No. _____

In the
# Supreme Court of the United States

DEPUTY CHAD JENKINS AND
DEPUTY MICHAEL DONNELLON,
*Petitioners*,

v.

JOHN JORDAN,
*Respondent*.

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

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Petitioners are police officers who used a takedown maneuver to effectuate the arrest of Respondent John Jordan who arrived at the scene of a traffic accident that involved his nephew who had been driving Jordan's company vehicle. While the officers questioned witnesses at the scene, Jordan repeatedly and loudly inserted himself into the investigation. Eventually the officers ordered Jordan to leave, which he refused to do. Jordan then did not comply with an instruction to put his hands behind his back and instead pulled away from the officer. Thereupon, an officer grabbed Jordan's arm and took him to his knees and then to the ground to handcuff him. No further force was used. Jordan brought suit under 42 U.S.C. § 1983 challenging Petitioners' probable cause for his arrest and their use of force. The district court granted the officers qualified immunity at summary judgment. On appeal, the Tenth Circuit reversed relying heavily on this Court's First Amendment decision in *City of Houston v. Hill*, 482 U.S. 451 (1987) and circuit precedent involving passive non-compliance with an officer's orders.

The questions presented are:

1. Whether the Tenth Circuit's use of *Hill's* First Amendment analysis negated the objective Fourth Amendment standard of *Maryland v. Pringle*, 540 U.S. 366 (2003)?

2. Whether it was clearly established for qualified immunity purposes that initiating a takedown maneuver to effectuate an arrest on a person who did not comply with an order to place his

hands behind his back and pulled away was an excessive use of force in violation of the Fourth Amendment?

## PARTIES TO THE PROCEEDING

Petitioners are Chad Jenkins and Michael Donnellon. At the time of the incident, both were Adams County Sheriff's Officers. Petitioners were defendants in the district court and appellees in the Tenth Circuit.

The Adams County Sheriff's Office was a defendant in the district court related to Jordan's First Amendment claim against the Sheriff's Office for violating his religious freedom during his incarceration. That claim was tried before a jury which rendered its verdict in favor of the Sheriff's Office. The Adams County Sheriff's Office is not a party to this petition.

Respondent is John Jordan. Respondent was appellant in the Tenth Circuit.

## STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- Jordan v. Adams County, *et al.*, No. 22-1154 (10th Cir.) (opinion reversing judgment of district court, issued July 18, 2023); and
- Jordan v. Adams County, *et al.*, No. 22-cv-02297-STV (D. Colo.) (order granting summary judgment to defendants Jenkins and Donnellon, filed January 17, 2022).

There are no other proceedings in state or federal trial or appellate courts, or in this Court,

directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Chad Jenkins and Michael Donnellon respectfully petition this Court to issue a writ of certiorari to review the July 18, 2023 opinion and judgment of the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The order of the district court granting summary judgment to Adams County Sheriff's Officers Jenkins and Donnellon based on qualified immunity for Respondent's Fourth Amendment claims brought under 42 U.S.C. § 1983 is reported at *Jordan v. Adams Cty. Sheriff's Office*, No. 20-cv-02297-STV, 2022 U.S. Dist. LEXIS 91606, 2022 WL 1567129 (D. Colo. Jan. 17, 2022) and reproduced at Pet.App.24-49.

The Tenth Circuit's opinion reversing the district court is reported at *Jordan v. Adams Cnty. Sheriff's Office*, 73 F.4th 1162 (10th Cir. 2023) and reproduced at Pet.App.1-23.

## STATEMENT OF JURISDICTION

The Tenth Circuit issued its opinion on July 18, 2023. Petitioners timely filed a petition for rehearing en banc under Fed. R. App. P. 35 on August 1, 2023. The Tenth Circuit denied that petition on August 17, 2023. Pet.App.54. This Court has jurisdiction over this timely-filed petition pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution and 42 U.S.C. § 1983 are reproduced at Pet.App.56.

## INTRODUCTION

In 1994, the Court in *Elder v. Holloway* held that "appellate review of qualified immunity dispositions is to be conducted in light of all relevant precedents, not simply those cited to, or discovered, by the district court." 510 U.S. 510, 512 (1994). In the process of so holding, the Court construed its earlier precedent in *Davis v. Scherer*, 468 U.S. 183, 197 (1984), that "[a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that *those rights* were clearly established at the time of the conduct at issue." 510 U.S. at 515 (emphasis in *Elder*). Not only must the prior case law be relevant to the claims actually asserted in the case, but it must also be unequivocal or lay down a categorical rule. *See, Stanton v. Sims*, 571 U.S. 3, 8 & 9 (2013). The Court has repeatedly instructed federal courts not to take conditional or subsidiary points in case law and extend beyond what was directly set out in the original holding. *See*, *e.g.*, *City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021); *White v. Pauly*, 580 U.S. 73, 80-81 (2017); *Reichle v. Howards*, 566 U.S. 658, 665-670 (2012). Of particular note, the Court has also warned against citation to precedent arising after the triggering incident even for "illustrative" purposes. *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018).

Here, the Tenth Circuit transgressed these rules in two ways. First, it relied heavily on this Court's limited First Amendment decision in *Hill* to resolve two Fourth Amendment claims that should have been predicated on an objective probable cause determination. The court did this notwithstanding its assumption that Jordan's conduct fell within the ambit of Colorado's obstruction statute, thus establishing probable cause. Second, while conducting an independent inquiry into the relevant case law in support of the respondent's claim, the Tenth Circuit failed to consider its own case law on the permissible use of force involving active resistance to arrest. In particular, it did not evaluate case law on individuals who pull away or otherwise attempt to evade arrest. Instead, the Tenth Circuit relied on various post-incident cases as well as irrelevant case law on passive noncompliance.

The court did all of this, moreover, in a case where the respondent admitted certain key facts before the district court, did not make the arguments adopted by the Court, and conceded the absence of case law on the issue of excessive force. Thus, the Tenth Circuit's decision reversing the district court's grant of qualified immunity to the petitioners on respondent's Fourth Amendment claims was plainly wrong.

