had led police on a dangerous high-speed chase. App. 27. The officers knew that, while it initially appeared Kalbaugh might surrender when he realized he was on a dead-end road, Kalbaugh instead accelerated and attempted to crash through the fence. App. 27. The officers knew Kalbaugh exited the car with multiple guns. App. 27. Although Kalbaugh

dropped three guns, the officers did not know, and had no way to know, how many other weapons Kalbaugh might have concealed on his person. App. 27, n. 34, App. 35. The officers knew that after dropping the visible weapons, Kalbaugh put his hands up – but only long enough to back over the downed fence. App. 21. The officers knew Kalbaugh dropped his hands, turned around, and resumed his flight as soon as he was clear of the fence; they also knew Kalbaugh ignored multiple commands to stop. App. 21-22. The officers did not know, and had no way to know, that Kalbaugh "ran from the police because he thought he heard them yelling to shoot him." See App. at 6.

Maybe Kalbaugh intended to surrender to Sgt. Deon, or as the Tenth Circuit put it was "trying to lie down and put his hands out to show he was not resisting," see App. 6, but this is not how Officers Jones and Wright, or for that matter Sgt. Deon, perceived the encounter. See App. 22. The officers saw Kalbaugh running towards, and struggling with, an innocent bystander. Could this conduct have been intended as a surrender? Perhaps. State of mind, whether innocent or culpable, is easy to allege but hard to disprove after the fact. *Nieves* at 1724-1725. If Sgt. Deon had been less courageous or quick-thinking, Kalbaugh's approach could have just as easily been the prelude to a hostage situation. The point, as *White* makes clear, is that the qualified immunity determination must focus on the facts known or knowable to Officers Jones and Wright, which in this case were Kalbaugh's observable

actions rather than his subjective intent or motivations.

It is undisputed Officer Wright and Jones gave numerous commands to stop. See App. 22. These commands included: stop reaching for the gun, stop running, stop biting, and, finally, stop resisting. Kalbaugh's failure to comply with the officers' commands is relevant to determining the degree of threat he posed under Tenth Circuit precedent. *Cordova v. City of Albuquerque*, 816 F.3d 645 (10th Cir. 2016), citing *Thomson v. Salt Lake City*, 584 F.3d 1304, 1314 (10th Cir. 2009). The officers knew they gave Kalbaugh commands, which, if followed, would have ended the situation without the need for force. However, the officers did not know, and had no way to know, whether Kalbaugh heard and/or understood those commands.

Officers Jones and Wright knew Kalbaugh had a knife in his pocket. App. 3, 28. This knife clearly posed an immediate threat to the officers; whether Kalbaugh intended to use it is irrelevant. The officers did not know, and had no way to know, that Kalbaugh "did not remember that he was carrying it." See App. 6. Moreover, they did not know, and should not be expected to determine in the midst of the tense and rapidly evolving situation they faced, that the knife might not pose an actual threat of harm because Kalbaugh "would have needed both hands to unsheathe it." See App. 6. Instead, as this Court recognized in *Saucier*, if an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, the officer would be justified in using more force than in fact was needed. *Saucier* at 205;

Estate of Larsen v. Murr, 511 F.3d 1255, 1260 (10th Cir. 2008). Police officers who make on-the-spot choices in dangerous situations are entitled to a fairly wide zone of protection in close cases. *Saucier* at 215, n. 6. A reasonable officer need not await the "glint of steel" before taking self-protective action; by then it is often too late. *Estate of Larsen* at 1260.

The factors to be considered in determining whether a particular seizure is reasonable include the severity of any crimes a suspect had committed, the potential threat the suspect posed to the safety of the defendant officer or others, and whether the suspect was attempting to resist being arrested or taken into custody. *Graham* at 396; *Kisela* at 1152. The second *Graham* factor, whether the suspect posed an immediate threat to the officers or others, is the most important and most fact intensive factor in determining whether a particular use of force was objectively reasonable. *Pauly v. White*, 874 F.3d 1197 (10th Cir. 2017). The critical issue is whether Officers Jones and Wright reasonably perceived they were in danger at the moment they used force. *Thomas v. Durastanti*, 607 F.3d 655, 664-666 (10th Cir. 2010) (Officer who shot at a vehicle he believed was trying to run over him was entitled to qualified immunity because, in a situation where an officer "has mere seconds to react," his "reasonable perceptions are what matters"). Moreover, under Tenth Circuit precedent, whether an individual has been subdued from the perspective of a reasonable officer depends on the officer having enough time to recognize that the individual no longer poses a threat

and react to the changed circumstances. *McCoy v. Meyers*, 887 F.3d 1034, 1048 (10th Cir. 2018).

