No. __________

IN THE

Supreme Court of the United States

SILVER CITY POLICE CHIEF ED REYNOLDS AND CAPTAIN RICKY VILLALOBOS,

Petitioners,

v.

KARRI DALTON AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF NIKKI BASCOM, DECEASED, AND NEXT FRIEND TO M.B., A MINOR CHILD, AND A.C., A MINOR CHILD,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent's decedent Nikki Bascom and Silver City Police Department Captain Marcello (Mark) Contreras were involved in a romantic relationship for several years. In March 2016, Contreras began accusing Bascom of having an affair with her co-worker. On March 9, 2016, Bascom's son called 911 to report that Contreras had threatened to kill himself following an argument. On March 21, 2016, Bascom reported to SCPD Chief Ed Reynolds that Contreras had harassed the man he believed she was having an affair with; Chief Reynolds told Contreras to stop his behavior. On the morning of April 21, 2016, Bascom reported to Chief Reynolds that Contreras had stopped in front of her vehicle and taken her phone. Chief Reynolds placed Contreras on administrative leave shortly after 1:00 p.m. At approximately 4:30 p.m., Contreras killed Nikki Bascom and then himself. On behalf of Ms. Bascom's estate and her minor children, Respondent filed this case under 42 U.S.C. § 1983, alleging *inter alia* that Chief Reynolds and Captain Villalobos, Petitioners here, violated Bascom's Equal Protection rights by failing to provide her with police protection. Under the particular facts of this case:

I. Did the Tenth Circuit err in denying Petitioners qualified immunity on Dalton's Equal Protection claim where it was not clearly established that police officers in Petitioners' position would have been on notice that their conduct in March and April 2016 was unconstitutional (i.e. where no Equal Protection jurisprudence from this Court squarely governed the particular facts of this case)?

II. For purposes of qualified immunity, can a federal court of appeals decision constitute clearly established law?

PARTIES TO THE PROCEEDING, RELATED CASES, AND RULE 29.6 STATEMENT

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

- Karri Dalton, as the Personal Representative of the Estate of Nikki Bascom, deceased, and Next Friend to M.B., a minor child, and A.C., a minor child, plaintiff, appellee below, and respondent here.
- Silver City, New Mexico Police Chief Ed Reynolds and Captain Ricky Villalobos, defendants, appellants below, and petitioners here.

The Town of Silver City, New Mexico and the Estate of Marcello Contreras are defendants in the underlying matter but were not appellants below and are not parties to this Petition.

The following proceedings are directly related to this case:

- *Dalton v. Town of Silver City*, No. 2:17-cv-01143, U.S. District Court for the District of New Mexico. Memorandum Opinion and Order Denying Summary Judgment entered Mar. 7, 2019.
- *Dalton v. Reynolds*, No. 19-2047, U.S. Court of Appeals for the Tenth Circuit. Judgment entered June 28, 2021.

Grant County, New Mexico and Grant County Sheriff's Office Sergeant Frank Gomez, Deputy Jacob Villegas, and Detective Adam Arrellano are not parties to this Petition but were defendants in the underlying district court action. Defendants Grant County and Sergeant Gomez were appellants in the following related proceeding:

- *Dalton v. Town of Silver City*, No. 19-2061 U.S. Court of Appeals for the Tenth Circuit. Appeal dismissed Mar. 24, 2020.

No corporations are involved in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ed Reynolds and Ricky Villalobos respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The June 28, 2021 panel opinion of the Court of Appeals for the Tenth Circuit is reported at 2 F.4th 1300 and is reprinted in the Appendix hereto, pp. 1-23.

The memorandum opinion of the United States District Court for the District of New Mexico denying the motion for summary judgment and qualified immunity filed by Petitioners has not been reported but is available at 2019 WL 1085181. It is reprinted in the Appendix hereto, pp. 24-48.

JURISDICTION

The Tenth Circuit had appellate jurisdiction because the district court's order denying Petitioners' motion for summary judgment was a "final decision" within the meaning of 28 U.S.C. § 1291 and the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 527-30 (1985); *see also Plumhoff v. Rickard*, 572 U.S. 765, 771-72 (2014) (pretrial orders denying qualified immunity are immediately appealable). Petitioners filed this timely petition for writ of certiorari on August 31, 2021. *See* Sup. Ct. R. 13.1, 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent brought the underlying action under 42 U.S.C. § 1983, which provides, in relevant part:

> 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...

Respondent alleged that Petitioners violated her decedent's rights under Section 1 of the United States Constitution's Fourteenth Amendment, which provides in relevant part that: "No State shall…deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

1. This case arises out of Nikki Bascom's murder by her ex-boyfriend, Silver City Police Department Captain Marcello (Mark) Contreras on April 21, 2016. App. 1, 25. Based on the events of that morning and several incidents in the preceding months, Petitioners initiated an internal investigation of Contreras and placed him on leave, but did not criminally investigate him. *Id.* Later in the afternoon of April 21st, Contreras shot and killed Ms. Bascom, and then himself. *Id.* The pertinent facts of this case (discussed in brief below) are set forth in the Tenth Circuit panel's opinion, *see* App. 3-10, as well as the District Court's memorandum opinion. *See* App. 26-33.

2. From the 1990s to 2016, Mark Contreras and Nikki Bascom had married, divorced, and then dated again. App. 3. In 1999, Bascom (who was, at the time, married to Contreras) reported to SCPD that Contreras had threatened to shoot her at gunpoint because he believed she was having an affair. *Id.* Contreras admitted pushing his wife but denied threatening her. *Id.* SCPD charged him with battery on a household member, though it is not clear how this charge was resolved. *See id.* In 2001, SCPD hired Contreras as a police officer. *Id.*

On March 9, 2016, Ms. Bascom's thirteen-year-old son called 911 to report that Contreras and Bascom were arguing—again about an affair suspected by Contreras—and that Contreras was threatening to shoot himself. App. 4. Three SCPD officers, including Sergeant Joseph Arredondo (not a named Defendant below) responded to the call. *Id.* When the officers arrived on the scene, Ms. Bascom handed Sergeant Arredondo a gun she had taken from Contreras and said "[Contreras] has gone crazy and wants to kill himself." *Id.* Ms. Bascom informed Sergeant Arredondo that Contreras had been drinking heavily for two days. *Id.* Sergeant Arredondo observed that Contreras had alcohol on his breath and had bloodshot, watery eyes. *Id.* Arredondo allowed Contreras to drive his truck into the driveway. *Id.*

