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

REPLY BRIEF FOR PETITIONERS

Devi M. Rao
Daniel M. Greenfield*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Ste. 275
Washington, DC 20002

*Licensed to practice in Illinois; not admitted in D.C. Practicing under the supervision of an attorney at the Roderick & Solange MacArthur Justice Center who is an enrolled, active member of the D.C. Bar.

Tiffany R. Wright
Raymond P. Tolentino
Counsel of Record
HOWARD UNIVERSITY SCHOOL
OF LAW CIVIL RIGHTS CLINIC
2900 Van Ness Street NW
Washington, DC 20008
(202) 699-0097
raymond.tolentino
@huslcivilrightsclinic.org

Andrew Martin Stroth
ACTION INJURY LAW GROUP
191 North Wacker Drive
Ste. 2300
Chicago, IL 60606

Counsel for Petitioners

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INTRODUCTION

The devastating facts of this case remain despite Respondent's obfuscation. Officer Denton Scherman killed Isaiah Lewis—a teenager in the throes of a mental-health emergency. Officer Scherman *knew* that Isaiah was unarmed; the teen was completely naked save for his socks. Officer Scherman *knew* that other officers had managed the crisis without any violence whatsoever. Yet, faced with a naked teen in crisis, Officer Scherman did not employ de-escalation techniques; he did not display the competence expected from trained officers armed with deadly weapons. Officer Scherman instead shot the unarmed teen to death.

Adding insult to the injury Isaiah's grieving family suffered, the Tenth Circuit erroneously applied the doctrine of qualified immunity to relieve Officer Scherman of any liability for his unconstitutional use of deadly force. The petition presented this Court with three separate reasons to correct the Tenth Circuit's error. Respondent's brief in opposition attempts to defend the indefensible and deny the undeniable.

First, Respondent understandably fails to muster a meaningful defense of qualified immunity: The doctrine simply "cannot withstand scrutiny." *McKinney v. City of Middletown*, 49 F.4th 730, 756-58 (2d Cir. 2022) (Calabresi, J., dissenting) (appendix). It is atextual. It is ahistorical. It offends every interpretive principle espoused by this Court in the modern era. It represents "precisely the sort of 'freewheeling policy choice[s]'" the Court has "previously disclaimed the power to make." *Ziglar v. Abbasi*, 582 U.S. 120, 159-60 (2017) (Thomas, J.,

concurring in part). Worst of all, in attempting to craft a policy to "balance competing values," *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982), this Court has controverted the very purpose of Section 1983—"to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails," *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). The Court should narrow or abolish the doctrine and return the task of policymaking to Congress.

Second, Respondent cannot deny that the Circuits are deeply divided over the degree of factual specificity to prior precedent required to clearly establish a constitutional right in excessive force cases. It is plain that some Circuits demand an extraordinarily high level of "specificity and granularity" to satisfy the standard, *Morrow v. Meachum*, 917 F.3d 870, 874-75 (5th Cir. 2019), while others correctly recognize that an excessive force violation may be clearly established "even without a precise factual correspondence between the case at issue and a previous case," *Peroza-Benitez v. Smith*, 994 F.3d 157, 166 (3d Cir. 2021) (cleaned up). This conflict—which stems in part from this Court's varying articulations of the standard—has transformed the qualified immunity inquiry into a jurisprudential Mirror of Erised from which seekers may glean "whatever [they] want."[1] So, even if the Court is disinclined to abolish the doctrine, it should grant the petition to clarify its parameters.

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[1] J.K. Rowling, HARRY POTTER AND THE SORCERER'S STONE 213 (Scholastic Press 1997).

Finally, Respondent's defense of the Tenth Circuit's decision fails. The Tenth Circuit's analysis hinged on improper factfinding and robbed Petitioners of the reasonable inferences to which they are entitled at summary judgment. That alone warrants summary reversal. The court then adopted an inappropriately strict clearly established standard that places it on the wrong side of the Circuit split that this Court should resolve.

The Court should grant certiorari on the questions presented or summarily reverse the decision below.

ARGUMENT

I. THE COURT SHOULD ABOLISH OR NARROW THE DOCTRINE OF QUALIFIED IMMUNITY

As the petition explains, qualified immunity is a broken doctrine in need of serious repair. Pet.11-16. The Court should recalibrate or abolish the doctrine entirely.

