No. 22-675

In The
Supreme Court of the United States

VICKI JO LEWIS AND TROY LEVET LEWIS, INDIVIDUALLY AND AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF ISAIAH MARK LEWIS, DECEASED,

Petitioners,

v.

CITY OF EDMOND, AN OKLAHOMA MUNICIPAL CORPORATION; POLICE SERGEANT MILO BOX; AND POLICE OFFICER DENTON SCHERMAN,

Respondents.

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

BRIEF IN OPPOSITION OF PETITION FOR A WRIT OF CERTIORARI

KATHRYN D. TERRY
Counsel of Record
CATHERINE L. CAMPBELL
PHILLIPS MURRAH P.C.
Corporate Tower, Thirteenth Floor
101 North Robinson
Oklahoma City, Oklahoma 73102
(405) 235-4100
kdterry@phillipsmurrah.com
Attorneys for Respondent Officer Denton Scherman

February 21, 2023

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Petitioners sued the City of Edmond and several police officers, including Respondent, claiming that they used unconstitutional excessive force in attempting to subdue Isaiah Lewis. The district court granted summary judgment to the City of Edmond and Sergeant Milo Box but concluded that because the law was clearly established that Respondent Officer Denton Scherman's actions, when construed in favor of Petitioners, violated Lewis's constitutional rights, he was not entitled to qualified immunity. Applying well-established precedent, the Tenth Circuit reversed.

"[I]immunity protects all but the plainly incompetent or those who knowingly violate the law." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (internal quotation marks and citation omitted). The Tenth Circuit rightly concluded that neither the district court nor Petitioners "identified a single precedent finding a Fourth Amendment violation under similar circumstances" to those in which Scherman found himself. *City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021). Consequently, Scherman did not have fair notice that his actions were violative of the Fourth Amendment. At issue is:

One: Whether Petitioners have offered compelling reasons to jettison the Court's long-standing and deeply-embedded qualified immunity jurisprudence.

Two: Whether the circuit courts are split on proper application of the Court's requirement that in

QUESTIONS PRESENTED—Continued

determining whether the law is clearly established, the facts of the comparator cases must "*squarely govern*[] the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (emphasis added); *Mullenix v. Luna*, 577 U.S. 7, 13 (2015).

Three: Whether the Tenth Circuit departed so far from this Court's precedent in determining that Scherman is entitled to qualified immunity that this Court should exercise its supervisory corrective power.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

INTRODUCTION

Petitioners aim to abolish qualified immunity. Although several members of the Court have, in limited factual circumstances, voiced concern about the breadth of application of the doctrine, the Court has consistently upheld and applied the doctrine. Moreover, given that qualified immunity is, and for years has been, applied in countless cases, *stare decisis* prevents the Court from reversing course without a special justification. Petitioners offer none.

Further, Petitioners identify no genuine conflict among the circuit courts in applying the Court's qualified immunity analysis. That circuit courts reach different outcomes utilizing the same precedent is attributable to the specific facts of the cases with which they are presented, not to any confusion regarding the applicable legal standards. Finally, the Tenth Circuit correctly followed the Court's decisions in determining that Respondent was entitled to qualified immunity. It did not hold Petitioners to an impermissibly high standard to identify cases which would have provided a reasonable officer with fair notice that their actions violated the Fourth Amendment.

COUNTER-STATEMENT OF THE CASE

Not only is the Petition for Writ of Certiorari ("Petition") replete with euphemisms intended to obfuscate the actual troubling facts of the April 29, 2019 incident

at issue, but Petitioners also misrepresent the material record findings.

I. The Facts Determined By The District Court.

The United States District Court for the Western District of Oklahoma's fact findings set out below are controlling. *See Johnson v. Jones*, 515 U.S. 304, 316 (1995). On April 29, 2019, Lewis smoked marijuana.[1] After an altercation between Lewis and his girlfriend, the Edmond Police Department received a 911 call reporting that Lewis was "beating up" a girl. While officers were in route, Lewis removed his clothing, fled on foot and, for about an hour, was "intermittently running naked around the neighborhood, hiding and generally behaving strangely."[2] (Pet.App.22.)

Box and Scherman first spotted Lewis in a yard outside a residence. (*Id*., 23.) Box identified himself and commanded Lewis to stop and get on the ground. Rather than comply, Lewis "forced his way into" the home by "physically breaking through the front

---

[1] Petitioners claim the marijuana was laced with PCP based on double hearsay statements in the police report investigatory file.

[2] Petitioners repeatedly characterize Lewis as "harmlessly" roaming or wandering, suggesting that he was acting peacefully with and no cause for concern. (Petition at 5 and 6.) However, while Lewis was not *yet* physically violent, his behavior was aggressive and erratic. He was naked, jumping over fences, fleeing officers and when approached by the officers, responded "f*** you" on multiple occasions. (Aplt.App.253, 262, 264 and 265.)

door."[3] (*Id*.) Box followed Lewis into the home and found him attempting to exit through the back door. Box again commanded Lewis to stop and get on the ground. Instead, Lewis "charged" at Box. As he did so, Box deployed his taser for the first time to no effect. (*Id.*) Lewis began "pummeling Box," who would ultimately deploy his taser twice more, also to no effect. Rather, Lewis continued to strike Box in the head, face, and neck. (*Id.*)

Scherman followed Lewis and Box into the home entering through the front door and down a narrow entry hallway. Upon entering the living room of the home, Scherman witnessed Lewis "pummeling Box," Box's ineffective taser deployments, and Box falling to the ground out of his line of sight. (*Id.*)[4] It is undisputed that immediately after Box fell, Lewis turned toward Scherman and *advanced upon him* as Scherman began to retreat by backing down the confined entry hallway behind him. As the Tenth Circuit acknowledged, the district court found that when Scherman fired his shots, he and Lewis were both "confined in a small space in the entry hallway" of the home. (Pet.App.5, 15, 18 and 37.) It was at this moment, while Lewis was

---

[3] Again, Petitioners endeavor to minimize Lewis's conduct by stating he "used his shoulder to dislodge the front door's glass window." (Petition at 6.) Lewis broke the glass window of the door and trespassed in the home of a stranger. (Pet.App.5.)