Sergeant Arredondo reported the domestic disturbance incident to then-Chief Ed Reynolds. App. 5. Chief Reynolds met with Contreras and suggested he take advantage of SCPD's employee assistance program. *Id.* Contreras was not charged with any offenses—domestic violence, refusal to obey an officer, or DWI—as a result of the incident. *Id.*

On March 25, 2016, Ms. Bascom called Chief Reynolds to report that Contreras had followed her in his car and had also harassed one of her co-workers at a Walgreens drug store. App. 5. Contreras believed that Ms. Bascom was in a romantic relationship with the co-worker. *Id.* Ms. Bascom asked Chief Reynolds to prevent Contreras from harassing her co-worker. Chief Reynolds contacted Contreras and told him to "knock it off" and that any further incidents would impact his job. *Id.*

On April 21, 2016, Contreras, while in an SCPD patrol car, forced Ms. Bascom off the road by swerving in front of her car. App. 6. When Bascom tried to call 911, Contreras took her cell phone. *Id.* Contreras then went to the home of Ms. Bascom's co-worker and said, "I'm telling you right now you haven't seen the last." *Id.* Meanwhile, Ms. Bascom went to the SCPD police station to report the incident. *Id.* She told Chief Reynolds that Contreras was harassing her and had taken her phone. *Id.* Chief Reynolds sent Captain Villalobos to the co-worker's home to ensure he was safe. *Id.* Captain Villalobos later called Chief Reynolds and told him that Contreras had threatened Ms. Bascom's co-worker. *Id.*

Captain Villalobos returned to the police station to take a statement from Ms. Bascom, who was still there. App. 6. Despite Captain Villalobos's warning to Ms. Bascom that she could be charged with false reporting, Ms. Bascom told Villalobos that: (1) Contreras stopped her while driving by pulling his car quickly in front of hers and forcing her to the side of the road, (2) Contreras reached into her car and grabbed her phone out of her hand when she was calling 911, and (3) she had changed the locks on her home and Contreras did not have a key. App. 6-7.

While Captain Villalobos took Ms. Bascom's statement at the station, Chief Reynolds met with Contreras in Ms. Bascom's home to notify him that he was being placed on administrative leave. App. 7. Chief Reynolds took Contreras's service weapon. *Id.* Contreras admitted that he was angry, that he had followed Ms. Bascom and her co-worker that morning, that he had pulled over Ms. Bascom and confronted her, and that he had grabbed her cell phone and left. *Id.* He also admitted he had gone to the co-worker's house and confronted him. *Id.* Chief Reynolds returned to the police station and recounted the meeting to Ms. Bascom, who was angry that Chief Reynolds left Contreras in her home "with all those guns." *Id.* Captain Villalobos told

Chief Reynolds about Ms. Bascom's report. *Id.*

On her way home from the police station, Ms. Bascom called 911 to report that Contreras was following her again. App. 8. Grant County Sheriff's Department officers responded and spoke to both Ms. Bascom and Contreras. *Id.* Chief Reynolds called GCSD Sergeant Gomez, but did not tell GCSD about Contreras's prior conduct. *Id.* Later, on her way to a domestic violence shelter, Ms. Bascom called 911 to report that Contreras was following her there. *Id.* She checked in to the domestic violence shelter at about 1:45 p.m. *Id.* Around the same time, GCSD Sergeant Yost was patrolling the area around the co-worker's house because of Contreras's alleged threats. *Id.* Sergeant Yost started following Contreras, and then around 3:30 p.m., Sergeant Yost called Captain Villalobos and Chief Reynolds and told them he was following Contreras but did not feel that he had enough information to stop him. *Id.* Chief Reynolds did not tell Sergeant Yost about Contreras's reported theft of Ms. Bascom's cell phone and false imprisonment of Ms. Bascom. *Id.*

Ms. Bascom left the domestic violence shelter and drove to her friend's house; Contreras followed her there as well. App. 8. At 4:20 p.m., Contreras shot and killed Ms. Bascom in front of her friend's house and then turned the gun on himself. *Id.*

3. Karri Dalton, on behalf of Ms. Bascom's children and estate, sued SCPD, Chief Reynolds, Captain Villalobos, and the Town of Silver City. App. 11. The Estate alleged, among other things, that Chief Reynolds and Captain Villalobos violated Ms. Bascom's clearly established right to due process and

equal protection of the law in violation of 42 U.S.C. § 1983. App. 11, 24. Petitioners moved for summary judgment on the basis of qualified immunity. *See id.*

The District Court granted Petitioners' Motion for Summary Judgment seeking dismissal of Dalton's Due Process claims. *See* App. 45-47. However, the District Court denied Chief Reynolds and Captain Villalobos qualified immunity on Dalton's Equal Protection claim. In support of its ruling, the District Court found that "Bascom received disparate treatment compared to other domestic violence victims." App. 37. Throughout its opinion discussing the individual liability of Reynolds and Villalobos, as well as its analysis of whether or not they were entitled to qualified immunity, the District Court repeatedly (and exclusively) cited three Equal Protection opinions from the Tenth Circuit: *Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988); *Price-Cornelison v. Brooks*, 524 F.3d 1103 (10th Cir. 2008); and *SECSYS, LLC v. Vigil*, 666 F.3d 678 (10th Cir. 2012). *See generally* App. 37-42. As discussed herein, none of these cases squarely govern the unique facts of the present case.

4. Following full briefing and oral argument, the United States Court of Appeals for the Tenth Circuit affirmed the District Court's rulings in all respects. *See generally* App. 1-24. In pertinent part, the Tenth Circuit found that "[a]t the time of the Officers' conduct, it was clearly established in" the Tenth Circuit "it that it is unlawful to provide less police protection to a sub-class of domestic violence victims, like those whose assailants were police officers with whom they had been in a domestic relationship." App. 20. As did the District Court, the Tenth Circuit

panel cited to *Watson* and *Price-Cornelison*—which the panel asserted were "factually similar cases"—in support of this ruling. *See* App. 20-22. The Tenth Circuit entered its Judgment in favor of Respondent on June 28, 2021.