Respondent does not dispute that "the judge-made doctrine of qualified immunity … is found nowhere in the text of § 1983." *Sampson v. Cnty. of Los Angeles by & through Los Angeles Cnty. Dep't of Child. & Fam. Servs.*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part). Nor does Respondent contend with the mountain of evidence demonstrating that the common law provides scant support for *any* good-faith defense to constitutional torts—much less the categorical defense of qualified immunity that exists today. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 55-57 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801-02, nn.24-26 (2018).

And whatever the common law permitted in 1871, Respondent entirely ignores that this Court has since "reformulated qualified immunity along principles not at all embodied in the common law." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

Without any anchor in the statutory text or common law, Respondent reaches to policy for a life raft. That, too, fails. Qualified immunity does not, as Respondent claims, "avoid unwarranted timidity in performance of public duties," Opp.13, due to "potentially disabling threats of liability," *Harlow*, 457 U.S. at 806. Individual government officials virtually never pay damages out of their own pockets: "In the vast majority of jurisdictions, officers are more likely to be struck by lightning than to contribute to a settlement or judgment over the course of their career." Schwartz, *The Case Against Qualified Immunity*, *supra* at 1806; *see generally* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014). Qualified immunity does not "ensur[e] that talented candidates are not deterred from public service." Opp.13 (quoting *Filarsky v. Delia*, 566 U.S. 377, 389-90 (2012)). Available evidence confirms that to the extent such deterrence exists, it is unrelated to qualified immunity and caused by the realities of modern policing. Schwartz, *The Case Against Qualified Immunity*, *supra* at 1813 & n.101.

Finally, stare decisis provides no support for qualified immunity. Stare decisis "does not matter for its own sake." *Johnson v. United States*, 576 U.S. 591, 606 (2015). It matters only to the extent that "it 'promotes the evenhanded, predictable, and consistent development of legal principles.'" *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Qualified

immunity promotes *none* of these principles. As the petition demonstrates, Pet.17-24, courts are intractably divided over how to apply the doctrine, reaching opposing outcomes in analogous cases that are neither predictable nor evenhanded. Moreover, the "special force" typically granted to stare decisis in statutory interpretation cases is unwarranted because qualified immunity does not even derive from any interpretation of Section 1983—it is a judicial invention with no basis whatsoever in statutory text or purpose. In stare decisis decisions implicating common law, this Court has recognized "a competing interest … in recognizing and adapting to changed circumstances and the lessons of accumulated experience." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Decades of accumulated experience have shown that qualified immunity is an unworkable, inequitable doctrine, and it is now clear that the supposed depository of common law underlying the doctrine is bankrupt. Stare decisis is no reason to adhere to this egregiously wrong, judicial policy gloss on Section 1983.

The Court should grant the petition and narrow or abolish the doctrine of qualified immunity.

II. THE COURTS OF APPEALS ARE DIVIDED ON THE PROPER APPLICATION OF THE QUALIFIED-IMMUNITY DOCTRINE IN EXCESSIVE FORCE CASES

If the Court declines to abolish or recalibrate qualified immunity, this Court should resolve widespread confusion among (and within) the Circuits on the proper application of the "clearly established"

standard in excessive force cases. The conflict is widely acknowledged. Jurists have observed that "courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" for prior precedent to clearly establish the law. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part); *see, e.g.*, *City of Middletown*, 49 F. 4th at 756-58 (Calabresi, J., dissenting). Scholars agree that "whether a right is found to be 'clearly established' is very much a function of which circuit … is asking the question." Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 924-25 n.68 (2015); *see, e.g.*, John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010). Advocates across the ideological spectrum agree that the clearly established standard is "unworkable and fails to promote stability and predictability in the law." Br. of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law, *Taylor v. Riojas*, No. 19-1261, 2020 WL 2572472, at 20 (2020).

Against the tide of this consensus, Respondent, in his quest to avoid liability for killing a naked and obviously unarmed teenager, asserts that the confusion represents nothing more than "semantic differences." Opp.19. But, as explained in the petition, the difference is far more than semantic: different Circuits (and different panels *within* Circuits) are applying dramatically different approaches in determining whether the law is clearly established. Pet.17-26.