## STATEMENT OF THE CASE

### I. Factual Background

On September 6, 2018, John Jordan's nephew was involved in a car accident in Bennett, Colorado. Jordan's nephew was a minor at the time of the

accident and was driving a truck owned by Jordan's company. C.A.App.73, ¶19. Officers Donnellon and Jenkins were dispatched to the scene to investigate. *See, id.*, 66, ¶ 1-67, ¶¶ 2-3. As part of this investigation, Officer Donnellon questioned Jordan's nephew about the accident. *Id.* 66, ¶1. Jordan's nephew could not locate proof of insurance for the truck and called Jordan. *Id.*, 73, ¶19.

Jordan arrived at the scene lacking proof of insurance. C.A.App.73, ¶19. At some point after arriving on scene, Jordan called his office to attempt to obtain proof of insurance. A portion of that call was recorded. While on the sidewalk, Jordan inserted himself into the ongoing investigation. Jordan repeatedly raised his voice, yelling while at the scene, and was admittedly irritated at the officers. *Id.*, 54:9-19; 66-67, ¶¶1-2.

According to Officer Jenkins's report, Jordan's shouting interfered with Officer Donnellon's ability to understand answers from at least two third-party witnesses at the scene. *Id.*, 63-64; 67, ¶¶2-3. A portion of the interaction between Jordan and the officers was picked up by the audio recording. C.A.App.17-19; 95, ¶4. The audio records Jordan not only insulting the officers but repeatedly interrupting them while conducting interviews:

- "Are you taking a statement or are you giving a statement?"
- "And they're saying that's not the point of impact. That's what you're saying."
- "How can you tell those skidmarks are from that car? This whole road is full of skidmarks."

- "Quit making statements. If you guys want their statements."
- "If you guys want their statements, let them give their statements."

C.A.App.115-116.

Near the end of the recorded exchange, Officer Jenkins advised Jordan, "Sir, you better go away." Jordan continued to interject himself in the investigation. The exchange concludes:

> Deputy Jenkins: Are you done?
>
> Jordan: Yeah.
>
> Deputy Jenkins: Good. Go. Go.
>
> Jordan: I'm not going anywhere. I'm going to stay right here.
>
> Deputy Jenkins: [Inaudible] Put your hands behind your back.

C.A.App.116.

Jordan did not put his hands behind his back. Jordan variously asserted he either did not hear the first instruction, or he was unable to comply because he was still on the telephone. C.A.App.68, ¶5; 74, ¶24. Initially, the officer attempted to make contact with Jordan's wrist. C.A.App.69, ¶6. Jordan thought the officer was "trying to knock the phone out of my hand and I was trying to put the phone in my left-hand shirt pocket." The officer eventually grabbed Jordan's wrist and initiated a takedown maneuver. The officer requested Jordan place his hands behind his back three more times–although the parties differ as to exactly when and how quickly the takedown

maneuver was completed relative to the second instruction. C.A.App.68, ¶5; 74, ¶¶23-24. According to Jordan, an officer took him to the ground, first to his knees while the officer was holding his left arm. The officer then pushed him to the ground and then did an arm sweep until Jordan was lying face down. C.A.App.69-70, ¶¶6-7; 96.

Once on the ground, the officers were able to place Jordan in handcuffs. C.A.App.17, ¶¶25-26; 69-70, ¶¶6-7; 75, ¶25. No further force was used. C.A.App.70, ¶8. Jordan was arrested for resisting arrest and obstructing a police officer under Colo. Rev. Stat. §§ 18-8-103 and 18-8-104. C.A.App.19, ¶29; 70, ¶9. The charges against Jordan were dropped after he completed a remedial class on making good choices. C.A.App.111:17-112:12.

## II. Proceedings Below

Jordan's complaint asserted three Fourth Amendment claims under 42 U.S.C. § 1983 for excessive force, unlawful seizure, malicious prosecution against Officer Donnellon and Jenkins. Jordan also brought a claim for violation of his First Amendment right to freedom of religion against the Adams County Sheriff's Office. The parties in this case consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73(b). Pet.App.24; C.A.App.114; Dist.Ct.Dkt. ECF 6 & 7.

In response to Jordan's complaint and after discovery was complete, the officers filed a motion for summary judgment and asserted qualified immunity.

### A. Jordan minimally argues qualified immunity before the district court at summary judgement.

In response to the officers' motion, Jordan argued his shouting could not have interfered with the investigation because he did not enter the street. In support, he pointed to two pieces of evidence. The first was an affidavit from his nephew that Jordan's shouting did not interfere with *the nephew's* ability to answer questions. The second was his deposition testimony that he stayed on the sidewalk. C.A.App.85; *citing* C.A.App.68, ¶4 and 94. As for his arrest, Jordan admitted in his response to the undisputed facts that he did not comply with either the officer's instruction to leave the scene or place his hands behind his back. C.A.App.83. But he claimed he had not heard the first instruction. C.A.App.68, ¶5. He also admitted the officer initially made contact with his wrist. C.A.App.69, ¶6. He thought the officer was "trying to knock the phone out of my hand and I was trying to put the phone in my left-hand shirt pocket." C.A.App.68-69, ¶5 and¶7; 96, ¶8. In any event, Jordan argued, he could not have complied with the order without hanging up the phone. *Id.* He claimed, therefore, that the tackle came as a surprise. C.A.App.69, ¶7.

As for case law relating to qualified immunity as to probable cause for his arrest and prosecution under the Fourth Amendment, Jordan cited only to two First Amendment cases, *Hill*, 482 U.S. at 462-63, and *Dempsey v. People*, 117 P.3d 800, 810-11 (Colo. 2005), along with one Fourth Amendment qualified immunity case, *Stearns v. Clarkson*, 615 F.3d 1278

(10th Cir. 2010). Finally, while acknowledging that the probable cause determination should be an objective one under *Graham v. Connor*, 490 U.S. 386 (1989), Jordan nevertheless argued that the "Plaintiff's theory of the case is" that one of the officers "was irritated with plaintiff questioning the officers' conduct and, when plaintiff refused to leave the scene," the officer "lost his temper and arrested plaintiff." The officer "arrested him out of spite, not because of probable cause that plaintiff committed a crime." C.A.App.86.