BASIS FOR FEDERAL JURISDICTION

Respondent filed her complaint in New Mexico state district court. Petitioners, along with all defendants, removed the case to the United States District Court for the District of New Mexico based upon federal question jurisdiction, 28 U.S.C. § 1331. The Petitioners sought qualified immunity and summary judgment on Respondent's Equal Protection claims. The district court denied Petitioners' motion. Petitioners appealed to the United States Court of Appeals for the Tenth Circuit; the Tenth Circuit exercised jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE TENTH CIRCUIT PANEL MANIFESTLY ERRED IN ITS APPLICATION OF QUALIFIED IMMUNITY

This Court "often corrects lower courts when they wrongly subject individual officers to liability." *City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 611 n.3 (2015); *see also White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) ("[i]n the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases"). This Court "has found this necessary both because qualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial." *White*, 137 S.Ct. at 551 (cleaned up); *see also City of Escondido v. Emmons*, 139 S.Ct. 500 (2019) (per curiam) (granting petition for certiorari and reversing lower court's determination that law enforcement officer was not entitled to qualified immunity); *Kisela v. Hughes*, 138 S.Ct. 1148 (2018) (per curiam); *Mullenix v. Luna*, 577 U.S. 7 (2015) (per curiam); *Carroll v. Carman*, 574 U.S. 13 (2014) (per curiam); *Plumhoff*, *supra*, 572 U.S. at 765; *Wood v. Moss*, 572 U.S. 744 (2014); *Reichle v. Howards*, 566 U.S. 658 (2012); *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam); *Ryburn v. Huff*, 565 U.S. 469 (2012) (per curiam). Here, the Tenth Circuit clearly erred when it denied qualified immunity to Petitioners, and this Court should grant certiorari and reverse the error.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). This immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Put another way, "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

An officer should not be subject to liability if the law at the time did not "clearly establish" that the officer's conduct would violate the Constitution. *Brosseau*, 543 U.S. at 198. "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. "It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *D.C. v. Wesby*, 138 S.Ct. 577, 590 (2018). The focus is on whether the officer had fair notice that their conduct was unlawful. *Brosseau*, 543 U.S. at 198. Under this Court's precedents, to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

Qualified immunity is "the most important doctrine in the law of constitutional torts" because it shields a government official from a civil suit for monetary damages unless said official violates "clearly established" constitutional rights. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 Fla. L. Rev. 851, 852 (2010); *Harlow*, 457 U.S. at 818. Over the last decade, this Court has greatly expanded the qualified immunity defense, beginning with its opinion in *Ashcroft v. al-Kidd*, *supra*, where this Court reformulated the qualified immunity standard to require "*every* 'reasonable official'...[to] underst[an]d that what he is doing violates that right.'" *al-Kidd*, 563 U.S. at 741 (emphasis supplied) (quoting *Anderson*, 483 U.S. at 640). To overcome the defense of qualified immunity, a plaintiff must carry the heavy burden of showing the violation of a "clearly established" constitutional right. "To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent" such that it is "settled law." *Wesby*, *supra*, 138 S.Ct. at 589.

A. The Tenth Circuit Defined the Relevant Constitutional Right at a Highly Generalized Level

This Court has "repeatedly told courts…not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742 (citation omitted); *Stanton v. Sims*, *supra*, 571 U.S. at 5; *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014);

Mullenix, *supra*, 577 U.S. at 12. "[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne*, 526 U.S. 603, 615 (1999). Consequently, the court must define the clearly established right at issue on the basis of the specific context of the case. *See*, *e.g.*, *Tolan*, 572 U.S. at 657; *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (the "clearly established" inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition"); *City of Escondido v. Emmons*, *supra*, 139 S.Ct. at 503, *on remand*, 921 F.3d 1172 (9th Cir. 2019) (affirming grant of summary judgment based on qualified immunity).

In all Section 1983 cases, courts must undertake the qualified immunity analysis "in light of the specific context of the case, not as a broad general proposition." *Mullenix*, 577 U.S. at 12 (quoting *Brosseau v. Haugen*, *supra*, 543 U.S. at 198); *see also Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993) (plaintiff cannot rely on general, conclusory allegations or broad legal truisms to show that a right is clearly established). Put another way, the court must enunciate "a concrete, particularized description of the right." *Hagans v. Franklin Cnty. Sheriff's Office*, 695 F.3d 505, 508 (6th Cir. 2012); *see also Spady v. Bethlehem Area Sch. Dist.*, 800 F.3d 633, 638 (3d Cir. 2015) (the right at issue must be framed "in a more particularized, and hence more relevant, sense, in light of the case's specific context"); *Cope v. Cogdill*, 3 F.4th 198, 205 n.4 (5th Cir. 2021) (rejecting dissent's assertion that "clearly established rights may be defined generally" in light of the "heightened requirements that" this Court "has set forth in its recent qualified immunity decisions"); *Shooter v. Arizona*, 4 F.4th 955, 962 (9th Cir. 2021) (rejecting plaintiff's reliance "on overarching principles that define his due process rights at a very 'high level of generality'") (quoting *Kisela*, *supra*, 138 S.Ct. at 1152); *Sampson v. Cnty. of Los Angeles*, 974 F.3d 1012, 1024-25 (9th Cir. 2020); *Kollaritsch v. Michigan State Univ. Bd. of Trustees*, 944 F.3d 613, 626-27 (6th Cir. 2019).

The only constitutional provision at issue here is the Equal Protection Clause of the Fourteenth Amendment. Equal protection is, essentially, a direction that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). The equal protection clause is triggered when the government treats someone differently than another who is similarly situated. *City of Cleburne*, 473 U.S. at 439. "[I]t is of course important to be precise about what equal protection is and what it is not." *SECSYS, LLC v. Vigil*, *supra*, 666 F.3d 678, 684 (10th Cir. 2012) (Gorsuch, J.). "'Equal protection of the laws' doesn't guarantee equal results for all, or suggest that the law may never draw distinctions between persons in meaningfully dissimilar situations—two possibilities that might themselves generate rather than prevent injustice." *Id.* (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-73 (1979)). "Neither is the equal protection promise some generic guard against arbitrary or unlawful governmental action." *SECSYS*, 666 F.3d at 684 (citing *Snowden v. Hughes*, 321 U.S. 1, 8 (1944)). Instead, the Equal Protection Clause "seeks to ensure that any classifications the law makes are made 'without respect to persons,' that like cases are treated alike, that those who 'appear similarly situated' are not treated differently without, at the very least, 'a rational reason for the difference.'" *SECSYS*, 666 F.3d at 684-85 (quoting *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 602 (2008) (quotations omitted)).