Even if the Circuits were "stating the same rules," Opp.25, they are certainly not "uniformly apply[ing]"

the correct legal standard, as Respondent claims, Opp.19. Respondent takes issue with Petitioners' claim that the Fifth Circuit requires an erroneously high level of specificity to meet the clearly established standard. To rebut this claim, Respondent "incorporated portions of the Brief in Opposition to Petition for Certiorari in *Taylor v. Riojas*, 141 S. Ct. 52 (2020)," Opp.12 n.7—a curious choice given that *Taylor* exemplifies the erroneously rigid standard applied by the Fifth Circuit. In *Taylor*, rather than crediting the broad consensus and binding circuit precedent holding that forced exposure to human waste violates the Eighth Amendment, the Fifth Circuit found no violation of clearly established law because prison guards forced a man to live in human waste for "only six days," rather than seven, eight, or nine days. *Taylor*, 141 S. Ct. at 53. In another case, *McCoy v. Alamu*, the Fifth Circuit found no violation of clearly established law when a prison guard sprayed an incarcerated man with pepper spray "for no reason," despite prior circuit precedent finding constitutional violations based on unprovoked use of batons and tasers. 950 F.3d 226, 234-35 (5th Cir. 2020) (Costa, J., dissenting in part), *vacated by* 141 S. Ct. 1364 (2021). The Fifth Circuit's insistence on "specificity and granularity," *Morrow*, 917 F.3d at 874-75, earned a summary reversal from this Court in *Taylor*, 141 S. Ct. at 54, underscored by a remand to the Fifth Circuit in *McCoy*, 141 S. Ct. 1364. Despite this, Respondent insists that the qualified-immunity jurisprudence of the Fifth Circuit and the Eighth Circuit—which likewise requires prior precedent involving "the precise scenario" at issue in the current case to satisfy the clearly established requirement, *Goffin v. Ashcraft*, 977 F.3d 687, 696 (8th

Cir. 2020) (Kelly, J., dissenting)—reflect "the appropriate legal standard," Opp.21. It does not.

Moreover, this approach (which the Tenth Circuit applied in the decision below) is squarely at odds with that of other Circuits that do not require prior cases involving identical facts to satisfy the clearly established prong. Pet.17-26. As just one example, consider the Seventh Circuit's opinion in *Phillips v. Community Insurance Corp.*, finding that police officers employed excessive force by shooting an unarmed woman four times in the leg with a baton launcher. 678 F.3d 513, 518 (7th Cir. 2012). The officers claimed that no binding precedent clearly established that the use of the baton launcher was unconstitutional. *Id.* at 528. Relying on precedent involving unwarranted use of a different weapon (bean-bag guns), the court rejected the officers' argument, reasoning that "[e]very time the police employ a new weapon, officers do not get a free pass to use it in any manner until a case from the Supreme Court or from this circuit involving that particular weapon is decided." *Id.* This outcome cannot be squared with the Fifth Circuit's refusal to find clearly established law in *McCoy* because officers used pepper spray rather than a baton or a taser. Nor can it be squared with the Tenth Circuit's draconian application of the clearly established test in this case. Pet.24-26.

The division among the Courts of Appeals over the clearly established standard is entrenched and widely acknowledged. Accordingly, this Court should grant the petition to resolve it.

III. THE COURT SHOULD GRANT THE PETITION TO CORRECT THE TENTH CIRCUIT'S FLAGRANT ERRORS

With its decision in this case, the Tenth Circuit joined the Fifth and Eighth Circuits in insisting on an inappropriately high level of specificity, granularity, and precision to satisfy the clearly established standard. Pet.24-26. Respondent's opposition adopts that same inappropriately strict standard and confirms that this Court should intervene to correct the Tenth Circuit's error.

As a threshold matter, Respondent's assertion of factual "misstatements" misapprehends the record and the procedural posture of this case. At this stage, Petitioners are entitled to the benefit of all justifiable inferences and to have the facts viewed in the light most favorable to them. *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (per curiam). And to the extent Respondent disputes Petitioners' position on the material facts, a jury should decide those facts at trial—an opportunity denied by the Tenth Circuit's erroneous decision. Two supposed "misstatements" warrant mention here.

First, Respondent takes issue with Petitioners' statement that Isaiah "was not even close enough to injure Officer Scherman when he was first shot." Pet.7. But the record supports this fact. Pet.App.6 (crediting District Court's findings that Isaiah was not within close range when Officer Scherman fired the first shot); AA367-68.

Second, Respondent disputes Petitioners' view that Isaiah was immobilized by Officer Scherman's first shot. But the record, properly construed, supports this fact too. Pet.App.6-7 (noting that District Court found

that "after Scherman first shot Lewis, Lewis no longer continued to barrel toward him"). Even assuming Isaiah "continued to advance" after the first shot, that does not mean he continued to pose a danger to Officer Scherman because, as the District Court found, "a reasonable jury could conclude that, *after* Scherman discharged his firearm once, Lewis no longer presented a threat of serious physical harm to Scherman or others." Pet.App.7.