As for the excessive force claim, Jordan first argued that his seizure was improper because the officers lacked probable cause. "Thus, if [an officer] seizes an individual without probable cause, the officer is not entitled to qualified immunity." C.A.App.87. Citing to a portion of the transcript of Jordan's call with his office, Jordan argued that he "was standing still and not attempting to evade the officers." C.A.App.89. As for case law, Jordan cited only to general propositions of law contained in *Graham v. Connor*, 490 U.S. 386, 396 (1989) and *Cortez v. McCauley*, 478 F.3d 1108, 1117 (10th Cir. 2007), which involved the use of force during an investigative detention.

The district court granted the officers' motion for summary judgment as to the excessive force, unlawful seizure, and malicious prosecution claims based on qualified immunity.

On the excessive force claim, after surveying the *Graham* factors, the district court held the "Plaintiff has failed to sustain his burden to identify a clearly established right regarding his excessive force

claim[.]" Pet.App.34-35. The court noted Jordan had not "compare[d] the facts in *Cortez* to Plaintiff's arrest, nor does he provide any analysis of the *Cortez* court's excessive force determination." Pet.App.36, n.7. Nor had Jordan "analyze[d] the *Graham* factors or argued that Defendants' violation of the Fourth Amendment is clear from *Graham* itself." Pet.App.37, n. 10. The district court nevertheless examined *Cortez* and distinguished its facts from those before it because the officers here were attempting to place Jordan under arrest at the time of the takedown maneuver. As for Jordan's argument that he could not have complied with the order without hanging up his phone, the district court found the argument unpersuasive because "[h]e could have simply ended his conversation and complied" with the deputy's order." Pet.App.37, n.9.

On the unlawful seizure and malicious prosecution claims, the district court held the officers had arguable probable cause for Jordan's arrest. After surveying federal law and the Colorado Supreme Court decision in *Dempsey*, the court held that Jordan's failure to leave the scene when ordered to do so and his interference with the officers' ability to interview third parties at the scene constituted sufficient interference to violate Colorado's obstruction statute. As for the nephew's affidavit, the district court observed it was limited to the officer's interview of the nephew and not third parties. The same was true for the transcript of the audio call between Jordan and his office. The court also observed that "Plaintiff's response barely addresses the clearly established prong of the qualified immunity analysis for these claims." Pet.App.45; *see also id.* 41, n.14.

Again, distinguishing *Cortez*, the court turned to *Stearns*, which it distinguished on the grounds that it "considered neither the Colorado obstruction statute, nor allegations that the plaintiff interfered with an ongoing investigation." *Id.* 46-47.

Jordan's remaining First Amendment claim against the Sheriff's Office for violating his religious freedom during his incarceration was tried before a jury. The jury rendered its verdict in favor of the Sheriff's Office. Jordan then filed an appeal of the district court's grant of summary judgment on the Fourth Amendment claims against the officers. Jordan did not challenge the jury's verdict on appeal.

### B. Jordan shifts grounds on appeal and concedes the absence of qualified immunity case law on point as to excessive force.

In his opening brief, Jordan sought reversal of the officers' qualified immunity on his unlawful seizure and malicious prosecution claims by again arguing that merely yelling at officers is not probable cause for obstruction. In support, he again relied on two First Amendment cases, *Hill* and *Dempsey*, as well as *Stearns*. He also cited for the first time this Court's decision in *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1977), as well as a decision from Washington State, *State v. EJJ*, 354 P.3d 815 (Wash. 2015). On the facts, he pointed to his nephew's affidavit. He also argued for the first time that he could not have interfered with an "investigation" because the officers were not truly investigating but were suggesting answers to the witnesses. Op. Br. 20-21. He then returned to the issue of the officers' intent,

concluding "there was a genuine dispute of fact as to whether the officers arrested him because he was criticizing them or because he was interfering in their investigation." *Id.* 21-22. "Only a jury could determine the reason for the arrest." *Id.* 22.

On excessive force, Jordan argued again the facts, but also asserted that any use of force was unconstitutional because the officers lacked probable cause for his arrest. *Id.* 24. In addressing his lack of citation to case law, Jordan argued for the first time, the officers use of force was clearly unconstitutional in light of both *Hill* and *Graham* but acknowledged "counsel found no case law on point." *Id.* 25; *see also id.* 26 ("even though there was no case directly on point.") & 27 ("even without precedent on point.")[1] Instead, he argued the absence of precedent was evidence of the obviousness of the officers' misconduct. *Id.* 25. He also advanced for the first time two additional Tenth Circuit decisions, *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007) and *McCoy v. Meyers*, 887 F.3d 1034 (10th Cir. 2018).

In response, the officers reiterated their arguments below and distinguished Jordan's new case law. The officers also pointed to the plaintiff's burden under circuit precedent to overcome qualified immunity at summary judgment and the court's argument forfeiture rules. (Resp. Br. 6, *quoting Estate*

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[1] These concessions regarding the lack of case law on point were not isolated. On remand before the district court, Jordan sought and received leave to add a demand for punitive damages. In his request for leave Jordan stated "prior to the circuit's opinion, it was unclear how the officers' conduct would be judged." Dist.Ct.Dkt. ECF 79, p. 2

*of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014) ("[u]nlike most affirmative defenses," the plaintiff "bear[s] the ultimate burden of persuasion […] to overcome qualified immunity"); *see also id.* 10, 19-20.

In reply, Jordan again returned to his modest factual dispute, relying heavily of the transcript of Jordan's partial interaction with one of the officers. He now argued his use of force claim was focused on the amount of force to be used "on a subdued suspect," but offered no additional case law on the use of force. Reply Br. 12-13. He also asserted his first issue presented for review was really "Did the court err in failing to consider plaintiff's theory of the case that he was arrested merely for yelling at the officers?" *Id.* 10. This, Jordan later asserted, was his "principal claim." *Id.* 16-17 ("Again, this turns the analysis back on plaintiff's principal claim–the officers arrested him because he was exercising a constitutional right, which he had a clearly established right to do.").