[4] The district court found undisputed that Lewis (1) evaded arrest, (2) trespassed, and (3) assaulted and battered Box, a felony. (Pet.App.35.) The parties dispute exactly why Box fell—Box says he was knocked unconscious; Petitioners speculate that Box may have merely tripped.

advancing and Scherman was attempting to retreat, that Scherman fired his weapon.

Although that Lewis was advancing toward Scherman is uncontroverted, the parties dispute the manner in which he advanced. Scherman testified that Lewis assumed a position similar to a football tackler and barreled at him ultimately coming close enough to land a punch. (*Id.*, 23-24.) Petitioners claim that Lewis was "windmilling" not "barreling" toward Scherman and, based on expert testimony, dispute that Lewis was within arm's reach of Scherman. (*Id.*, 24-25.) Both the district court and the Tenth Circuit assumed Petitioners' version of events was true. (*Id.*, 6 and 25.) The district court crystalized the material crux of this case:

> "Still, the [Petitioners] do not dispute that after his fight with Box in the living room, Lewis turned toward Scherman and advanced in his direction as Scherman backed down the entry hallway toward the front door. Four gunshot wounds in the front of Lewis's body and the bullet casings recorded in the Edmond police department's crime scene sketch confirm this account. Instead of arguing that Lewis did not advance towards Scherman, the [Petitioners] state that Lewis "mov[ed] his arms in a windmill motion" rather than in a tackling position and that Lewis was more than one and half to two feet away from Scherman when Scherman discharged his firearms four times. The parties agree that the incident ended at the front door when Lewis fell to the ground.

(*Id.*, 25) (record citations omitted).

II. Petitioners' Misstatements Of The Record.

Petitioners misstate the district court's findings and the evidence in stating that Lewis "who was not even close enough to injure Officer Scherman when he was first shot, stopped advancing toward Officer Scherman and posed no conceivable threat to officer safety after the first gunshot hit him." (Petition at 7.) First, Petitioners' record citation (Pet.App.38) does not support the statement. Rather, the district court—while acknowledging a dispute about whether Lewis was within one to two feet of Scherman when he fired—specifically found it uncontroverted that the two men were nonetheless "confined in a small space" when Scherman fired. (*Id*., 37.) Petitioners' statement that the two were not in close quarters is not supportable.

Petitioners also assert that after the first shot, Lewis "stopped advancing towards Officer Scherman." This oft-repeated statement is blatantly false and is belied by every piece of evidence. The district court found it undisputed that as he fired, Scherman backed down the entry hallway towards the front door. The incident started in the living room and "ended at the front door when Lewis fell to the ground." (*Id.*, 25 and 37.) It is self-evident that Lewis continued to move toward Scherman when Scherman fired because had Lewis stopped advancing, he would have fallen in the living room. The Tenth Circuit addressed this issue head on and agreed noting that the district court's findings "can only be read to mean Lewis continued

to advance toward Scherman after the first shot." (*Id.*, 7, n. 1.)

Next, the Tenth Circuit wrote that "Scherman does not challenge the district court's finding that when he shot Lewis multiple times, his use of force was objectively unreasonable and a violated the Fourth Amendment." (*Id.*, 7-8.) The Tenth Circuit regrettably used imprecise language when describing Petitioners' position on appeal since the statement is not supported by the record, the briefing below, or the remainder of the Tenth Circuit's opinion. Nonetheless, Petitioners seize on the language in an effort to cloud the issues.

Applying the two-pronged qualified immunity analysis, construing the facts in Petitioners' favor, the district court first found that because the facts were disputed, a reasonable jury could conclude that Scherman's use of force violated the Fourth Amendment. It did not find that Scherman violated the Fourth Amendment. (*Id.*, 38-39.) The district court further concluded that the law was clearly established that if a jury found in Petitioners' favor, Scherman's use of force was unconstitutional. (*Id.*, 41-42.) While it is certainly true that Scherman did not challenge on appeal whether the facts the district court ruled a reasonable jury could find would suffice to show a constitutional violation, this is not the same as either the district court finding that a violation occurred as a matter of law, or a concession by Scherman that a violation occurred as a matter of law. Scherman has never admitted that he violated Lewis's rights.

The Tenth Circuit recognized this distinction, and there was no significant confusion on this point:

> Defendant Scherman does not dispute the facts recited by the district court, when viewed in a light most favorable to [Petitioners], suffice to show a violation of the decedent's Fourth Amendment right to be free from excessive force. Accordingly, we assume without deciding that those facts are sufficient to establish a constitutional violation. What Scherman does dispute is the district court's holding that the law was clearly established at the time of the incident such "that *every* reasonable [officer] would have understood.

(*Id.*, 3-4) (citations omitted). The Tenth Circuit's subsequent language clearly misstates Scherman's position.

REASONS FOR DENYING CERTIORARI

I. The Court's Qualified Immunity Jurisprudence Is Well-established And Its Parameters Are Unambiguous.

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (per curiam) (quotation marks and citation omitted). "A right is clearly established when it is sufficiently clear that every reasonable official would have understood that what he is doing violates

that right." *Id.* (internal quotation marks and citation omitted). The clearly established "inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id*. at 8 (internal quotation marks and citation omitted).

In ascertaining whether existing case law clearly establishes that certain actions violate constitutional rights, "[s]pecificity is especially important . . . [because] it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Id.* (internal quotation marks and citation omitted).[5] If the precedent cited is "materially distinguishable" and thus does not govern the facts of the case, it does not give a reasonable officer fair notice that their conduct violates the Constitution. *Id*. at 8, 9. In other words, the "Court's caselaw does not require a case directly on point . . . [but] existing precedent must have placed the [] constitutional question beyond debate." *Kisela*, 138 S. Ct. at 1152 (quotation marks and citation omitted). *See also Mullenix v. Luna*, 577 U.S. 7, 18 (2015) (determining that "[o]ther cases cited by the Fifth Circuit and respondents are simply too factually distinct to speak clearly to the specific circumstances

[5] The qualified immunity analysis is so well-embedded in the Court's jurisprudence, the Court often issues per curiam opinions in excessive force cases. *See*, *e.g.*, *Rivas-Villegas*, 142 S. Ct. 4; *Kisela*, 138 S. Ct. 1148; *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (per curiam); *White*, 580 U.S. 73; *Mullenix*, 577 U.S. 7; *Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam); *Pearson v. Callahan*, 555 U.S. 223 (2009) (per curiam); *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam).

here" and distinguishing the material facts, including whether the suspect had a lethal weapon during flight); *White v. Pauly*, 580 U.S. 73, 79 (2017) (observing that the circuit court "misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under similar circumstances [] was held to have violated the Fourth Amendment.").