On the merits, Respondent's defense of the Tenth Circuit's analysis depends on immaterial factual distinctions and demonstrates the error of an inappropriately high standard for clearly established law. As the petition details, Pet.26-37, binding Tenth Circuit precedent put Respondent on notice that deadly force was not justified against a naked, unarmed teenager in the first instance, and further, that any supposed threat was neutralized by the first shot.

The similarities between Tenth Circuit precedent and this case are striking and described in the petition. Pet.26-37. In those cases, as in this one, officers confronted mentally troubled individuals whose allegedly violent confrontations with others precipitated police involvement and who, because of their mental health crises, aggressively responded to police engagement. In the prior cases, the Tenth Circuit refused to grant qualified immunity because the responding officers, rather than demonstrating competence to de-escalate the situation, rushed to deadly violence. The same is true here; yet, Respondent, like the Tenth Circuit, rejects these cases as insufficient to qualify as clearly established law based on the smallest factual differences. Respondent's quest for facts—*any* facts—to distinguish precedent demonstrates the emptiness

to which the clearly established analysis has been reduced: Under Respondent's view, so long as he can point to any fact that exists here that did not exist in prior cases, he is home free. This Court should reject that view.

Respondent first claims that some of the prior cases (*Allen* and *Ceballos*) involved escalation. But Officer Scherman *did* escalate the situation when he rushed onto the scene (after other officers had been peacefully following Isaiah for nearly an hour) and, instead of attempting to de-escalate the situation, repeatedly shot Isaiah. Pet.32; Pet.App.4-5; AA411-12. Respondent next distinguishes those cases on the ground that "the officers were in open spaces and had ample area to retreat if they feared for their safety." Opp.33. But the same is true here—the front door was at Officer Scherman's back and Isaiah was not in close range, providing ample opportunity to retreat from an unarmed teen.

Respondent further attempts to distinguish another case (*Carr*) on the ground that "[n]otable time and distance elapsed between the assault on officers and the interaction with the two officers who chose to fire." Opp.33. But Officer Scherman claims he killed Isaiah primarily because of the threat to his life and the circumstances in the hallway—not because of anything that happened in another place or time.

Finally, Respondent tries to distinguish *Fancher, Perea*, *Montoya*, and *Zuchel* on the ground that, in those cases, the danger to officers had passed when they fired the fatal shots. Opp.33-34. But, as the District Court found, the same was true here if the facts are viewed in the light most favorable to Petitioners.

Respondent claims that a more "worthy comparator" is *Clark v. Colbert*, 895 F.3d 1258 (10th Cir. 2018), a case in which the Tenth Circuit granted qualified immunity to officers who shot a man who charged them with a knife. *Clark* is no comparator at all. For one thing, the officers developed and implemented an "arrest strategy" and employed an "array" of non-lethal options before resorting to deadly force. *Id*. at 1262-63. Here, there was no plan or array of other options. And most significantly, the man in *Clark* charged officers with a deadly weapon. Here, Isaiah had no weapon—he was completely naked. Indeed, this fact is significant not only because of its difference from *Clark*, but also because of what it means for the cases detailed in the petition. Each of those cases—where the Tenth Circuit *denied* qualified immunity—involved the use of weapons (a gun, concrete, baseball bats) against officers. If the officers in those cases acted unreasonably when they shot and killed mentally troubled individuals who were armed and dangerous, those cases unquestionably provided fair notice that it was unreasonable to shoot, without warning, a naked, unarmed teen who was outside of arm's length.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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Tiffany R. Wright
Raymond P. Tolentino
Counsel of Record
HOWARD UNIVERSITY SCHOOL
OF LAW CIVIL RIGHTS CLINIC
2900 Van Ness Street NW
Washington, DC 20008
(202) 699-0097
raymond.tolentino
@huslcivilrightsclinic.org

Devi M. Rao
Daniel M. Greenfield*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Ste. 275
Washington, DC 20002

Andrew Martin Stroth
ACTION INJURY LAW GROUP
191 North Wacker Drive
Ste. 2300
Chicago, IL 60606

*Licensed to practice in Illinois; not admitted in D.C. Practicing under the supervision of an attorney at the Roderick & Solange MacArthur Justice Center who is an enrolled, active member of the D.C. Bar.

Counsel for Petitioners