### C. The Tenth Circuit reverses the grant of qualified immunity based on *Hill* and case law not raised below or on appeal by Jordan.

On appeal, the Tenth Circuit reversed the district court's grant of qualified immunity to the officers on all three of Jordan's Fourth Amendment claims. Pet.App.2-3. The opening line of the Court's opinion restated Jordan's theory of the case: "According to Plaintiff John Jordan's allegations, he was thrown to the ground and arrested for criticizing the police." Pet.App.2.

The court then summarized the factual record below but omitted any discussion of whether Jordan's conduct interfered with the officers' ability to conduct interviews with third party witnesses. Critically, the court asserted because Jordan made no argument that his conduct did not violate Colorado's obstruction statute, Colo. Rev. Stat. § 18-8-104, the court "would assume for this appeal that *his conduct fell within the ambit of that statute*, and consider only whether his arrest violated his constitutional rights." Pet.App.7, n.2 (emphasis added).

Turning to the qualified immunity framework, the court reiterated the plaintiff bore "the burden of proving that … the federal rights were clearly established at the time of the conduct." Pet.App.8. "To show that the law is clearly established," the court explained, "a plaintiff must normally point to 'a Supreme Court or Tenth Circuit decision on point[.]'" *Id.*, *quoting Cortez*, 478 F.3d at 1114.

Under its discussion of probable cause, the court turned to *Hill* and recited its facts. At the conclusion thereof, the court asserted "[l]ike in *Hill*, Jordan here was arrested for merely criticizing an officer while the officer was questioning another party," again adopting Jordan's theory of the case. Pet.App.10. The court explained that *Hill* was "relevant to an unlawful arrest claim under the Fourth Amendment, even though it involved a First Amendment challenge to a local ordinance," because the court had made "clear in *Guffey v. Wyatt*" it was by relying on it, in part, to deny qualified immunity in another Fourth Amendment case. *Id.* The court acknowledged footnote 11 in *Hill* and the limits

contained therein but declined to apply them to the undisputed facts of the case–deferring instead to Jordan's theory at summary judgment that the officers were motivated solely by retaliation. Pet.App.12-13, n.5.

In two footnotes, the court first declined to consider standard appellate forfeiture rules in light of this Court's holding in *Elder*.[2] Pet.App.11, n.3. The court then invoked the first of a series of recent post-incident decisions, *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022). *Irizarry*, the court explained, "addressed the right to criticize and film police[.]" Pet.App.11, n.4. Acknowledging the decision's recency, the court nevertheless cited *Irizarry* "to illustrate how the Tenth Circuit has recently addressed the right at issue here[.]" *Id.*

Turning to whether the officers violated clearly established law, the Tenth Circuit eventually explained that:

> Although Deputy Jenkins claims that he could not hear the nephew over Mr. Jordan's criticism, see App'x at 64, this is irreconcilable with a view of the record most favorable to Mr. Jordan, *see* App'x at 115 (phone recording of interaction), see also App'x at 97-98 (Deputy

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[2] The Tenth Circuit has previously applied the appellate forfeiture rule in a qualified immunity case. *See Gutierrez v. Cobos*, 841 F.3d 895, 902-03 (10th Cir. 2016). The deputies argued appellate forfeiture on several points newly raised by Jordan on appeal, although not for the proposition discussed in the court's footnote.

> Donnellon's report reviewing his conversation with the nephew, including what they both said), App'x at 94-95 (declarations of Mr. Jordan and his nephew). And even though the Deputies claim that Mr. Jordan was "attempting to direct the interviews and suggest answers to his nephews," Aple. Br. 13, this is also unsupported by the transcript recording when viewed most favorably to Mr. Jordan.

Pet.App.15-16. At no point, however, did the court explain how its assessment forecloses the interference with third party witnesses that was documented in one of the officer's contemporaneous reports. Nor did the court explain how its adoption of Jordan's theory of the case was consistent with its prior assumption "that his conduct fell within the ambit of that statute." Pet.App.7, n.2. Instead, the court held *Hill* combined with *Guffey* clearly established that the officers lacked probable cause to arrest Jordan without any assessment of the exceptions noted in *Hill*. Pet.App.14-16.

Turning to Jordan's excessive force claim, the court set aside Jordan's actual argument, and conducted its own assessment of the *Graham* factors. Pet.App.18, n.6. Here again the court adopted "Mr. Jordan's *presentation* of the facts[.]" Pet.App.18 (emphasis added) In support, the court invoked the inconclusive audio transcript. The court did not address either of the officer's contemporaneous reports or Jordan's admission before the district court. The court only minimally discussed Jordan's attempt

to pull away from the officer's initial attempt to grab his wrist in a footnote. There the court, without citation to record or Jordan's own admission to the contrary, held "[e]ven if Mr. Jordan did throw out his arm, this happened after takedown maneuver[.]" Pet.App.20, n.9. Instead, the court held "[b]ecause Mr. Jordan's account of the facts is not contradicted by the audio recording, we must credit his version of the events on summary judgment." Pet.App.19, n.7. The court concluded the officers' use of a takedown maneuver was a disproportionate use in the amount of force to secure an arrest for two misdemeanors. In its analysis the court relied heavily on two recent decisions rendered by the court after the incident occurred in this case, *Wilkins v. City of Tulsa*, 33 F.4th 1265 (10th Cir. 2022) and *Surat v. Klamser*, 52 F.4th 1261 (10th Cir. 2022). App.18-20.

Finally, the court turned to whether it was clearly established that the officers' use of force was excessive. The court agreed with the district court that *Cortez* did "not clearly establish the law here." Pet.App.21, n.10. Nor did the court cite to or discuss the two new cases, *Casey* and *McCoy*, advanced by Jordan for the first time on appeal. Instead, the court again turned to a case Jordan had never advanced, *Morris v. Noe*, 672 F.3d 1185 (10th Cir. 2012), which involved only passive noncompliance with an officer's order. The Tenth Circuit justified its reliance on a new case by citing to this Court's holding in *Elder*.