Petitioners argue that the Court's qualified immunity analysis is internally contradictory—on the one hand, the Court does not require comparator cases to be directly on point, but, on the other, the comparator case cannot merely convey the general constitutional principle. Petitioners assert that it is this internal contradiction has led several circuits to impose too heavy a burden on those seeking vindication for constitutional violations at the hands of law enforcement by requiring plaintiffs to make "an extraordinary showing" that existing precedent provides fair notice to the offending officer. (Petition at 20-21) (citing *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019)).[6] Yet this Court has characterized the clearly established standard as "demanding." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). Precedent is clear: the burden *is*, as the Fifth Circuit perceives it,

---

[6] As the *Morrow* court observed, the Court has routinely summarily reversed circuit courts that have denied qualified immunity. 917 F.3d at 876 (citing *Wesby v. District of Columbia*, 816 F.3d 96, 102 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from the denial of rehearing en banc) ("Indeed, in just the past five years, the Supreme Court has issued 11 decisions reversing federal courts of appeals in qualified immunity cases, including five strongly worded summary reversals."), *rev'd*, 138 S.Ct. 577.

substantial. There is nothing new in asking circuit courts to weigh precedent on a continuum. Although the calculus is often not easy, with the consistent guidance of the Court, lower courts successfully navigate the analysis in numerous cases each year.

II. Petitioners Offer No Compelling Rationale To Abolish Qualified Immunity.

A. The Court has correctly interpreted 42 U.S.C. § 1983 to incorporate the defense of qualified immunity.

In support of their quest to convince the Court to discard or narrow qualified immunity, Petitioners, citing Justice Thomas, assert that it is supported neither by the text of 42 U.S.C. § 1983 nor common law. Nevertheless, Justice Thomas consistently applies the modern qualified immunity analysis. *See*, *e.g.*, *Wesby*, 138 S. Ct. at 590 ("readily conclud[ing] that the officers here were entitled to qualified immunity" and correcting the circuit court's analysis of the "clearly established" issue); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment, expressly joining the portion of the Court's opinion "hold[ing] that respondents are entitled to qualified immunity"); *Reichle v. Howards*, 566 U.S. 658 (2012) (Thomas, J., authoring the opinion, which includes a modern qualified immunity analysis and support for the "clearly established" standard).

While it is certainly true that Justice Thomas has expressed "concern with [the Court's] qualified

immunity jurisprudence," his concern arises from whether the analysis should include a determination of "whether officers . . . would have been accorded immunity at common law in 1871 from claims analogous to [those presently asserted]." *Ziglar*, 137 S. Ct. at 1872. Thus, he has invited the Court to consider tethering the doctrine to immunities available under "common-law rules prevailing in 1871." *Id.* *See also* *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from denial of certiorari). Justice Thomas may have supported narrowing the doctrine in the past, but he is not in favor of eradicating it.

However, when recognizing and applying immunities, the Court has rejected the view that § 1983 should be applied "as stringently as it reads." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (recognizing that when the Reconstruction Congress enacted the 1871 Act, "immunities 'well grounded in history and reason' had not been abrogated 'by covert inclusion in the general language' of § 1983" (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). Because "[c]ertain immunities were so well established in 1871, when § 1983 was enacted, [] we presume that Congress would have specifically so provided had it wished to abolish them." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967)). The *Buckley* Court denied that the Court could create immunities—including qualified immunity—out of whole cloth unsupported by Congressional intent. *Id*.

1871's common law amply supports the scope of modern qualified immunity.[7] It protected societal values by limiting an official's liability for good faith, reasonable conduct. *See Filarsky v. Delia*, 566 U.S. 377, 383 (2012) ("At common law, government actors were afforded certain protections from liability, based on the reasoning that the public good can best be secured by allowing officers charged with the duty of deciding upon the rights of others, to act upon their own free, unbiased convictions, uninfluenced by any apprehensions." (internal quotation marks and citation omitted), *see also id.* at 388 (collecting cases from the 1800s and noting a "well settled" good-faith defense applicable to law enforcement)); *Pierson*, 386 U.S. at 556-57 (determining that § 1983 "should be read against the background of tort liability. . . ."[8] and "[p]art of the

---

[7] In recent years, the Court has addressed certiorari petitions in several cases which, in part, raise substantially the same issues as Petitioners in this case. The Court has consistently denied certiorari in those cases. *See*, *e.g.*, *Brennan v. Dawson*, 141 S. Ct. 108 (2020); *Fijalkowski v. Wheeler*, 141 S. Ct. 261 (2020); *Liberti v. City of Scottsdale*, 141 S. Ct. 1387 (2021); *Cox v. Wilson*, 141 S. Ct. 2596 (2021); *Ramirez v. Guadarrama*, 141 S. Ct. 2571 (2022). Respondent has incorporated portions of the Brief in Opposition to Petition for Certiorari in *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (brief at 2020 WL 3512840 (2020)). The Court did not address the merits of these arguments in reversing and remanding *Taylor*.

[8] *Id.* (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978)). Notably, overturning qualified immunity precedent would necessitate revisiting *Monroe* where the Court utilized common law to inform the scope of liability under § 1983. That qualified immunity bears a "close relation to a whole web of precedents," so "that reversing it could threaten others," is

background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause" (internal quotation marks and citation omitted). The 1871 common law also safeguarded well-recognized principles of "'protect[ing] [a] government's ability to perform its traditional functions.'" *Filarsky*, 566 U.S. at 389 (quoting *Wyatt v. Cole*, 504 U.S. 158, 167 (1992)). The qualified immunity doctrine protects traditional government functions "by helping to avoid unwarranted timidity in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can accompany damages suits." *Id.* at 389-90 (citing *Richardson v. McKnight*, 521 U.S. 399, 409-11 (1997)).