A Fourteenth Amendment claim arising out of an alleged failure to provide police protection is viable against individual officers only where the plaintiff demonstrates (1) that she is a member of a protected class; (2) that she was treated differently from similarly situated individuals who were not members of the protected class; and (3) that the officers' failure to provide police protection was motivated, at least in part, by a discriminatory purpose. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (stating that a plaintiff in an Equal Protection action has the burden of demonstrating that a state actor intentionally discriminated against her because of her membership in a protected class); *see also Hayden v. Grayson*, 134 F.3d 449, 453 (1st Cir. 1998).

In the present case, the District Court—without citing to a specific opinion from this Court, or even the Tenth Circuit—found that "it was clearly established that providing less police protection to domestic violence victims whose assailants were officers of the department compared to other domestic violence victims may violate Equal Protection." App. 21. The Tenth Circuit panel similarly held that "it was clearly established…that it is unlawful to provide less police protection to a sub-class of domestic violence victims." App. 20; *see also* App. 21 ("our circuit *has* clearly established precedent that police officers may not intentionally discriminate in providing police protection to domestic violence victims") (emphasis in original). These rulings, as well as the District Court's statement that "Equal Protection applies to classes of domestic violence victims, wholly apart from their gender, and even though domestic violence victims are not a protected class," see App. 34, are precisely the type of overbroad generalizations of law that this Court disfavors. *See City of Escondido v. Emmons*, *supra*, 139 S.Ct. at 503. Moreover, the panel "did what [this] Court has repeatedly told [the lower courts] not to do: [it] created a new rule and then applied that new rule retroactively against the police officers." *Wesby v. D.C.*, 816 F.3d 96, 111 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

B. No Particularized Clearly Established Law Squarely Governs This Case

For purposes of qualified immunity, the relevant "clearly established law" must be "particularized" to the facts of the case. *White v. Pauly*, *supra*, 137 S.Ct. at 552 (quoting *Anderson v. Creighton*, *supra*, 483 U.S. at 640). Otherwise, "[p]laintiffs 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." *White*, 137 S.Ct. at 552 (quoting *Anderson*, 483 U.S. at 639). This Court has repeatedly reaffirmed and applied this "particularity" or "specificity" requirement. *See Ziglar v. Abbasi*, 137 S.Ct. 1843, 186-67 (2017); *Wesby*, *supra*, 138 S.Ct. at 590 ("[t]he clearly established standard…requires a high degree of specificity") (quotations omitted)); *Kisela v. Hughes*, *supra*, 138 S.Ct. at 1153 ("police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue") (quoting *Mullenix*, 577 U.S. at 13).

There is no particularized law—especially from this Court—which would have put Chief Reynolds and Captain Villalobos on fair notice that their actions in March and April of 2016 would be unconstitutional. "When a plaintiff complains that a public official has violated the Constitution, qualified immunity shields the official from individual liability unless he had fair notice that his alleged conduct would violate 'the supreme Law of the Land.'" *Echols v. Lawton*, 913 F.3d 1313, 1326 (11th Cir.) (quoting U.S. Const. art. VI), *cert. denied*, 139 S.Ct. 2678 (2019). "Because the Constitution's general provisions can be abstract," fair notice protects an official from "liab[ility] for conduct that [he or she could] reasonably believe[] was lawful." Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1873 (2018). The prior Tenth Circuit cases chiefly relied upon by the District Court and the Tenth Circuit panel below—*Watson*, *Price-Cornelison*, and *SECSYS*—could not have put Petitioners on notice that their conduct as of March and April 2016 was unconstitutional.

1. *Watson v. City of Kansas City*

First, in *Watson*, the plaintiff—who had a son from a previous relationship—was married to a police officer. *Watson*, 857 F.2d at 692. When her husband became abusive, plaintiff Watson obtained a restraining order against him. *Id.* Watson reported to the police that her husband "shook a knife at her"—however, the police captain purportedly told her that she would be arrested if she called the police again. *See id.* After divorcing, Watson and her husband later remarried—however, he again became physically abusive, even while on duty as a police officer. *Id.* He also abused Watson's son; following that incident, plaintiff requested that her husband be arrested, and later signed a formal complaint against him. *See id.*

When plaintiff again filed for divorce, the court "issued an order providing that [plaintiff] was to have the use, occupancy, and control of the parties' residence and restraining the parties from molesting or interfering with the privacy of the other." *Watson*, 857 F.2d at 693. Nonetheless, her husband went to the family's residence, where he held Watson and the children for three days. *See id.* Watson called the police and requested assistance because her husband had forced his way into the house, put a gun to her head, and threatened to kill both her and himself. *Id.* Several police officers responded to the call; Watson indicated that she wanted her husband to be arrested, however, the officers did not arrest him. *Id.* He later held the family hostage again and raped Watson, before killing himself. *See id.*

In her subsequent Section 1983 lawsuit, Watson alleged "that the Police Department and the various individual police officers violated her right to equal protection under the law." *Watson*, 857 F.2d at 693. While it found that "plaintiff's version of events regarding her own situation, if believed, may demonstrate a pattern of deliberate indifference on the part of the Police Department," *see id.* at 696, the Tenth Circuit affirmed the district court's grant of summary judgment against Watson on her claim of class-based discrimination based on sex. *Id.* Finally, the Tenth Circuit noted that "[t]he basis for the district court's order granting summary judgment for defendants in their individual capacities [wa]s unclear." *Id.* at 697. Consequently, the Tenth Circuit instructed the district court on remand to "determine whether qualified immunity shields these individual defendants notwithstanding the presence of a section 1983 claim against the city." *Id.* On remand, the Defendants in *Watson* renewed their motion for summary judgment seeking qualified immunity, and the district court granted that motion "[s]ince the law regarding a police officer's duties under the equal protection clause in responding to domestic assaults was not clearly established at the time of defendants' action." *Watson v. City of Kansas City*, 1989 WL 21165, *2 (D. Kan. Feb. 2, 1989) (unpublished).