In a footnote, the Tenth Circuit again invoked *Surat*, a case it decided after the incident here. *Surat*, the court explained, had extended *Morris* to disallow the use of a takedown maneuver when only minimal

resistance is used. The court acknowledged *Morris* only governed when there was "no resistance whatsoever." Pet.App.22, n.11. Thus, the court concluded, whether Jordan "did or did not resist arrest remains a key factual question for the application of qualified immunity." *Id.*

## REASONS FOR GRANTING THE PETITION

### I. The Decision Below Is Wrong

#### A. The Tenth Circuit misapplied *Hill* by using its qualified First Amendment analysis to determine whether the law of the Fourth Amendment was clearly established.

The Tenth Circuit's decision as to probable cause was largely premised on this Court's First Amendment decision in *Hill* even though no First Amendment claim was at issue on appeal. Pressing *Hill* into service as the Tenth Circuit did here transgresses this Court's admonitions about looking to relevant case law because *Hill* does not establish a clear rule applicable to the facts or claims of this case. Moreover, the court negated the objective standard of *Maryland v. Pringle*, 540 U.S. 366 (2003), by ignoring both the officer's alternative grounds for the arrest and its own stated assumption that Jordan's conduct fell within the ambit of the statute. Instead, the court adopted Jordan's argumentative theory of the case regarding the officers' intent.

*1. Hill does not clearly establish the law for purposes of the Fourth Amendment.*

The Tenth Circuit, rightly, has previously observed police officers are "entitled to assume the validity of the law they are sworn to uphold and enforce[.]" *Miller v. Stinnett*, 257 F.2d 910, 914 (10th Cir. 1958); *cited in Pierson v. Ray*, 386 U.S. 547, 555 & n.10 (1967) ("Although the matter is not entirely free from doubt, the same consideration would seem to require excusing [a police officer] from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied."). "[I]t would be contrary to public policy to require such public officers to enforce laws, valid on their face, at the risk of holding them civilly liable if they are subsequently declared invalid." *Miller*, 257 F.2d at 914. Yet, that is exactly what the court did here.

This Court's decision in *Hill* involved a facial First Amendment challenge to a municipal ordinance that made it unlawful to interrupt a police officer in the performance of his duty. 482 U.S. at 457-58 & n.6. There the plaintiff was arrested when he verbally accosted police officers who were attempting to question his friend about stopping traffic. The Court invalidated a portion of the ordinance based on a *concession* that the offense at issue involved pure speech, which is different from mixed offenses involving "physical interruptions." *Id.* at 460-61 & n.9; 469, n.18 (noting concession of "preemption," *i.e.*, that the charged offense only covered speech not otherwise chargeable under a state physical interference statute). The Court then specifically explained that

physical interruptions would include not only physical touching of an officer, but speech that physically obstructed the officer. In footnote 11, the Court offered several examples of punishable obstructive speech, such as "an individual who chooses to stand near a police officer and persistently attempt to engage the officer in conversation while the officer is directing traffic at a busy intersection," or a person who "fail[s] to disperse in response to a valid police order or [creates] a traffic hazard." *Id.* at 462, n.11. Under the case as presented, however, the Court in *Hill* found the ordinance to be overbroad as to pure speech. *Id.* Notably, the Court's decision in *Hill* contains no reference to the Fourth Amendment or probable cause.

Here, the officers charged Jordan with violating Colorado's resisting arrest and obstruction statutes, Colo. Rev. Stat. §§ 18-8-103 and 18-8-104. Neither Colorado statute has been previously declared unconstitutional on its face or as applied by either Colorado courts or the Tenth Circuit.

The Colorado Supreme Court in *Dempsey* already conducted an extensive assessment of Colorado's obstruction statute in light of this Court's earlier holding in *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973), that "one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer." In doing so, the Colorado Supreme Court confirmed that Colorado's obstruction statute does not punish mere verbal remonstrance, but nor does it require either physical contact or actual physical interference. 117 P.3d at 810-11. Effectively impeding an investigation through an "interposition of

an obstacle" is enough. *Id*. at 811; *see also Kaufman v. Higgs*, 697 F.3d 1297, 1301-02 (10th Cir. 2012) (relying on *Dempsey* to hold that mere silence is not enough to constitute obstruction because the "silence here did nothing to the police's investigative efforts; it allowed them to continue unimpeded," including asking questions of third-party witnesses.). This is consistent with the Court's discussion in footnote 11 of *Hill* of physical interruptions.

*Hill* itself has never been cited by a Colorado court in a published decision. Given *Hill*'s limited ruling premised on a concession, that is hardly surprising. The Tenth Circuit has only cited *Hill* twice–in this case and in *Guffey v. Wyatt*, 18 F.3d 869 (10th Cir. 1994), which arose out of Oklahoma.

Even if it was proper for Tenth Circuit to rely on *Hill*, footnote 11 forecloses a finding that it was clearly established that the officer's decision to arrest Jordan for his conduct at the scene of a traffic accident was unconstitutional. Here, the issue confronted by the Officers was not the pure speech considered by the Court in *Hill*, but the physical interruption caused by Jordan that was carved out in footnote 11 of *Hill*. Even in the absence of footnote 11, the limited holding of *Hill*, predicated as it was on a concession as to the scope of the ordinance at issue, would not be enough to put the issue beyond doubt when the conduct at issue triggered a more narrowly tailored state interference statute.

The Tenth Circuit, however, undertook no analysis of the constitutionality of Colorado's obstruction statute whether on its face or as applied. Nor did Jordan argue the issue in the Tenth Circuit. If

either had been addressed, the Tenth Circuit would have had to directly confront the exceptions noted by the Court in footnote 11 of *Hill*. As it stands, the Tenth Circuit's generalized application of *Hill* in a Fourth Amendment case simply reads the distinctions in footnote 11 out of *Hill*.