Based on the circumstances described above, the district court correctly concluded that each of the three *Graham* factors weighed in favor of Officers Jones and Wright, and that the officers' use of force was objectively reasonable. App. 28. The first and third *Graham* factors clearly support the officers' right to qualified immunity because the use of force immediately followed a pursuit in which Kalbaugh put the public at grave risk of serious injury. App. 28. As the video shows, Kalbaugh was driving at a high rate of speed, crossing into the median and onto the shoulder of the road, and ignoring traffic signals in his attempt to elude capture. App. 2, 20. Although Kalbaugh had numerous opportunities to surrender, most notably when the initial driver in the pursuit jumped out of the vehicle and again when Kalbaugh finally exited the vehicle after it was incapacitated by his attempt to crash through a fence, he chose not to do so.

With respect to the second *Graham* factor, while Officer Jones and Wright did not know what Kalbaugh was thinking at any particular instant, based on his prior actions they had every reason to believe he, like the suspect in *Brousseau*, had "proven he would do almost anything to avoid capture." See *Brousseau* at 200. Therefore, it was reasonable for Officers Jones and Wright to believe Kalbaugh posed an immediate threat until he had been successfully handcuffed and searched. The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly

if delay would gravely endanger their lives or the lives of others. *City and County of San Francisco v. Sheehan*, 575 U.S. ___, 135 S.Ct. 1765, 1775, 191 L.Ed.2d 856 (2015). This is true even when, judged with the benefit of hindsight, the officers may have made some mistakes. The Constitution is not blind to the fact that police officers are often forced to make split-second judgments. *Id.* Thus, Kalbaugh cannot establish a Fourth Amendment violation by arguing Officers Jones and Wright "misjudged the situation." *Sheehan* at 1777.

Once Kalbaugh was on the ground, the officers knew Kalbaugh was trying to reach behind his back. Kalbaugh admitted this in his motion for summary judgment. See App. 23-24. Given this admission, it does not matter whether the video, standing alone, conclusively establishes that Kalbaugh was moving his upper body and arms. See App. 7. In *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d (2007), this Court held that when opposing parties tell two different stories, one of which is blatantly contradicted by the record, a court should not adopt that version of facts for purposes of ruling on a motion for summary judgment. *Scott* does not hold, however, that summary judgment is never appropriate unless the moving party's story is confirmed by video evidence. When video does not capture the entire episode, courts should look to other evidence in the record to determine whether a genuine dispute of material fact precluding qualified immunity exists. *Thomas* at 664-665, discussing *Scott*. To the extent there is a contradiction in the

record, it is, as the district court recognized, only a contradiction between Kalbaugh's own shifting stories.

The Tenth Circuit erred in crediting Kalbaugh's testimony that he was "not resisting" and "subdued and compliant," see App. 6-7, over his admission that he was moving his hands. App. 7, 23-24. Kalbaugh may have intended to comply rather than resist, and therefore may have believed he was subdued, but his intent was not knowable to Officers Jones and Wright. Regardless of his intent, if Kalbaugh's hands were still in motion, he was not compliant and subdued. Law enforcement officers may use physical force to subdue an arrestee when he fails to comply with orders to lie still during handcuffing. *Carpenter v. Gage*, 686 F.3d 644, 649 (8th Cir. 2012). Even if a suspect's motive for failing to comply is innocent, his movement may reasonably be interpreted as resistance. *Id*. See also, *Hosea v. City of St. Paul*, 867 F.3d 949, 958 (8th Cir. 2017) (The fact that some force was exerted after the individual has begun to comply does not necessarily render the force objectively unreasonable). *Carpenter* and *Hosea* are consistent with *McCoy*'s recognition that whether an individual has been subdued from the perspective of a reasonable officer depends on the officer having enough time to recognize that the individual no longer poses a threat and react to the changed circumstances.