B. Modern qualified immunity doctrine adequately protects both plaintiffs and government officials.

To support their claim that modern qualified immunity doctrine prevents courts from remedying constitutional violations, Petitioners principally rely upon an overly broad reading of Justice Sotomayor's opinions. Far from supporting Petitioners' position, any reasoned review of Justice Sotomayor's views unequivocally demonstrates her continued adherence to the doctrine as presently articulated.

---

yet another strong reason not to revisit it. *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 458 (2015).

Rather than challenging the viability of the doctrine, Justice Sotomayor has, in certain cases, disagreed with the scope of the Court's analysis. *See Mullinex*, 577 U.S. at 26 (condemning the "Court's decision" because of "the culture [it] supports when it calls it reasonable—or even reasonably reasonable—to use deadly force for no discernable gain and over a supervisor's express order to 'stand by.' "). In *Mullinex*, Justice Sotomayor advocated for a different formulation of the qualified immunity question. To her, certain material facts of the case merited more emphasis in the analysis. The Court asked whether a reasonable officer would know that "shoot[ing] a fleeing felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight" violated the Constitution, *Id*. at 12. By contrast, Justice Sotomayor asked "whether, under all the circumstances" known to the officer "there was a governmental interest in shooting at the car rather than waiting for it to run over spike strips." *Id.* at 22. She asserted that the Court's flawed application of the qualified immunity analysis in the case at issue "render[ed] the protections of the Fourth Amendment hollow." *Id.* at 26.

Similarly, in her dissent in *Kisela*, 138 S. Ct. 1148, Justice Sotomayor did not conclude that the Court's current qualified immunity analysis elevates the protection of police over the protection of constitutional rights in all cases. Instead, while at the same time describing the qualified immunity standard as "well-settled," Justice Sotomayor criticized the Court's

reading of the specific facts of the case and application of the law to the facts. *Id.* at 1155, 1162 (citation omitted), *see also id.* at 1158 (clarifying that the standard for determining whether a constitutional right violation is clearly established "is not nearly as onerous as the majority makes it out to be"). Petitioners' reliance on Justice Sotomayor's case-specific statements simply cannot support the Petitioners' argument that "qualified immunity often forces courts to forsake th[e] critical responsibility [of guarding federal rights] and protect government officials instead of the public."

Next, citing *Pierson*, 386 U.S. 547, and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), Petitioners assert that "(1) protecting officers from financial liability" and "(2) decreasing the costs of burdensome litigation against government officials" are the primary policy goals that qualified immunity serves. To be sure, the Court has stated that the doctrine "is an entitlement not to stand trial or to face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001) (internal quotation marks and citation omitted). But neither *Pierson* nor *Harlow* support that protecting government coffers is the overarching goal underpinning qualified immunity. Instead, as *Harlow* makes clear:

> The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate

> statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences.

457 U.S. at 819 (quoting *Pierson*, 386 U.S. at 547). *See also Reichle*, 566 U.S. at 664 (explaining that the "'clearly established' standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can 'reasonably . . . anticipate when their conduct may give rise to liability for damages.'" (quoting *Anderson v. Creighton*, 438 U.S. 635, 639 (1987)); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (per curiam) ("Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."); *Wyatt*, 504 U.S. at 167 ("Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions.").

As noted, the application of qualified immunity requires a highly specific factual inquiry, which, unsurprisingly, results in fact-driven disparities in outcomes

between cases. These disparities do not signal a broken doctrine, but, rather, one that successfully serves the myriad interests it is intended to serve. Decades of jurisprudence establish that the qualified immunity inquiry balances the vindication of constitutional rights and the effective performance of public duty without unreasonably favoring public officials. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (indicating that test is designed to protect "all but the plainly incompetent or those who knowingly violate the law"); *see also Katz*, 533 U.S. at 205 ("The concern of the immunity inquiry is to acknowledge that *reasonable* mistakes can be made as to the legal constraints on particular police conduct." (emphasis added)).

C. *Stare decisis* should proscribe abolishing qualified immunity.

Even assuming that the modern expression of the qualified immunity doctrine is flawed, settled principles of *stare decisis* dictate the Court rest on its prior decisions. "*Stare decisis* [] is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Michigan v. Bay Mill Indian Cmty.*, 572 U.S. 782, 798 (2014) (internal quotation marks and citation omitted). To abandon precedent, the Court requires proof of "a 'special justification'—over and above the belief 'that the precedent was wrongly decided.'" *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015) ("[A]n argument

that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then." (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)).

"*[S]tare decisis* carries enhanced force when a decision . . . interprets a statute" because "Congress can correct any mistake it sees." *Id*. at 455 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). Therefore, academic criticism of the qualified immunity doctrine's applicability to § 1983—the only real criticism Petitioners are able to offer—presents insufficient justification for overturning decades of supporting precedent. Moreover, academic criticism is not based on subsequent legal developments "remov[ing] the basis for a decision," such as "'growth of judicial doctrine or further action taken by Congress.'" *Id.* at 458.

Further, the support for *stare decisis* is at its apex in "cases involving property and contract rights" because the stakeholders "are especially likely to rely on such precedents when ordering their affairs." *Id.* at 457 (internal quotation marks and internal citation omitted). Here, the stakeholders are the States and local governments that have structured their legal and contractual affairs to indemnify individuals sued for official conduct. These stakeholders rely on the doctrine to "protect[] government's ability to perform its traditional functions. . . . by helping to avoid 'unwarranted timidity' in the performance of public duties, ensuring

that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." *Filarsky*, 566 U.S. at 389-90 (first, quoting *Wyatt*, 504 U.S. at 167 and second, citing *Richardson*, 521 U.S. at 409-11).

III. There Is No Circuit Split On Proper Application Of The Clearly Established Prong Of The Qualified Immunity Analysis.