The Tenth Circuit sought to close the gap between *Hill*'s First Amendment analysis and the Fourth Amendment claims presented here by citing to *Guffey*, 18 F.3d 869 (10th Cir. 1994). The Tenth Circuit asserted *Guffey* "made this clear[.]" Pet.App.10. But *Guffey* involved a police officer's decision to arrest a referee at a high school basketball game. After approaching the referee on the court, the officer directed the referee "to start 'calling more fouls.'" *Id.* at 871. The referee replied, "I don't know who you are, but you don't have any business out here on the floor." *Id.* at 870. At that, the police officer briefly arrested the referee and escorted him from the court before eventually releasing him.

On appeal, the Tenth Circuit held the referee's undisputed conduct did not give rise to an actionable offense under Oklahoma's obstruction statute. *Id.* 872-873. The court went so far as to distinguish as "factually distinguishable," Oklahoma case law permitting a conviction for obstruction where the defendant had "'harassed' and 'hindered' and officer, frustrating his attempts to remove a vehicle from the road and delaying a blood alcohol test.'" *Id.* at 872, *distinguishing Trent v. State*, 777 P.2d 401 (Okla. Crim. App. 1989). In passing, the Tenth Circuit observed that it was "mindful" that this Court "has repeatedly vitiated statues providing the police with

unfettered discretion to arrest individuals for words or conduct an officer finds offensive." 18 F.3d at 871-72. It then quoted a passage from *Hill* regarding the right to verbally oppose and challenge police action. Nothing in *Guffey's* substantive analysis, however, relied on *Hill* as a necessary supporting basis for its ruling against the officer there. *Id.* at 872. Nor did the Tenth Circuit in *Guffey* vitiate either Oklahoma's or Colorado's obstruction statute.

Thus, on the date of the incident, the officers had no notice or reason to believe that their ability to charge Jordan for his conduct (which the court also assumed fell within the obstruction statute) was somehow limited by *Norwell*, *Hill*, or any other First Amendment case.

*2. The Tenth Circuit's use of Hill negated the objective Fourth Amendment standard of Maryland v. Pringle, 540 U.S. 366 (2003).*

To determine whether an officer had probable cause for an arrest, a court must "examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quotation omitted). Because probable cause "deals with probabilities and depends on the totality of the circumstances," *id.*, it is "a fluid concept" that is "not readily, or even usefully, reduced to a neat set of legal rules," *Illinois v. Gates*, 462 U.S. 213, 232 (1983). It "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.* at 243-244, n.13. It "is not a high bar." *Kaley v. United States*, 571 U.S. 320, 338 (2014).

The Tenth Circuit focused on Jordan's arrest for obstruction under Colo. Rev. Stat. § 18-8-104. That offense stems from Jordan's (1) interference with the officers' ability to interview third-party witnesses at a live traffic accident scene; (2) the coaching of a witness–his nephew–during his interrogation by the officers; and (3) Jordan's refusal to disperse in response to a lawful order to leave the scene.

The court acknowledged that the first two activities would justify probable cause if present. But the panel in footnote 5 summarily dismissed the undisputed evidence on this point without analysis because it sought to "construe the facts most favorably to Jordan at this time" because it involved an appeal from the grant of qualified immunity. Pet.App.13, n.5. By doing so, the panel simply adopted what Jordan labelled as his "theory of the case" that the motivation for the arrest was retaliation for mere verbal criticism. (*Compare* Pet.App.9-10 & 13, n.5 *with* Op. Br. 4, 14, 17 n.7 & Reply Br. 4, 10 (referring to Jordan's criticism "theory" of the case predicated on *Hill*).) In other words, the panel took it as a given that Jordan was arrested for criticizing the officers, and nothing more, simply because Jordan said so. The fact the transcript of the phone call does not contradict Jordan's theory does not establish a disputed factual record because it also does not contradict the officers' account of what occurred. Neutral evidence cannot be construed in either party's favor to create a factual dispute that does not otherwise exist.

Nor is the court's adoption of Jordan's argumentative theory consistent with the standard for a probable cause assessment at summary judgment.

That assessment should be undertaken from the "standpoint of an objectively reasonable police officer." *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (quoting *Pringle*, 540 U.S. at 371). In making that assessment, the court must examine "historical facts," not argumentative theories. *Pringle*, 540 U.S. at 371. Nor is the panel's role to credit innocent explanations for the plaintiff's conduct at summary judgment. *Wesby*, 138 S. Ct. at 588.

The Tenth Circuit did not explain how the partial phone recording (which consisted of a call between Jordan and his office containing only a subset of Jordan's interactions with the officers) could possibly foreclose the fact that his shouting interfered with Officer Donnellon's ability to talk to *third-parties* on the scene. The same is true for the nephew's statement that the officer was able to understand *him*.[3] The district court specifically pointed to and assessed this evidence at summary judgment. The Tenth Circuit, however, did not explain how the district court's assessment was flawed.

The Tenth Circuit, moreover, simply ignores Jordan's refusal to disperse from an active traffic investigation scene in response to a lawful order from Officer Jenkins. On appeal, Jordan again conceded he refused to comply with the order to leave. Op. Br. 7. Probable cause, therefore, existed to arrest Jordan for obstruction based on any one of his several on-scene

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[3] Neither Jordan nor his nephew were in a position to know the impact of Jordan's shouting on the Officers' ability to interview *third-parties*. Nor did they ever claim to know in the evidence submitted to the district court. C.A.App.94.

activities. The Tenth Circuit, however, cited no authority for the proposition that an officer cannot order a bystander at a traffic accident to leave under the circumstances presented here.

By adopting Jordan's theory of the case as to the officers' motive, the Tenth Circuit in effect treated his Fourth Amendment claims as if they were a First Amendment retaliatory arrest claims. But even there, no claim can lie if there was probable cause for the arrest. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1723 (2019). Thus, the court's concern as to the officers' alleged motives should have been irrelevant to its Fourth Amendment assessment. While *Elder* requires a court to independently inquire into the state of the relevant law, it does not authorize a circuit court to reframe a plaintiff's claims on appeal or to selectively credit the record. Under *Maryland v. Pringle*, the court should have assessed the undisputed historical facts from the perspective of an objectively reasonable police officer. Because it did not do so, the Tenth Circuit's reversal of the district court's grant of summary judgment on Jordan's unlawful seizure and malicious prosecution claims was plainly wrong.