2. *Price-Cornelison v. Brooks*

Twenty years later, in *Price-Cornelison*, the plaintiff was in a same-sex relationship with another woman (Rogers); after that relationship deteriorated, Price-Cornelison sought an emergency protective order, alleging that Rogers had threatened to shoot both Price-Cornelison and then herself, and that Rogers had fired a gun over the telephone while making this threat. *Price-Cornelison*, 524 F.3d at 1106. Plaintiff asked the state court to order Rogers to leave their residence on or before the following day. *Id.* The state court issued Price-Cornelison's requested emergency protective order that same day. *Id.* However, even after the court issued its order, Rogers began taking items from Price-Cornelison's farm. *Id.* Plaintiff called the county sheriff's office and asked the undersheriff to go out to the farm and stop Rogers from removing plaintiff's property. *Id.* However, Brooks refused, and also refused to make a police report. *Id.* Additionally, similar to what was alleged in *Watson*, "Brooks informed Price-Cornelison that if she went to the farm, she would be arrested." *Id.*

Price-Cornelison and one of her friends called the sheriff's office several more times that day, to no avail. *Price-Cornelison*, 524 F.3d at 1106. Before going home that day, the undersheriff left instructions at the sheriff's office that if anyone called again about Price-Cornelison's emergency protective order, sheriff's personnel were to have the caller contact him the next morning. *Id.* at 1107. According to the undersheriff, he left these instructions because he "did not want any of [the other deputies] to be negotiators as to who owned the property." *Id.* When Price-Cornelison did return home late at night, she found that Rogers had taken many things belonging to Price-Cornelison. *Id.* Two weeks later, the state court issued Price-Cornelison a permanent protective order against Rogers; that order required Rogers, among other things, "to remain away from" Price-Cornelison and away from her residence. *Id.* Despite this permanent protective order, Rogers returned to the farm and gained access to it by crawling under a fence. *Id.* Price-Cornelison called the sheriff's office twice to report that Rogers was violating the protective order by being present at Price-Cornelison's farm. *Id.* However, the woman who answered the phone at the sheriff's office (apparently a deputy) told Price-Cornelison that "they" were "busy" and were not going to send anyone out to her farm. *Id.*

Price-Cornelison sued the undersheriff, claiming that he deprived her "of equal protection of the law when he refused to enforce her protective orders because she is a lesbian victim of domestic violence." *Price-Cornelison*, 524 F.3d at 1108. More specifically, she alleged that the undersheriff "deprived her of equal protection of the law when he refused to enforce both her emergency and permanent protective orders to the same extent that he enforced protective orders obtained by heterosexual victims of domestic violence." *Id.* at 1110. Plaintiff purported to contrast the undersheriff's enforcement of Chandler's (a heterosexual woman's) protective order with his refusal to enforce both Price-Cornelison's emergency and permanent protective orders. *Id.* at 1111. However, the Tenth Circuit found that the undersheriff's "refusal to enforce Price-Cornelison's *emergency* protective order…by refusing to go to her farm and prevent Rogers from removing any property" was "not sufficiently similar" to his enforcing Chandler's protective order. *Id.* (emphasis in original). "Chandler's protective order was valid and enforceable on the day that she called seeking its enforcement. That was not the case with Price-Cornelison's emergency protective order." *Id.* Price-Cornelison did not muster any evidence suggesting that, contrary to his treatment of Price-Cornelison, the undersheriff "would have enforced a heterosexual domestic violence victim's protective order that was not yet effective under these same circumstances." *Id.*

Price-Cornelison did, however, later obtain an enforceable permanent protective order. *Price-Cornelison*, 524 F.3d at 1111. Comparing the undersheriff's refusal to enforce Price-Cornelison's permanent protective order with the level of enforcement he provided to Chandler, and viewing this differing treatment in light of the county's apparent policy of providing less police protection to lesbian victims of domestic violence than it provided to heterosexual domestic violence victims, a two-judge panel majority of the Tenth Circuit found that Price-Cornelison asserted sufficient evidence to show that the undersheriff treated her less favorably than he treated other domestic violence victims. *Id.* at 1113. Citing the Tenth Circuit's prior general statement that, "[a]lthough there is no general constitutional right to police protection, the state may not discriminate in providing such protection," the panel majority found that the prior decision in *Watson* was sufficient to put the undersheriff "on notice that providing Price-Cornelison less police protection than other domestic violence victims because she is a lesbian would deprive her of equal protection." *Id.* at 1114-15 (citing *Watson*, *supra*, 857 F.2d at 694).

Ultimately, the Tenth Circuit reversed the district court's decision denying the undersheriff qualified immunity on Price-Cornelison's equal protection claim, to the extent that claim was based upon his refusal "to enforce Price-Cornelison's *emergency* protective order." *Price-Cornelison*, 524 F.3d at 1115 (emphasis in original). The two-judge majority in *Price-Cornelison* affirmed the district court's decision denying the undersheriff qualified immunity on Price-Cornelison's equal protection claim to the extent that it was based upon his "refusal to enforce Price-Cornelison's permanent protective order." *Id.* (emphasis in original). Notably, the third panel member would have granted the undersheriff qualified immunity on both claims because, *inter alia*, "Price-Cornelison and Chandler were not similarly situated and their cases [we]re not comparable." *See id.* at 1119-20 (O'Brien, J., dissenting).

Neither *Watson* nor *Price-Cornelison* is particularized to the facts of the present case. In both of those prior opinions, the plaintiffs had a restraining or protective order against their respective abusers. Nikki Bascom did not secure either a temporary or permanent protective order that could be enforced by Chief Reynolds or Captain Villalobos. Unlike with the plaintiffs in *Watson* and *Price-Cornelison*, neither Chief Reynolds nor Captain Villalobos overtly threatened to arrest Bascom—while Captain Villalobos may have warned Bascom she could be charged with false reporting, Villalobos did not ultimately dissuade Bascom from making a statement. Bascom was also not a lesbian victim of domestic violence, as was Price-Cornelison. Moreover, as noted above, the individual defendants in *Watson* were eventually granted qualified immunity, while the two-judge majority in *Price-Cornelison* upheld in part and reversed in part the district court's order denying the undersheriff qualified immunity; the third Judge would have granted the undersheriff qualified immunity on both of Price-Cornelison's Equal Protection claims. Because neither of these cases is factually on point, along with fact that the *Watson* Defendants were granted qualified immunity and the *Price-Cornelison* Defendant was only partially denied immunity by two of three Judges of the Tenth Circuit, these cases could not clearly establish any legal principle applicable to the particular facts of this case.