Petitioners claim that the circuits are split in how to apply the Court's qualified immunity analysis. However, they fail to discuss the circuit courts' analyses of the material facts of identified comparator cases vis-à-vis the facts of the cases issue. Looking past the mere semantic differences in the circuit courts' articulation of the qualified immunity analysis, the circuit courts clearly uniformly apply the legal standard for determining whether a constitutional-right violation is "clearly established" by existing law. All circuit courts ask whether a reasonable official would have understood that his conduct was unconstitutional given existing controlling case law. All circuit courts understand that the determining factor is "fair notice," which incorporates, but should not become enveloped by, factual similarity to comparator cases.

Petitioners concede that the Third, Fourth, Seventh, and Eleventh Circuits[9] apply the appropriate

[9] Unmentioned by Petitioners, the First, Second, and D.C. Circuits also apply the appropriate legal standard. *See Gray v.*

legal standard.[10] But they incorrectly claim the Fifth and Eighth Circuits have adopted a more stringent standard requiring factually identical precedent before an official would understand his conduct was unconstitutional. Petitioners also incorrectly claim that the Sixth, Ninth, and Tenth Circuits have vacillated between the appropriate standard and the more stringent standard. In reality, the circuits are consistent in their approach to the "clearly established" standard. Because the Petitioners fail to identify a true split, the Court should deny certiorari.

As noted, Petitioners cite *Morrow*, 917 F.3d 870, for the proposition that the Fifth Circuit requires "an extraordinary showing" to satisfy the "clearly established" requirement. Any reasoned reading of the opinion reveals that the Fifth Circuit requires nothing

---

Cummings, 917 F.3d 1, 10 (1st Cir. 2019) ("Although such a case need not arise on identical facts, it must be sufficiently analogous to make pellucid to an objectively reasonable officer the unlawfulness of his actions."); *Hedgpeth v. Rahim*, 893 F.3d 802, 809-10 (D.C. Cir. 2018) (noting that the case and comparators were not factually identical but based on the comparator cases, the officer would not have been able to determine if his force violated clearly established law); *Simon v. City of New York*, 893 F.3d 83, 92 (2d Cir. 2018) ("'[O]fficials can still be on notice that their conduct violates [clearly] established law even in novel factual circumstances'" (internal citation omitted) (second alteration in original)).

[10] The Third, Fourth, Seventh, and Eleventh Circuits indeed apply the appropriate standard. *See King v. Pridmore*, No. 18-14245, 2020 WL 3026399, at *7 (11th Cir. June 5, 2020); *James v. N.J. State Police*, 957 F.3d 165, 169 (3d Cir. 2020); *Tory v. City of Chicago*, 932 F.3d 579, 587 (7th Cir. 2019); *Thompson v. Virginia*, 878 F.3d 89, 98 (4th Cir. 2017).

more than this Court or any other circuit requires: (1) "fram[ing] the constitutional question with specificity and granularity,"[11] and (2) consulting "holdings, not dicta"[12] to (3) determine whether "'existing precedent "squarely governs" the specific facts at issue'"[13] so that "every reasonable officer would know it immediately." In describing the necessary showing as "extraordinary," the *Morrow* court evaluated a plethora of Supreme Court decisions which summarily reversed the circuit courts for fumbling the "clearly established" analysis.[14] *Id*. at 876. The court affirmed its adherence to the legal standard; it did not change it. Subsequent case law demonstrates the Fifth Circuit's understanding of the appropriate legal standard. *See Crittindon v. LeBlanc*, 37 F.4th 177, 186 (5th Cir. 2022) (identifying "fair warning" as the ultimate "touchstone" of whether law is clearly established: "The law can be clearly established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." (internal quotation marks and citation omitted)).

Like the Fifth Circuit, the Eighth Circuit's recent cases confirm its understanding of the appropriate legal standard. *See Doe v. Aberdeen Sch. Dist.*, 42 F.4th

---

[11] *Morrow*, 917 F.3d at 874-75.

[12] *Id.* at 875.

[13] *Id.* at 876 (quoting *Kisela*, 138 S. Ct. at 1148).

[14] *Morrow*, 917 F.3d at 876 (quoting *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting)).

883, 892 (8th Cir. 2022) (clarifying that "there need not be a case directly on point, . . . [but] existing precedent must have placed the statutory or constitutional question beyond debate" (internal quotation marks and citation omitted)).[15] Contrary to Petitioners' contention, the Eighth Circuit did not veer from the appropriate legal standard in *Goffin v. Ashcraft*, 977 F.3d 687 (8th Cir. 2020). Specifically invoking *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), the *Goffin* court appropriately determined that "Goffin must identify 'either controlling authority or 'a robust consensus of cases of persuasive authority' that 'placed the statutory or constitutional question beyond debate' at the time of the alleged violation.'" *Id.* at 691 (citation omitted). The court compared the case to existing precedent and ultimately determined that it had not "clearly establish[ed] that a pat down that recovered nothing eliminated [the officer's] objectively reasonable belief that [the individual] was armed and dangerous." *Id.* at 692. Importantly, the court specified that the factual difference between the cases must be *material*, explaining how existing precedent could not have "put [the officer] on notice that her conduct was illegal." *See id.* (distinguishing *Wealot v. Brooks*, 865 F.3d 1119 (8th Cir. 2017)). Because *Goffin* was not "the rare obvious case in which the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances," the court affirmed the district court's grant of qualified immunity.

---

[15] *Id.* (quoting *Talyor v. Barkes*, 575 U.S. 822, 825 (2015) (per curiam)).

Id. (omitting internal quotation marks and quoting *Wesby*, 138 S. Ct. at 590).