The Tenth Circuit erred in this case by considering each separate action taken by Kalbaugh in isolation, rather than in combination. This Court addressed a similar situation in *Ryburn v. Huff*, 565 U.S. 469, 132 S.Ct. 987, 181 L.Ed.2d 966 (2012). In *Ryburn*, the

petitioners were investigating a rumor of a letter from a student threatening to "shoot up" a school. *Id.* at 470. The student and his mother voluntarily spoke to the officers outside of their house, but when the officers asked if there were any guns in the house, the mother immediately turned around and ran inside. *Id.* at 471. At this point, fearing for their safety, the officers followed her into the house without a warrant. As in the instant case, the district court considered the encounter as a whole and concluded that the petitioners were entitled to qualified immunity because "within a very short period of time, the officers were confronted with facts and circumstances giving rise to grave concern about the nature of the danger they were confronting." *Id.* at 472-473. The Court of Appeals disagreed, finding any belief the officers or other family members were in danger was objectively unreasonable given that the mother "merely asserted her right to end her conversation with the officers and return to her home." *Id.* at 473. This Court reversed, and remanded for entry of judgment in favor of the officers, stating:

> The panel majority – far removed from the scene and with the opportunity to dissect the elements of the situation – confidently concluded that the officers really had no reason to fear for their safety or that of anyone else.
>
> * * *
>
> [T]he panel majority's method of analyzing the string of events that unfolded at the Huff residence was entirely unrealistic. The majority looked at each separate event in isolation

> and concluded that each, in itself, did not give cause for concern. But it is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture. . . . [T]he panel majority did not heed the District Court's wise admonition that judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation. With the benefit of hindsight and calm deliberation, the panel majority concluded that it was unreasonable for petitioners to fear that violence was imminent. But we have instructed that reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving." Judged from the proper perspective of a reasonable officer forced to make a split-second decision in response to a rapidly unfolding chain of events that culminated with Mrs. Huff turning and running into the house after refusing to answer a question about guns, petitioners' belief that entry was necessary to avoid injury to themselves or others was imminently reasonable. *Ryburn* at 475-477.

In the instant case, the belief of Officers Jones and White that Kalbaugh presented a threat was equally reasonable. Arguably, in isolation, neither Kalbaugh's

decision to run away from the officers and towards the National Guard facility, nor his decision to reach behind his back (and therefore towards his knife), established the officers had reason to fear for their safety. However, when viewed in combination with Kalbaugh's earlier acts, which included a dangerous high-speed pursuit, possession of multiple firearms, and feigned surrender just long enough to facilitate continued flight, any movement which could be construed as movement towards a weapon would have led a reasonable officer to believe he was in grave danger. As the district court concluded, the force used by Officers Jones and Wright was clearly reasonable under the circumstances. Certiorari review is warranted because the Tenth Circuit's basis for reversal, which considered Kalbaugh's claimed last-minute decision to comply in isolation from his dangerous actions only seconds earlier, and which focused on what Kalbaugh "remembered" rather than the facts known to the officers, is in clear conflict with *Graham*, *Saucier*, *Ryburn*, and *White*.

II. REVIEW IS WARRANTED BECAUSE THE TENTH CIRCUIT DECISION ANALYZES CLEARLY ESTABLISHED LAW AT TOO HIGH A LEVEL OF GENERALITY BY RELYING ON GENERAL STATEMENTS OF FOURTH AMENDMENT EXCESSIVE FORCE PRINCIPLES RATHER THAN IDENTIFYING A CASE WHERE OFFICERS ACTING UNDER SIMILAR CIRCUMSTANCES WERE HELD TO HAVE VIOLATED THE FOURTH AMENDMENT

The decision of the Tenth Circuit ignores the decision in *White*, and as a result, suffers from the same flaws as the decision in *Pauly v. White*, 814 F.3d 1060 (10th Cir. 2016), which was vacated and remanded in *White v. Pauly.* The panel opinion cites *Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016) for the proposition that "the qualified immunity analysis involves more than a scavenger hunt for prior cases with precisely the same facts." App. 8. This approach was rejected in *White*, which held the panel majority "misunderstood the 'clearly established' analysis" because it "failed to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment." *White* at 562. Without precedent particularized to the facts of the case, a plaintiff would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Id.*, citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Following *White*, the Court reiterated the importance of precedent squarely governing

the specific facts at issue in *Kisela* and *City of Escondido v. Emmons*, 139 S.Ct. 500, 503, 202 L.Ed.2d 455 (2019).