### B. The Tenth Circuit's Excessive Force analysis in this case is inconsistent with this Court's precedent and with its own prior decisions.

#### *1. The officers did not use excessive force in applying a takedown maneuver on Jordan.*

On prong one of the qualified immunity analysis related to excessive force, the Tenth Circuit undertook its review based only on a subset of the undisputed facts. Deploying the *Graham* factors, the court construed the facts as follows: "According to Jordan's presentation of the facts, the Officers tackled Jordan to the concrete, kicked out his supporting arm so that his head hit the concrete, and placed a knee on his cheek." Pet.App.18. But as a review of the undisputed facts in the record actually reveals, this was not an instantaneous "tackle" but was instead an incremental takedown. C.A.App.68-70. The situation in this case, by Jordan's own admission was defined by Jordan's actions and the Officers' necessary and subsequent reactions.

No party disagrees that Officer Jenkins unsuccessfully attempted to secure Jordan's hands prior to the application of any takedown maneuver. *Id.* 69. Even under Jordan's version of events, he and Officer Jenkins were engaged in physical contact prior to the initiation of the takedown maneuver, with Jordan attempting to evade the contact. *Id.* 96, ¶¶ 6, 7, 8, 9 and 10. Under either account, Officer Jenkins initiated the takedown only after Jordan demonstrated active resistance to lawful commands.

The Tenth Circuit, however, did not use Jordan's version of events. Instead, it posited the force used as a "tackle," Pet.App.20, n. 8, which ignores the descriptions from Jordan of the various intermediary steps between his first physical contact with the officers and the last. *Compare* Pet.App.20, n. 8 with C.A.App.69. Even when the court must take the disputed facts in the light most favorable to Jordan–they still must be Jordan's version of the facts–not an alternative set of facts constructed by the court at a higher level of abstraction.

Even still, under *Graham v. Connor*, 490 U.S. 386, 396 (1989), an officer is entitled to use appropriate force to secure an arrest. If an arrestee does not cooperate with an officer's attempt to bring him into custody and struggles against him, the police officer is entitled to use a takedown maneuver–even in cases involving minor offenses and no threat to the officers. *See*, *e.g.*, *Becker v. Bateman*, 709 F.3d 1019, 1021 & 1023-25 (10th Cir. 2013) (throwing a sober driver to the ground after he resisted being arrested during a traffic stop was not clearly established to be excessive); *Hinton v. City of Elwood*, 997 F.2d 774, 781 (10th Cir. 1993) (taking a person stopped for disturbing the peace to ground after he shoved an officer out of his way to get past him); *Huntley v. City of Owasso*, 497 F. App'x. 826, *5 (10th Cir. Sept 27, 2012) (leg sweep justified by suspect's resistance in the form of "struggling against their hold and pulling backward as they moved him").

*2. It was not clearly established that the Officers' use of a takedown maneuver was unconstitutional.*

Following *Elder v. Holloway*, appellate review of qualified immunity dispositions is to be conducted taking into consideration all relevant precedents, not only those cited to or discovered by the district court. 510 U.S. 510, 511 (1994). The Tenth Circuit misapplied this principle when it cited to *Morris v. Noe* as support for its decision denying qualified immunity on the grounds that the law was clearly established. In its heavy reliance on *Morris,* the Tenth Circuit failed to consider all relevant precedent.

In its assessment of prong two of the qualified immunity analysis, the Tenth Circuit held the law was clearly established that the use of a takedown maneuver was unconstitutional. In doing so, it did not rely on any Supreme Court precedent, but instead relied almost exclusively on *Morris*, 672 F.3d 1185 (10th Cir. 2012). The Tenth Circuit summarized *Morris* and construed its ultimate holding as "a takedown maneuver is unconstitutional when the arrestee poses no threat, puts up no resistance, and does not attempt to flee." Pet.App.21-22. Essentially, *Morris* establishes that a takedown maneuver is unconstitutionally excessive in situations where officers are faced with an individual exhibiting passive non-compliance. *Morris* at 1196.

This summary of *Morris*, however, omits several relevant details about that case that were emphasized in the underlying decision–namely, that (1) the takedown occurred at a crime scene that was "calm and under control," 672 F.3d at 1190,

(2) "Morris's behavior up to the point of the arrest was not threatening, *loud, or disorderly*," *id.* at 1193 (emphasis added), (3) Morris did not "fail to comply with any officer orders," *id.* and (4) prior to the takedown maneuver, Morris was not given any warnings. *Id* at 1196.

The Tenth Circuit's reading of this Court's precedent in *Morris* again falls outside of the parameters set by the Supreme Court for how courts are to conduct the clearly established prong of the qualified immunity analysis. Courts are reminded of the importance specificity plays in the Fourth Amendment context. The constitutionality of use of force by law enforcement is an area "in which the result depends very much on the facts of each case" thereby entitling law enforcement officers to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. *Mullenix v. Luna,* 577 U.S. 7, 8 (2015).

In *Bond*, for example, this Court held that its reliance on three of its own decisions does not "com[e] close to establishing that the officers' conduct was unlawful" in a Fourth Amendment excessive force case due to significant factual differences. 142 S. Ct. at 12. The same can be said here. In contrast with *Morris*, in this case (1) the participants were at a traffic accident scene that was still live, C.A.App.66 (2) Jordan was not "calm and under control," but loud and disorderly, *id.* 67 (3) he interfered with the Officers' ability to question third-parties, *id.* (4) he at least twice failed to comply with an officer's order–first to "go," and then to put his hands behind his back, *id.* 68 and (5) he resisted Officer Jenkin's attempt to handcuff him, *id.*

Any one of these factors would be enough to distinguish this case from *Morris*–most importantly his failure to comply with an officer's orders. Even under Jordan's version of events, he did not cooperate with Officer Jenkins' efforts to bring him into custody, instead pulling his arm away from reach, evidence of active resistance, which is sufficiently minimal force to fall under qualified immunity doctrine as it existed at the time of the incident.