Petitioners compare *Baynes v. Cleland*, 799 F.3d 600 (6th Cir. 2015), and *Gordon v. Bierenga*, 20 F.4th 1077, 1085 (6th Cir. 2021) in an attempt to cast doubt on the Sixth Circuit's understanding of the qualified immunity doctrine in excessive force cases. But the Sixth Circuit applied the appropriate, not a heightened, legal standard in both cases. The court determined that the case fell between its precedent establishing the constitutionality of using deadly force where a fleeing driver demonstrated an " 'obvious willingness to endanger the public' " and the unconstitutionality of using deadly force where the fleeing driver posed nothing " 'more than a fleeting threat' " *Bierenga*, 20 F.4th at 1083-85 (internal citations omitted). Because no precedent "involved reckless flight from a traffic stop in a crowded area prior to the shooting, or the striking of both civilian and police vehicles in an attempt to flee"—facts which materially distinguished the case—the court determined that it could not find that "existing precedent . . . placed the . . . constitutional question beyond debate." *Id.* at 1085 (internal quotation marks and citation omitted). Nothing about the *Bierenga* court's analysis demonstrates that the Sixth Circuit's view of the appropriate legal standard is in any way muddled. Moreover, subsequent Sixth Circuit cases confirm its unchanged commitment to the appropriate analysis. *Campbell v. Cheatham Cty. Sheriff's Dep't*, 47 F.4th 468, 481 (6th Cir. 2022) (stating "we look to the law at the time of the officer's

conduct and identify the 'existing precedent [that] squarely governs the specific facts at issue,'" and "[t]here need not be 'a case directly on point for a right to be clearly established,' but 'existing precedent must have placed the statutory or constitutional question beyond debate,'" (quoting *Kisela*, 138 S. Ct. at 1152, 1153)).

Likewise, the Ninth Circuit has not confused the appropriate legal standard. *See Shafer v. Cty. of Santa Barbara*, 868 F.3d 1110, 1117-18 (9th Cir. 2017) (stating "we do not require a [comparator] case to be on all fours," and concluding the officer was entitled to qualified immunity because "none [of the comparator cases] . . . involved a challenging environment or an act of physical resistance or obstruction by the arrestee," which were material differences affecting the officer's notice (internal quotation omitted)); *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013) (stating "'officials can still be on notice that their conduct violates established law even in novel factual circumstances'" and "while there need not be a 'case directly on point, [] existing precedent must have placed the statutory or constitutional question beyond debate'" (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) and *al-Kidd*, 563 U.S. 741)); *Torres v. City of Madera*, 648 F.3d 1119, 1128 (9th Cir. 2011) (determining that qualified immunity did not apply because comparator cases were "materially indistinguishable" and the court has "never required a prior case on all fours prohibiting that particular manifestation of unconstitutional conduct to find a right clearly established" (internal

quotation marks and citations omitted)). The *Madera* court emphasized: "[W]e have repeatedly stressed that officials can still have 'fair warning' that their conduct violates established law 'even in novel factual circumstances.'" 648 F.3d at 1129 (quoting *Hope*, 536 U.S. at 741).

Petitioner claims that the decision in *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011) conflicts. But it does not. *See* 661 F.3d at 442 (stating the same rules as above), *see also id.* at 447-48, 452 (determining qualified immunity applied because no existing Ninth Circuit case law addressed whether an official's use of a taser constituted a constitutional right violation, and the facts of the case were materially distinguishable from analogous cases in other circuits). The Ninth Circuit has confirmed its appropriate understanding of the "clearly established" inquiry in *Andrews v. City of Henderson*, 35 F.4th 710, 718 (9th Cir. 2022) (confirming that the test is not whether there is a factually identical case but whether "'existing precedent'" has "'placed the statutory or constitutional question beyond debate.'" (quoting *Rivas-Villegas*, 142 S. Ct. at 7-8)).

Finally, the Tenth Circuit's decisions are equally clear in applying the appropriate standards. *See McWilliams v. Dinapoli*, 40 F.4th 1118, 1128 (10th Cir. 2022) ("[A] right may be clearly established even without a prior case directly on point, so long as there is existing precedent that places the unconstitutionality of the alleged conduct beyond debate" (internal quotation marks and citations omitted)); *Estate of Smart v.*

City of Wichita, 951 F.3d 1161, 1168 (10th Cir. 2020) (stating that "a prior case need not be exactly parallel to the conduct here for the officials to have been on notice of clearly established law" (internal quotation marks and citation omitted) (alterations in original)). The Tenth Circuit has rightly acknowledged that if a case contains "a distinction [which] *might* make a constitutional difference," from comparator cases, the law is not clearly established. *Kerns v. Bader*, 663 F.3d 1173, 1187 (10th Cir. 2011) (emphasis in original).

Last, contrary to Petitioners' contention, in *Arnold v. City of Olathe*, 35 F.4th 778, 794 (10th Cir. 2022), the court required "factual symmetry" in determining whether the officers recklessly created the need for deadly force, not whether the constitutional right was clearly established. In addressing the latter inquiry, the court distinguished the offered comparator cases. In each, mere minutes separated the officers' aggressive approach to the suspect and the subsequent use of force. *Id*. Those cases would not inform a reasonable officer that it was unconstitutional to "confront a potentially armed suspect after hours of protracted negotiation." *Id*.

IV. The Tenth Circuit's Unanimous Decision That Scherman Is Entitled To Qualified Immunity Correctly Applies Governing Precedent And Need Not Be Revisited.

A. Petitioners' arguments.

Before turning to the case law, Petitioners raise several matters that warrant attention. First, the

facts as determined by the district court and recited above are materially indistinguishable from those the Tenth Circuit recited. (*Compare* Pet.App.22-26 *with* Pet.App.4-6.) To the extent the Tenth Circuit analyzed the facts further, it did not reweigh or reconsider the district court's findings, but instead rebuffed Petitioners' efforts to distort the well-established factual record. (*See*, *e.g.*, Pet.App.7, n. 1.)

Second, as much as Petitioners try to reframe it, the district court's specific findings make clear that this is not an escalation case. The district court soundly rejected Petitioners' argument that Box's actions necessitated the use of deadly force finding instead that Box's conduct was objectively reasonable. (*Id.*, 29, 32-32.) That is, Box was entitled to qualified immunity on the first prong of the analysis. Petitioners now suggest that Scherman should have used de-escalation tactics. (Petition at 32.) This argument belies both logic and the uncontradicted facts. Lewis was already "pummeling Box" in the living room despite Box's use of non-lethal force when Scherman first encountered Lewis.