Like the instant case, *Kisela* involved a suspect who was armed with a knife and behaving erratically. *Kisela* at 1153. However, the precedents relied on by the Ninth Circuit in denying qualified immunity involved deadly force against an unarmed man who had generally followed instructions,[3] and the use of deadly force by an FBI sniper who shot a retreating suspect at Ruby Ridge.[4] The Court found these precedents were too far removed from the facts confronting Kisela to provide notice that his use of force violated the Fourth Amendment.[5] Because excessive force is an area of the law "in which the result depends very much on the facts of each case," police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. *Id.*, citing *Mullenix v. Luna*, 577 U.S. ___, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015). Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful. *Kisela* at 1153. An officer cannot be

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[3] *Deorle v. Rutherford*, 272 F.2d 1272, 1281-1282 (9th Cir. 2001)

[4] *Harris v. Roderick*, 126 F.3d 1189, 1202-1203 (9th Cir. 1997)

[5] See *Kisela* at 1154 ("Suffice it to say, a reasonable police officer could miss the connection between the situation confronting the sniper at Ruby Ridge and the situation confronting Kisela in Hughes' front yard").

said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable officer in the defendants' shoes would have understood that he was violating the right. *Id.*, citing *Plumhoff v. Rickard*, 572 U.S. 765, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014).

In *Escondido*, officers responding to a domestic dispute forcefully took down and placed in handcuffs a man who exited the apartment and tried to push past the officer. *Escondido* at 502. The district court granted qualified immunity on the excessive force claim. *Id.* However, the Ninth Circuit reversed, citing a case involving police force against individuals engaged in passive resistance[6] without explaining how that case prohibited the officer's action in the case before it. That, this Court held, was a problem under its qualified immunity precedents. *Id.* at 504, citing *District of Columbia v. Wesby*, 583 U.S. ___, 138 S.Ct. 577, 593, 199 L.Ed.2d 453 (2018). While there are rare, obvious cases where the unlawfulness of an officer's conduct is sufficiently clear even in the absence of existing precedent, a body of case law is usually necessary to clearly establish the answer. *Escondido* at 504; *Wesby* at 581.

The problem identified by the Court in *Escondido* is the same problem warranting certiorari in the instant case. None of the cases cited in the Tenth Circuit panel decision address a use of force similar to the force used by Officers Jones and Wright. *Perea* involved

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[6] *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013)

a welfare check of a mentally ill individual. The officers located him, and pushed him off of his bicycle, which led to a struggle. The subject was tased 10 times in two minutes and died a short time later. *Perea* at 1201. The court held it is not reasonable for officers to repeatedly use a taser against a subdued arrestee they know to be mentally ill, whose crime is minor, and who poses no threat to the officers or others. *Id.* at 1204 (It was clearly established in 2011 that "the use of disproportionate force to arrest an individual who is not suspected of committing a serious crime and who poses no threat to others constitutes excessive force"). As was true in *Kisela*, a reasonable police officer could miss the connection between the repeated tasing of a mentally ill suspect wanted for a minor crime and the situation confronting the officers in the instant case.

In *Fancher v. Barrientos*, 723 F.3d 1191 (10th Cir. 2013), see App. 8, the suspect attempted to take the defendant officer's gun and then tried to steal a patrol vehicle. The officer tried to reach in and take the keys out of the ignition, but fired one shot at the suspect when the suspect put the car in reverse. *Id.* at 1196. The officer saw the suspect slump, then took two or three steps away from the car, which he testified made him feel safer. *Id.* at 1197. He nevertheless fired six more shots at the suspect. Neither the district court nor the Tenth Circuit questioned the reasonableness of the first shot. However, the officer was not entitled to qualified immunity for the subsequent shots because there was evidence the officer had time between the first shot and the subsequent shots to take a few steps