Importantly, controlling case law approves of the use of a takedown maneuver in analogous cases. In *City of Escondido v. Emmons*, 139 S. Ct. 500, 502 & 503 (2019), this Court held that where an officer tells a man not to close a door, but he does so anyway and tries to brush past the officer who then stops him and takes "him quickly to the ground, and handcuff[s] him," any prior precedent involving only "*passive* resistance" did not establish adverse precedent. Likewise, cases like *Becker*, *Hinton*, and *Huntley*, which approve takedown maneuvers in analogous situations are inconsistent with the denial of qualified immunity. *See Kisela* at 1153-54.

The Tenth Circuit specifically noted *Surat v. Klamser*, 52 F.4th 1261, 1274-75 (10th Cir. 2022), a circuit opinion from 2022, a date several years after the incident at play here, seemingly as additional support for its reliance on *Morris* in this case. Pet.App.22, n. 11. However, any level of reliance on *Surat* by the Tenth Circuit is misplaced and in direct contravention of this Court's holding in *Kisela* reminding courts that "the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the

law *at the time of the conduct."* 138 S. Ct. at 1152 (emphasis added) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (*per curiam).*)

In sum, *Morris* does not put the issue of the use of force exercised in the circumstance presented here beyond debate. As such, the Officers had no "fair and clear warning of what the Constitution requires." *al-Kidd*, 563 U.S. at 617 (quotation omitted). The Officers, therefore, should have been given qualified immunity on Jordan's excessive force claim.

## II. The Questions Presented Are Critically Important And Recurring

The questions presented are exceptionally important and recur frequently, if not in every Section 1983 case involving the Fourth Amendment. Defining and construing the universe of relevant law used in assessing qualified immunity is an issue this Court has had to address with considerable frequency, both as to the circuit courts generally, and the Tenth Circuit in particular. *See*, *e.g.*, *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021); *Sause v. Bauer*, 138 S. Ct. 2561 (2018); *White v. Pauly*, 580 U.S. 73 (2017); *Pickens v. Aldaba*, 577 U.S. 972 (2015); *Reichle v. Howards*, 566 U.S. 658 (2012); *Pearson v. Callahan*, 555 U.S. 223 (2009); *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (reversing Tenth Circuit en banc); *see also* John Spizak, *Qualified Apathy: The Tenth Circuit Concedes Jurisdiction Over Constitutional Questions*, 61 WASH. L.J. ONLINE 83 (2022); Josiah Cohen, *Unclear and Unestablished: Exploring the Supreme Court / Tenth Circuit Disconnect in Qualified Immunity Jurisprudence*, 92 UNIV. OF COLO. L. REV. FORUM 1 (2021).

This Court has had to repeatedly overturned the Tenth Circuit for its inadequate qualified immunity analysis. *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021), *White v. Pauly*, 580 U.S. 73, 79-80 (2017).

Delimiting the universe of case law relevant to assessing whether a legal right is clearly established is particularly acute where a circuit court reverses a district court's grant of summary judgment that was predicated on the grounds that the case law was not clearly such. Judicial disagreement within the same case over the meaning of governing case law must be a relevant factor in assessing whether the law is actually clear, especially to non-lawyers, if the doctrine is to operate in a realistic manner and influence officers' conduct. *See Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."). Defining relevant precedent, moreover, is of critical practical importance if police officers, as non-lawyers, are expected to ascertain the governing legal rules and modify their conduct. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987) ("[T]he relevant question in this case . . . is . . . whether a reasonable *officer* could have believed [the conduct in question] to be lawful[.]") (emphasis added); *Pierson*, 386 U.S. at 557 ("We agree that a police officer is not charged with predicting the future course of constitutional law."); *see also Saldana v. Garza*, 684 F.2d 1159, 1165 (5th Cir. 1982) ("Certainly, we cannot expect our police officers to carry surveying equipment and a Decennial Digest on patrol; they cannot be held to a title-

searcher's knowledge of metes and bounds or a legal scholar's expertise in constitutional law.").

In addition, a court's obligation to adhere to the factual record, as opposed to the argumentative theories of counsel, is paramount in qualified immunity cases, where, as this Court has warned, the temptation is high to define rights at an overly generalized level in order to extend the law into new contexts. *See*, *e.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). This extension comes at the price of fair notice to the defendants. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018); *Pierson*, 386 U.S. at 557. Also present is the importance of the party presentation principle, which this Court has had to reiterate in several other contexts is "basic to our procedural system." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). Exceptions to the rule exist, but they are "modest." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

Absent this Court's intervention, petitioners will face trial, with all the costs and risks of second-guessing that this Court's excessive force jurisprudence is designed to prevent. The trial will carry with it the risk of punitive damages solely as a consequence of the Tenth Circuit's ruling based on its (re)construal of the undisputed facts and interpretation of the governing case law.

## III. This Case Presents A Clean Vehicle To Resolve The Questions Presented

Several aspects of this case make it an ideal vehicle for addressing the questions presented.

First, the record is brief and the facts largely undisputed. Where there was a material dispute of facts, the district court addressed them squarely. Where the Tenth Circuit departed from the undisputed record before the district court, it made clear that its view of the facts was based on the transcript of a partial recording of the parties' exchange, to which it gave dispositive weight.

Second, the facts here are emblematic of how this legal issue typically arises. Petitioners asserted qualified immunity at summary judgment. The district court assessed the governing case law at that time and the arguments pressed by the parties before rendering its decision. Respondent appealed after entry of final judgment. Thus, the appeal presents no jurisdictional or procedural barriers to a review of the merits.

Third, the decision below was published. Left undisturbed, the Tenth Circuit's decision will be potentially binding on all future cases within the Circuit subject to the application of the court's prior panel precedent rule.

Finally, the sole issue for this Court to resolve is whether qualified immunity bars the respondent's claims. That issue was squarely presented and was the sole basis for the decision below. The Tenth Circuit's opinion was based primarily on its view of the governing legal principles and its construal of the brief factual record.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted.

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