Equally important, the district court's findings preclude any argument that Scherman's conduct prior to firing the second shot was unreasonable or unlawful. It is undisputed that: (1) Scherman witnessed Lewis physically burst through the front door; (2) Scherman entered the home to provide Box backup; (3) Scherman witnessed Lewis "pummeling Box" until Box disappeared from Scherman's line of sight; (4) Lewis then turned and began advancing towards Scherman, an

undersized officer; and (5) Scherman continued to back away from Lewis down the confined entry hallway. (Pet.App.37.) Based on these facts, the court determined that "a reasonable jury could conclude that *after Scherman discharged his firearm once*, Lewis no longer presented a threat of serious physical harm." (*Id.*, 38.) (emphasis added). The significance of this finding is clear: Scherman's conduct in taking the first shot was not unreasonable. The Tenth Circuit recognized this finding. (*Id.*, 7, n. 1 and 12-14.)

B. The Tenth Circuit did not err.

After establishing the appropriate framework for consideration of the issue, the Tenth Circuit determined that Scherman is entitled to qualified immunity because at the time of the encounter, no existing case law placed the unconstitutionality of his alleged conduct "beyond debate," and with a sufficiently high degree of specificity. *Wesby*, 138 S. Ct. at 589-90 (citation omitted). The Tenth Circuit was correct.

As the Court has observed, whether an officer has used excessive force:

> . . . requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the

> scene, rather than with the 20/20 vision of hindsight. . . . [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—about the amount of force that is necessary in a particular situation.

Graham v. Connor, 490 U.S. 386, 396 (1989) (internal quotation marks and citations omitted). Whether a government official is entitled to qualified immunity turns "very much on the facts of each case" and unless existing precedent "squarely governs" the specific facts at issue, qualified immunity is in order. *Kisela*, 138 S. Ct. at 1153. None of the cases on which the district court and the Petitioners rely meets the standard since all are readily and meaningfully distinguishable on their material facts.

Despite the district court's conclusion that the first shot did not violate Lewis' constitutional rights, Petitioners persist in offering comparator cases in which the officers used lethal force as a "first resort." (Petition at 32, n. 9.) In doing so, Petitioners urge the Court to consider only the precise moment that Scherman fired, implying that he simply followed Box and Lewis into the house and began shooting immediately. Notwithstanding, courts cannot view "each fact in isolation, rather than as a factor in the totality of the circumstances." *Wesby*, 138 S. Ct. at 588 (2018) (citation omitted). Courts must consider "the whole picture" when assessing the question of qualified

immunity, because this Court's precedents recognize that the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation. *Id*. (citations omitted). The specific fact situation in which the officer finds himself is vitally important in determining whether the unconstitutionality of his use of force is clearly established. *City of Tahlequah*, 142 S. Ct. at 11.

Considering the totality of the circumstances here, the officers did not use lethal force as the first resort. The totality of the material undisputed facts demonstrates that before Scherman first fired:

- the original call was a report that Lewis was "beating up" a girl;
- Lewis had been running around the neighborhood naked for over an hour;
- Scherman observed that when Box exited his vehicle, pointed a taser at Lewis and commanded Lewis to get down, Lewis did not do so;
- instead, Scherman saw Lewis bust through the front door window of the nearest home, not his own, and Box followed Lewis through;
- when Scherman followed through the door and entry hallway, he observed Lewis "pummeling Box";
- Scherman saw Box deploy non-lethal force which had no affect whatsoever on Lewis, who continued to batter Box about the head, face and neck;

- Box fell to the ground and Lewis turned toward Scherman;
- Lewis advanced on Scherman who backed away and, only after Box's attempts to subdue Lewis failed, did Scherman fire his first shot.

When Scherman fired again:

- Lewis was continuing to move toward him in the entry hallway, in a "windmilling" motion;
- the entry hallway, was a confined and small space;
- the door was behind Scherman, and he was backing toward the door and away from Lewis as he fired;
- the incident ended when Lewis fell to the floor at the front door.

Respondent is entitled to qualified immunity unless existing cases place the unconstitutionality of his conduct beyond debate and such that any reasonable officer in Scherman's particular situation would have understood his conduct was unlawful. No case to date meets this standard.

Allen v. Muskogee, 119 F.3d 837 (10th Cir. 1997) is an escalation case. The decedent was sitting in a parked car with a gun in his hand when the officers arrived. He had not threatened anyone. *Id*. at 839. Although conflicting, the evidence indicated that one officer ran to the car and screamed at decedent. One officer reached into the vehicle to grab the gun while another held the decedent's left arm. When a third

officer opened the passenger door, Allen first pointed the gun at that officer, and then swung the gun toward the officers on his left prompting officers to shoot him. On this basis, the Tenth Circuit ruled that there was a question of fact whether the officers' conduct precipitated the need for deadly force. *Id.* at 841.

Allen is not an apt comparator for several reasons. First, as noted, this is not an escalation case. Box, who the district court determined acted reasonably, pursued Lewis after he ignored Box's commands to get down and broke through the door of a home that did not belong to Lewis. Concerned for his partner, Scherman followed and, when he first encountered Lewis, he saw Lewis "pummeling Box" who fell to the ground. Unlike the officers in *Allen*, the undisputed evidence here is that prior to Lewis turning and advancing on Scherman, the two had no interaction whatsoever and no conduct of Scherman's can fairly said to have escalated or provoked Lewis. Second, and as the Tenth Circuit correctly observed, unlike the facts of any prior precedent, Scherman observed Lewis pummeling another officer who had not provoked him (a violent felony), and then immediately thereafter Lewis turned and advanced on Scherman. (Pet.App.13.)

For the same reasons, *Estate of Ceballos v. Husk*, 919 F.3d 1204 (10th Cir. 2019) is inapplicable. There, the decedent was in his own driveway, with no one else around, and he was fully contained at the time he was shot and killed." *Id*. at 1220. He had not threatened the police until, as the appellate court observed, an officer approached quickly, screaming at the Ceballos, and

refusing to give ground as Ceballos closed the gap between the two. *Id.* at 1216. The Tenth Circuit, relying on *Allen*, again determined that the officer's conduct was provocative. *Id.* at 1217. In this case, Scherman did not approach Lewis, did not scream at him or refuse to give ground. In fact, even though in a confined, small hallway—in both *Allen* and *Ceballos*, the officers were in open spaces and had ample area to retreat if they feared for their safety—Scherman continued to back away from Lewis as Lewis advanced upon him.