back to get out of the way of the car, to assess the situation, and to recognize the suspect no longer presented a danger. *Id.* at 1200-1201.[7] In the instant case, in contrast, as in *Plumhoff*, there was no obvious break or pause in which Officer Jones or Officer Wright had a realistic opportunity to stop and evaluate whether Kalbaugh had stopped acting aggressively. At the moment the force was used, in light of Kalbaugh's past actions, the knife in his pocket, and his admission he was trying to reach behind his back, a reasonable officer could have concluded Kalbaugh was intent on resuming his flight and if able to do so would once again pose a threat to the officers or others. See *Plumhoff* at 777.

The Tenth Circuit opinion also relies on *Estate of Smart v. City of Wichita*, 951 F.3d 1161 (10th Cir. 2020). Like *Fancher*, *Estate of Smart* is also a deadly force case. There is a "world of difference"[8] between deadly force and the strikes which were used by Officers Jones and Wright in the instant case. Moreover, *Estate of Smart* was decided after the use of force at issue in the instant case, and therefore is "of no use in

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[7] Thus, *Fancher* is similar to the hypothetical situation distinguished in *Plumhoff* at 777 ("This would be a different case if petitioners had initiated a second round of shots after an initial round had clearly incapacitated *Rickard* and had ended any threat of continued flight, or if *Rickard* had clearly given himself up. But that is not what happened").

[8] See *Sheehan* at 1776, distinguishing *Graham* ("There is a world of difference between needlessly withholding sugar from an innocent person who is suffering from an insulin reaction and responding to the perilous situation Reynolds and Holder faced.")

the clearly established inquiry" because a reasonable officer "is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious." *Kisela* at 1154. *Estate of Smart* is helpful, however, as a reminder that both the *Graham* standard and the qualified immunity inquiry focus on the reasonable beliefs of the officer; therefore, courts should be particularly deferential to the split-second decisions police officers must make in determining when a threat has passed. See *Estate of Smart* at 1171, 1177. Citing *Thomas*, the Tenth Circuit recognized that "the reasonable perceptions [of the officers] are what matter" and that "the salient question is whether the officers' mistaken perceptions that Mr. Smart was the shooter were reasonable." *Id.* at 1171.

The Tenth Circuit opinion cites *Estate of Smart* for the proposition that "Force justified at the beginning of an encounter is not justified *even seconds later*, if the justification for the initial force has been eliminated." App. 9. The quoted language originally comes from *McCoy v. Meyers*, 887 F.3d 1034, 1050, n. 19 (10th Cir. 2018). Unlike *Perea*, *Fancher* and *Estate of Smart*, the decision in *McCoy* addressed a use of force similar to the instant case. Thus, the Tenth Circuit panel was not faced with a choice between undertaking a "scavenger hunt" for similar cases or, as it chose to do instead, extrapolating from deadly force cases with little factual correspondence to the situation with which Officers Jones and Wright were confronted. There was a recent, published Tenth Circuit opinion which squarely

governed the specific facts at issue and which was discussed at length in the district court decision granting summary judgment. See App. 28-30. Because the Tenth Circuit opinion fails to even mention *McCoy*, the opinion offers no basis to distinguish or reject the on-point analysis of *McCoy.*

In *McCoy*, as in the instant case, when the defendant officers first encountered the suspect he was holding a gun. After 30 to 45 seconds, he complied with orders to drop the gun, and was pulled to the ground. *Id*. at 1040. Once McCoy was on the ground, lying facedown with his hands behind his back, officers simultaneously pinned him down and hit him in the head, shoulders, back and arms. He was also placed in a carotid restraint, which caused him to lose consciousness. *Id.* at 1041. While McCoy was unconscious, officers handcuffed his hands behind his back and zip-tied his feet together. The Tenth Circuit characterized the force used up to this point as the "pre-restraint period." *Id.* Once McCoy regained consciousness, officers again struck him, more than 10 times, on his head, shoulders, back and arms and applied a second carotid restraint. He was still handcuffed and zip-tied. The Tenth Circuit characterized this latter application of force as the "post-restraint period." *Id.* at 1042. The Court found the officers were entitled to qualified immunity with respect to the force used in the pre-restraint period, but not the post-restraint period, stating:

> Whether an individual has been subdued from the perspective of a reasonable officer depends on the officer having enough time to

> recognize that the individual no longer poses a threat and react to the changed circumstances. [citing *Fancher* at 1201]
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> * * *
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> According to Mr. McCoy's testimony, as soon as he hit the ground, Officer Pickering "immediately" placed him in a carotid restraint while, "simultaneously," unidentified officers hit him in the head, shoulders, back, and arms. Even if Mr. McCoy was, as he maintains, lying face down with his hands behind his back and with several officers pinning him, a reasonable officer in the Appellees' position could conclude that he was not subdued when the allegedly excessive force occurred. Under these circumstances, the preexisting precedent would not have made it clear to every reasonable officer that striking Mr. McCoy and applying a carotid restraint on him violated his Fourth Amendment rights. *McCoy* at 1048 (internal quotation marks omitted).

McCoy supports the district court's finding that the defendant officers were entitled to qualified immunity in the instant case because all of the force used by Officers Jones and Wright would qualify as "pre-restraint" under the analysis of *McCoy*. It is easy to state a general legal rule that an officer should stop applying force as soon as a suspect stops resisting. However, it is not easy for an officer in a tense, uncertain, and rapidly evolving situation to immediately recognize exactly when a suspect has stopped resisting. Like the border between excessive and acceptable

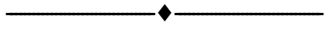
force, the border between resistance and compliance is sometimes hazy. In the midst of a potentially life and death struggle, it may take a few seconds for officers to realize circumstances have changed and the individual no longer poses a threat.

McCoy distinguished *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991), which is cited in the panel decision, see App. 8, in part because the plaintiff had already been frisked prior to the time the force in question was used. See *McCoy* at 1046. *McCoy* also noted the plaintiff in *Dixon* was not suspected of committing any crime; he was stopped so the defendant officers could question him about an associate. *Id.*; *Dixon* at 1462. As *Dixon* recognized, when an individual is not suspected of any crime, and has consented to be frisked, it is not reasonable for officers to choke, beat or hit that individual with a flashlight. See *Dixon* at 1463. As *McCoy* recognized, this rule is of little to no guidance to officers trying to arrest a suspect who has committed or is suspected of violent crimes, and who has surrendered his visible firearms but is not yet in handcuffs. *McCoy* at 1048-1049.

Both *Kisela* and *Escondido* recognize that a district court's grant of qualified immunity should not be overturned based on generalized or remote legal principles; police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue. *Kisela* at 1153; *Escondido* at 503. In each of those recent cases, the Court held:

> [I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. *Kisela* at 1153; *Escondido* at 503.

The approach criticized in *Kisela* and *Escondido* is exactly the approach taken by the Tenth Circuit in the instant case. As it did three years earlier in *White*, the Tenth Circuit erred by denying qualified immunity without identifying any case where officers acting under similar circumstances were held to have violated the Fourth Amendment. The error was particularly egregious in the instant case because there was recent Tenth Circuit precedent governing the circumstances at issue and that precedent was correctly identified and followed by the district court. Perhaps it should not be necessary for this Court to continue to grant certiorari to reiterate the longstanding principle that appellate courts should not continue to define clearly established law at such a high level of generality to render the purposes of the qualified immunity defense meaningless; however, the Tenth Circuit decision in this case demonstrates that the clearly established analysis is still misunderstood and still being misapplied.



CONCLUSION

The Tenth Circuit decision in this case is in conflict with more than thirty years of Supreme Court precedent regarding qualified immunity and the proper

application of the objective reasonableness standard in excessive force cases. Beginning with *Graham* in 1989, this Court has consistently held that the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene. Therefore, in considering qualified immunity, a court should consider only the facts that were knowable to the defendant officers and should not define clearly established law at a high level of generality. *White* at 550, 552. It is not enough for a court to simply state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remand the case for a trial on the question of reasonableness. *Kisela* at 1153; *City of Escondido* at 503. Yet that is exactly what the Tenth Circuit did in this case. For the reasons stated above, this Court should grant a writ of certiorari to clarify and reiterate the proper application of the qualified immunity defense.

Respectfully submitted,

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