3. <u>*SECSYS, LLC v. Vigil*</u>

Moreover, while they did not *per se* rely on the case as "clearly established" law, both the panel and the District Court also cited the Tenth Circuit's prior opinion in *SECSYS, LLC v. Vigil* in analyzing the Equal Protection issue in this case. *See generally* App. 14, 16, 36-38. *SECSYS* is extraordinarily remote in terms of its facts: in that case, the plaintiff (a disappointed bidder for a state contract) alleged that Vigil (then serving as New Mexico's state treasurer) "wanted to make sure a political rival didn't challenge him in the next election. So he and his deputy," Gallegos, "hatched a plan to find work for the rival's wife," Sais, "as a sort of payoff." *SECSYS*, 666 F.3d at 683. When Vigil and Gallegos solicited bids for a state contract, they insisted that any interested contractor hire Sais on any terms she wished; plaintiff SECSYS "agreed to the plan in principle but ultimately found it couldn't close the deal with" Sais. *Id.* When negotiations broke down, Vigil and Gallegos allegedly went with another contractor who agreed to pay Sais what she wanted. *Id.* According to SECSYS, Vigil and Gallegos unlawfully discriminated against the company when they refused to give the state contract to bidders who refused to pay Sais's full demand. *Id.* SECSYS claimed that the pair "violated the company's Fourteenth Amendment right to equal protection of the laws." *Id.*

Writing the Tenth Circuit's majority opinion, then-Judge Neil Gorsuch found that plaintiff SECSYS's theory of recovery was "novel": SECSYS made "the remarkable argument that it was discriminated against in violation of the federal

Constitution not because it was unwilling to pay, but because it was willing to pay only *some* of an allegedly extortionate demand"). *SECSYS*, 666 F.3d at 683 (emphasis in original). The panel majority found that "it has never been the case that 'every denial of a right conferred by state law involves a denial of the equal protection of the laws.'" *Id.* at 688 (quoting *Snowden v. Hughes*, *supra*, 321 U.S. at 8). Then-Judge Gorsuch found that "SECSYS's novel claim f[ound] no antecedents in [the Tenth Circuit's] lengthy equal protection tradition." *SECSYS*, 666 F.3d at 688. Concurring in the affirmance of summary judgment, Judge Michael Murphy (joined by Judge Wade Brorby) found that the record revealed that Defendants "did not intentionally discriminate against SECSYS" which "fully resolve[d both] SECSYS's 'traditional' and 'class of one' equal protection claims." *Id.* at 691 (Murphy, J., concurring). Given the disparity between the facts and legal theories advanced in that case and the present case, SECSYS certainly cannot serve as "clearly established" law.

Indeed, as in *SECSYS*, Dalton's claims here find "no antecedent" in this Court's prior Equal Protection cases. In *Engquist v. Oregon Dep't of Agric.*, *supra*, this Court noted that some forms of governmental action "by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." *Engquist*, 553 U.S. at 603. "[A]llowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise." *Id.* "It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized." *Id.* at 604. Under these standards, the decision to refrain from arresting Mark Contreras on March 9, 2016 or on the morning of April 21, 2016 cannot form the basis of a clearly established Equal Protection Clause violation.

Although this Court in *Engquist* limited its holding to public employment, this Court illustrated its reasoning with an example from law enforcement: a traffic officer who cannot possibly stop all speeding drivers and has no way to distinguish among them literally treats "unequally" the one driver that she does stop. *Engquist*, 553 U.S. at 603-04. But that stop does not violate the Equal Protection Clause because discretion is inherent in the act of singling out one driver from the crowd. *Id.*; *see also Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1255 (10th Cir. 2016) (recognizing that "four other circuits—the First, Seventh, Eighth, and Eleventh Circuits—have extended *Engquist* beyond the context of government employment"); *Sargent v. Town of Hudson*, 2017 WL 4355972, *9 (D.N.H. Sept. 27, 2017) (unpublished) (noting lack of clear authority post-*Engquist* as to viability of class-of-one claims alleging disparate police protection of a victim of domestic violence due to her abuser's relationship with law enforcement).

Ultimately, it would not have been obvious to Reynolds and Villalobos that *Watson* or *Price-Cornelison* would control their respective actions in March and April 2016 relative to this case—as such, they are entitled to qualified immunity. *See*, *e.g.*, *Smith v. City of Minneapolis*, 754 F.3d 541, 546 (8th Cir. 2014) ("[b]ecause we do not find any clearly established law supporting Ms. Smith's claim, and any violation is not obvious, Officer Devick is entitled to qualified immunity for his actions during his initial encounter with Smith"); *Hudson v. Hall*, 231 F.3d 1289, 1296 n.7 (11th Cir. 2000) ("even assuming Officer Hall lacked probable cause to stop Plaintiffs' car…the illegality of the initial traffic stop was not obvious under clearly established law…Accordingly, the potential taint of the initial traffic stop would not deprive Officer Hall of qualified immunity"); *see also id.* at 1297-98 ("because the impropriety of Officer Hall's statement was not obvious and because no materially similar, pre-existing case law was around, a reasonable police officer in the circumstances might not have known that Meadows' consent was involuntary. Accordingly, Officer Hall is entitled to qualified immunity for his search of Meadows"); *Bowen v. City of Manchester*, 966 F.2d 13, 17-18 (1st Cir. 1992) ("[w]e hold that in 1986 it was not obvious that Officer DiSabato's conduct violated clearly established law and therefore he is entitled to qualified immunity"); *Sargent*, 2017 WL 4355972 at *8 ("while it may not be obvious…whether an underlying right exists, there is at least some argument that the lack of a clearly established means of bringing a claim may indicate that the constitutional right itself was not clearly established") (citing *Pearson v. Callahan*, *supra*, 555 U.S. at 237). Given the complete lack of obvious clarity in the law, Petitioners were and are entitled to qualified immunity on Respondent's Equal Protection claim.