In *Carr v. Castle*, 337 F.3d 1221 (10th Cir. 2003), after assaulting several officers, the decedent was in a lengthy foot pursuit with two officers when he came to a fence he could not climb. In the light most favorable to decedent, he threw a piece of concrete at officers and they subsequently shot him. All eleven shots hit decedent in the back in such a way that could have happened only if his head was near the ground and his buttocks were slightly elevated. Notable time and distance elapsed between the assault on officers and the interaction with the two officers who chose to fire. *Id.* at 1225. In other words, a jury could find that officers shot decedent when he was unarmed and face down on the ground; *i.e.*, the threat had clearly passed.

Similarly, the other cases Petitioners identify present circumstances so vastly different from those Scherman faced at the moment he fired his second shot, they are equally inapt comparators. In *Fancher v. Barrientos*, 723 F.3d 1191, 1994 (10th Cir. 2013), the officer shot after he admittedly saw the subject slump down and he had retreated away from the moving

vehicle with enough distance to feel "safer." *Id*. at 1198, 1201. Thus, the officer had "enough time to recognize and react to the changed circumstances and cease firing his gun." *Id*. at 1201. No such evidence exists in this case.

In *Perea v. Baca*, 817 F.3d 1198, 1201-02 (2016), the Tenth Circuit denied qualified immunity to officers who tased a subdued, unarmed misdemeanant ten times. The subject had neither attacked nor threatened anyone when he was first approached and much of the tasing occurred after officers had subdued the suspect who was face down on the ground. *Id.* In *Zia Trust Co. ex rel. Causey v. Montoya*, 597 F.3d 1150, 1155 (10th Cir. 2010), the court determined it was clearly established that shooting the unarmed and mentally disturbed driver of van—which was unable to move—from fifteen feet away, was a clearly established constitutional violation. In *Zuchel v. Spinharney*, 890 F.2d 273, 275-76 (10th Cir. 1989), the court denied qualified immunity because the facts could establish that the officers shot the subject from ten to twelve feet away when the suspect was not approaching the officer, but instead, had stopped and was trying to explain what was going on.[16]

---

[16] Petitioners also rely on *Estate of Smart*, 951 F.3d 1161 and *Reavis v. Frost*, 967 F.3d 978 (10th Cir. 2020). Both were decided in 2020, after the events in this case and are thus inapplicable. Even so, they are not on point. In *Smart*, the Tenth Circuit agreed that a jury could determine that Smart no longer posed a threat and that officers could perceive he was no longer a threat. *Smart*, 951 F.3d at 1175. In *Reavis*, the court found it was "clearly established" as excessive use of deadly force to shoot at a fleeing vehicle

In the circumstances facing Scherman, Petitioners' offered comparators would not have alerted him that Lewis, in continuing to move toward Scherman, no longer posed a threat sufficient to merit the use of deadly force. Mr. Lewis's advancing movement toward Scherman after he fired the first shot is a crucial and material distinction between this case and cases in which officers should have known that the threat was contained. "If an officer reasonably, but mistakenly believes that a suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed." *Katz*, 533 U.S. at 205, *overruled on other grounds by Pearson*, 555 U.S. 223 (2009). Additionally, unlike any other of Petitioners' offered comparators, Lewis and Scherman were in very close range, small, confined quarters, giving Scherman limited options for movement. Considering the totality of the circumstances with which Officer Scherman was presented before and during his encounter with Lewis, the law was not clearly established that Scherman violated Lewis's Fourth Amendment rights by using lethal force to protect himself and his partner, Sergeant Box.

[driven by a suspect] when a reasonable officer would have perceived he was in no immediate danger at the time he fired" because the officer had stepped out of the way of the vehicle and it had passed him by. *King v. Hill*, 615 F. App'x 470 (10th Cir. 2015) is unpublished, but also distinguishable. The court concluded that the officers violated the decedent's rights when they shot him from twenty-five to seventy-five yards away, he had raised his hands in a non-threatening manner and was not making any threatening moves toward police. *Id*. at 472.

A more worthy comparator is *Clark v. Colbert*, 895 F.3d 1258 (10th Cir. 2018), where police confronted Clark while he was in the midst of a psychotic episode. After Clark refused commands to drop the knife he was holding, officers fired pepperballs prompting Clark to charge with the knife. When officers' attempts to tase Clark failed, they shot him. In affirming that officers were entitled to qualified immunity, the Tenth Circuit rejected that simply because Clark was in the throes of a psychotic episode, any use of force against him was unreasonable noting that his "illness factors into our analysis only as one circumstance in the totality." *Id*. at 1264. Other circumstances—Clark's refusal to drop the knife, submit to arrest, and to respond to verbal commands—required officers to use of physical force. *Id*. at 1263. "And because Clark had already attacked his brother with a dangerous weapon, the officers reasonably treated him as a threat to himself and others." *Id*. The Court further rejected Clark's attempt to invoke *Allen* observing that although "police officers can incur liability for 'reckless' conduct that begets a deadly confrontation," officers did not recklessly provoke Clark. *Id*. at 1264. Instead, they confronted him only after he had already attacked his brother, had refused to submit to arrest, and nonlethal measures had failed to subdue him. *Id*.

The circumstances existing when Scherman fired his first shot are similar to those preceding the officers' use of lethal force in *Clark*. As in *Clark*, Scherman knew that Lewis was suffering from mental incapacity. As in *Clark*, Lewis refused to submit to arrest and

failed to respond to verbal commands. Importantly, Lewis attacked Box just as Clark had attacked his brother. And attempts at nonlethal force failed. *Clark* gives fair notice that the use of lethal force against a violent, mentally incapacitated suspect who has refused both verbal commands to stop and to submit to custody and who has rushed toward officers prompting failed attempts to use nonlethal force is constitutional.

CONCLUSION

Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari to review the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

KATHRYN D. TERRY
Counsel of Record
CATHERINE L. CAMPBELL
PHILLIPS MURRAH P.C.
Corporate Tower, Thirteenth Floor
101 North Robinson
Oklahoma City, Oklahoma 73102
(405) 235-4100
kdterry@phillipsmurrah.com
Attorneys for Respondent
Officer Denton Scherman