C. The Tenth Circuit has Created a Circuit Split, Which Further Illustrates that the Law was Not Clearly Established

The Tenth Circuit's panel opinion not only conflicts with this Court's qualified immunity and Equal Protection jurisprudence, it also conflicts with other Circuit opinions regarding similar claims. This Court has repeatedly recognized that a conflict among the federal appellate courts is a strong indication that the law is not clearly established. *Stanton v. Sims*, *supra*, 571 U.S. at 10 (fact that "federal and state courts of last resort around the Nation were sharply divided" on constitutional issue means law not clearly established); *Pearson*, *supra*, 555 U.S. 223, 243-45 (2009) (decisions by four Federal Courts of Appeals upholding defendant's conduct shows law not clearly established); *see also Gardner v. Bd. of Police Comm'rs*, 641 F.3d 947, 952-53 (8th Cir. 2011); *Cooper v. Rutherford*, 503 F. App'x 672, 676 (11th Cir. Oct. 12, 2012) (unpublished) ("[t]he existing case law regarding whether Appellees were seized for the purposes of the Fourth Amendment is far from settled, as evidenced by the varying decisions from our sister circuits analyzing similar situations") (collecting cases).

First, the panel decision below stands in stark contrast to the Third Circuit's decision in *Burella v. City of Philadelphia*, 501 F.3d 134 (3d Cir. 2007). In *Burella*, plaintiff was shot and seriously injured by her husband, "a ten-year veteran of the Philadelphia Police Department" who then shot and killed himself. *Burella*, 501 F.3d at 136. Plaintiff's husband had emotionally and physically abused her for years prior to the shooting, and "[a]lthough she reported numerous incidents of abuse to the police over the years, obtained several restraining orders just days before the shooting, and told police that her husband continued threatening her despite the orders, police failed to arrest him." *Id.* The district court found that the Philadelphia police officer Defendants were not entitled to qualified immunity with respect to equal protection claim. *Id.* at 139. However, the Third Circuit found that the Philadelphia police did not have a constitutional obligation to protect plaintiff Burella from her husband's abuse. *Id.* at 138.

Plaintiff Burella offered evidence 1) that "victims of domestic violence are predominantly women;" (2) that "the Philadelphia Police Department ha[d] discriminated against female victims of domestic violence;" and (3) regarding "the [allegedly deficient] manner in which the Police Department handled her own domestic abuse situation." *See Burella*, 501 F.3d at 148-49. However, Burella "provide[d] no other support for the assertion that discrimination against domestic violence victims amounts to gender discrimination against women." *Id.* at 149. The Third Circuit found that this evidence was not sufficient to meet the standard for an equal protection claim based on the unequal treatment of domestic violence victims. *See id.* (citing *Hynson v. City of Chester*, 864 F.2d 1026 (3d Cir. 1988)). Ultimately, "the officers' failure to arrest [plaintiff's] husband, or to handle her complaints more competently, did not violate her constitutional right to due process or equal protection of the law." *Burella*, 501 F.3d at 149-50; *see also Sargent v. Town of Hudson*, *supra*, 2017 WL 4355972 at *6-8; *Allen v. Town of East Longmeadow*, 2018 WL 1152098, *5-6 (D. Mass. Feb. 9, 2018) (unpublished). Similarly, in the present case, Dalton cannot demonstrate that either Chief Reynolds or Captain Villalobos violated clearly established law.

Similarly, in *Eckert v. Town of Silverthorne*, 25 F. App'x 679 (10th Cir. July 9, 2001) (unpublished)—a prior Tenth Circuit decision acknowledged, but not thoroughly discussed, by the panel below, see App. 19, 21—the plaintiff contended, *inter alia*, that the "police failed to adequately respond to her…complaints of threats, harassment, and property damage committed by" the man (Ballard) with whom she lived. *Eckert*, 25 F. App'x at 683. Plaintiff claimed that the Chief of Police and a Sergeant discounted her version of events and refused to arrest Ballard. *Id.* Plaintiff also claimed that the failure of the town police department to act in response to her complaints constituted a pattern of discriminatory conduct prohibited under the equal protection clause. *Id.* at 684. Indeed, during one of her calls, police arrested plaintiff herself. *See id.* at 682. The Tenth Circuit found that, "[w]hile a 'custom and policy of not providing assistance to victims of abuse by spouses in the same manner as other victims of assault deprived her of the equal protection of laws guaranteed by the fourteenth amendment,'…such was not the case here." *Id.* at 688 (quoting *Watson*, *supra*, 857 F.2d at 694). The police responded to plaintiff's call, and while she may have believed they arrested the wrong person, that was insufficient to support her contentions. *Eckert*, 25 F. App'x at 688. The Tenth Circuit also found that plaintiff's argument was "predicated on the belief that women are always the victims of domestic violence. An equal protection claim, without more, cannot rest on such a spurious premise." *Id.*

In *Flowers v. City of Minneapolis*, 558 F.3d 794 (8th Cir. 2009), the Eighth Circuit, relying on this Court's decision in *Engquist*, *supra*, held that law enforcement investigative decisions are not subject to Equal Protection claims based on the class-of-one theory. In *Flowers*, a local resident sued a police lieutenant and others claiming that they violated his Equal Protection rights based on, among other things, the lieutenant's personal animus towards him. The Eighth Circuit held that the lieutenant's investigatory decisions were discretionary; more specifically, the Eighth Circuit held that the investigatory decisions, which included directing patrol officers to engage in a targeted patrol of the area surrounding the plaintiff's home, were of the type of discretionary decisions protected by this Court's decision in *Engquist*. The Eighth Circuit reasoned that "[a] police officer's decisions regarding whom to investigate and how to investigate are matters that necessarily involve discretion." *Flowers*, 558 F.3d at 799. The Circuit also noted that this Court had used law enforcement officer decisions as the example of discretionary decision-making underlying its opinion in *Engquist*.

Additionally, in *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887 (7th Cir. 2012) (en banc), the Seventh Circuit addressed a plaintiff's constitutional claim based on the local police department's alleged failure to respond to his complaints of gang harassment. The judges took differing views on whether the plaintiff had adequately pleaded an equal protection claim. Four judges joined Judge Posner in proposing that the plaintiff be required to show that he was the "victim of *discrimination intentionally visited on him by state actors who knew or should have known that they had no justification, based on their public duties, for singling him out for unfavorable treatment—who acted in other words for* *personal reasons, with discriminatory intent and effect*." *Del Marcelle*, 680 F.3d at 889 (emphasis in original). Concurring in the judgment, Judge Easterbrook—citing, *inter alia*, this Court's opinion in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005)—stated

> The Constitution does not create a general right to protection from private wrongdoers. The original meaning of the equal protection clause is that, if the police and prosecutors protect white citizens, they must protect black citizens too, but Del Marcelle does not allege racial discrimination or any other kind of class-based discrimination. His contention is that the police failed to protect him, personally, from private aggression that targeted him, personally. *DeShaney* [*v. Winnebago Cnty. Dep't of Social Servs.*, 489 U.S. 189 (1989)] shows that this is not a good constitutional claim.
>
> This leaves an argument that the police violated the equal protection clause, even though not the due process clause, by issuing citations to Del Marcelle but not the bullies. That is a bad approach. It is inconceivable that the plaintiff could have prevailed in either *Castle Rock* or *DeShaney* by replacing a due-process theory with a class-of-one equal-protection theory; the claims advanced in those cases functionally were class-of-one claims, yet the plaintiffs lost. It was a

> premise in both *Castle Rock* and *DeShaney* that state officials had protected some persons but not the plaintiffs, who contended that they should have received the same benefit yet were denied it for no reason (i.e., without a rational basis). That's the same sort of claim Del Marcelle makes. He loses for the same reasons Gonzales and DeShaney lost.

Del Marcelle, 680 F.3d at 901. Judge Easterbrook also noted that this Court's decision in *Enquist* "shows that discretionary decisions in law enforcement are not amenable to class-of-one analysis." *Del Marcelle*, 680 F.3d at 905 (citing *Flowers*, 558 F.3d at 799-800).

In sum, the panel decision below creates—or exacerbates—a split among the federal circuit courts on this issue. Review is warranted address this circuit split head-on. Indeed, as discussed immediately below, one solution to resolving this conflict is requiring that "clearly established law" only flow from this Court's precedents.

II. THIS CASE PRESENTS AN IMPORTANT AND UNDECIDED ISSUE OF WHETHER CIRCUIT PRECEDENT ALONE CAN, FOR PURPOSES OF QUALIFIED IMMUNITY, CONSTITUTE CLEARLY ESTABLISHED LAW

In finding the existence of "clearly established law," the Tenth Circuit relied primarily on a pair of its prior opinions (*Watson* and *Price-Cornelison*), in addition to general statements of law from courts outside the Tenth Circuit. *See* App. 19, 21-22. As previously discussed, the facts of these cases do not squarely govern the particular facts of the present case. Even assuming otherwise, the Tenth Circuit still erred by relying almost exclusively on these circuit cases. In addition to the questions set forth above, the present case raises the question of whether any court, other than this Court, can for purposes of qualified immunity create clearly established law. Reasonable government employees should not expected to conduct "an exhaustive study of case law" in connection with their day-to-day operations. *See Meehan v. Thompson*, 763 F.3d 936, 946 (8th Cir. 2014). Indeed, it is questionable whether cases from other circuits are relevant to determining whether such a "robust consensus" exists. *See Ashford v. Raby*, 951 F.3d 798, 804 (6th Cir. 2020) (stating the "general rule" that precedents from other circuits "are usually irrelevant to the 'clearly established' inquiry" and that this rule "makes perfect sense" because while officers should be expected to know the law in their own circuits, "we can't expect officers to keep track of persuasive authority from every one of our sister circuits"); *Garcia v. Does*, 779 F.3d 84, 95 n.12 (2d Cir. 2015) ("We have not been altogether unequivocal as to the relevance of out-of-circuit cases in our assessment of whether a right is clearly established for the purposes of qualified immunity.").

This Court has "not yet decided what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity." *D.C. v. Wesby*, *supra*, 138 S.Ct. at 591 n.8; *see also Sheehan*, *supra*, 575 U.S. at 614 (assuming without deciding that "a controlling circuit precedent could constitute clearly established federal law"); *Carroll v. Carman*, *supra*, 574 U.S. at 350; *Reichle v. Howards*, *supra*, 566 U.S. at 665-66; *City of Escondido v. Emmons*, *supra*, 139 S.Ct. at 503; *Eves v. LePage*, 927 F.3d 575, 583 (1st Cir. 2019). In *Taylor v. Barkes*, this Court questioned, without deciding, whether the Third Circuit properly relied solely on its own opinions as clearly establishing a right for qualified immunity purposes where there was "disagreement in the courts of appeals." *Taylor*, 575 U.S. 822, 826 (2015). A number of lower courts have noted that this Court has repeatedly reserved this issue. *See*, *e.g.*, *Nerio v. Evans*, 974 F.3d 571, 576 n.2 (5th Cir. 2020) ("[a]lthough we know the Supreme Court's decisions can clearly establish the law, the Supreme Court has never held that our decisions can do the same"); *Doe v. Rector & Visitors of George Mason Univ.*, 132 F.Supp.3d 712, 725 n.16 (E.D. Va. 2015); *Soto v. City of New York*, 2015 WL 3422155, *3 (S.D.N.Y. May 28, 2015) (unpublished); *Estate of Burns v. Williamson*, 2015 WL 4465088, *7 (C.D. Ill. July 21, 2015) (unpublished). This Petition gives this Court the opportunity to address this important and recurring qualified immunity issue.

CONCLUSION

What happened on April 21, 2016 was undeniably tragic. However, no clearly established law supports Respondent's Equal Protection claim in this matter, as no precedent of this Court, or even the prior circuit decisions cited by the Tenth Circuit panel and District Court below, square with the particular facts of this case. Consequently, Petitioners Reynolds and Villalobos are entitled to qualified immunity because they did not violate any of Bascom's clearly established constitutional rights. The Tenth Circuit panel erred in affirming the District Court's denial of Petitioners' motion for summary judgment seeking qualified immunity on Dalton's Equal Protection claim.

Certiorari is appropriate where (as in the present case), "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Certiorari is also appropriate where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a); *see also Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 745 (11th Cir. 2004) (Tjoflat, J., dissenting) ("this case presents exactly the type of circuit split on an issue of national importance that warrants the Court's attention"), *cert. granted*, *Exxon Corp. v. Allapattah Servs., Inc.*, 543 U.S. 924 (2004), *reversed and remanded*, 545 U.S. 546 (2005). "A principal purpose for which" this Court uses its certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also Sheehan*, *supra*, 575 U.S. at 619 (Scalia, J., concurring in part and dissenting in part) (certiorari is granted "for compelling reasons," which "include the existence of conflicting decisions on issues of law among federal courts of appeals, among state courts of last resort, or between federal courts of appeals and state courts of last resort"). Under any or all of these compelling grounds, certiorari is warranted in this case.

This Court should grant the petition for a writ of certiorari and reverse the panel decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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