No. 17-1078

In The
Supreme Court of the United States

DANIEL T. PAULY, as Personal Representative
of the ESTATE OF SAMUEL PAULY,
and DANIEL B. PAULY, individually,

Petitioners,

v.

RAY WHITE, MICHAEL MARISCAL,
and KEVIN TRUESDALE,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the unanimous Tenth Circuit panel below properly grant qualified immunity to the Respondents where Petitioners failed to meet their burden of articulating clearly established law particularized to the facts of this case, despite the two-judge majority's unnecessary analysis of whether or not the Respondents violated Samuel Pauly's Fourth Amendment rights, in which the panel majority failed to consider the validity of the use of force from the perspective of a reasonable police officer on the scene?

2. Did the Tenth Circuit properly reject Petitioners' proposition that the Respondents were not entitled to qualified immunity because Respondents "proximately caused" the need to use deadly force through their alleged pre-seizure conduct?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

In *White v. Pauly*, 137 S.Ct. 548 (2017) (per curiam), this Court found that Respondent Ray White was entitled to qualified immunity because he "did not violate clearly established law" when he shot and killed Samuel Pauly on October 4, 2011. *White*, 137 S.Ct. at 551. In so ruling, this Court noted that "[t]his is not a case where it is obvious that there was a violation of clearly established law," under the unique set of facts and circumstances presented, "in light of White's late arrival on the scene." *See id.* at 552. The Court also found that "[n]o settled Fourth Amendment principle requires" an Officer in White's position "to second-guess the earlier steps already taken by his or her fellow officers" (Respondents Kevin Truesdale and Michael Mariscal) "in instances like the one White confronted here." *Id.* Consequently, this Court vacated the Tenth Circuit's prior opinion, 814 F.3d 1060 (10th Cir. 2016), and remanded the case for further proceedings consistent with this Court's opinion. *White*, 137 S.Ct. at 553.

Following remand, the Tenth Circuit ordered the parties to file supplemental briefing addressing the impact of this Court's decision on this case. On February 23, 2017, the Petitioners filed their supplemental brief (2017 WL 771886), as did Respondents (2017 WL 771887). The Tenth Circuit panel then issued a second opinion in this case, granting all three Respondents qualified immunity. *See generally Pauly v. White*, 874 F.3d 1197 (10th Cir. 2017). The two-judge panel majority unnecessarily spent much of the opinion analyzing

whether or not the allegedly reckless actions of all three Respondent Officers "precipitat[ed] the need to use deadly force." *See generally id.* at 1203-06, 1211-22. Nonetheless, the three panel members unanimously found that the Respondents are entitled to qualified immunity. *See Pauly*, 874 F.3d at 1222-23. Specifically, the unanimous panel found that 1) there is no case "close enough on point to make the unlawfulness of [Officer White's] actions apparent," 2) Officer White's "alleged use of excessive force was not clearly established in the circumstances of this case" and "therefore cannot serve as the basis of liability for Officers Mariscal and Truesdale," and 3) "neither Officer Mariscal nor Truesdale committed a constitutional violation in his own right." *Id.* at 1223 (citations omitted). Petitioners did not seek rehearing en banc in the Tenth Circuit, nor did they move for a stay of the Tenth Circuit's mandate, which was issued on November 22, 2017.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A POOR CANDIDATE FOR CERTIORARI BECAUSE PETITIONERS HAVE FAILED TO IDENTIFY ANY COMPELLING REASONS FOR REVIEWING THE TENTH CIRCUIT'S UNANIMOUS DECISION

In *White v. Pauly*, this Court reiterated its long-standing rule that, for purposes of qualified immunity, the relevant "clearly established law" must be

"particularized" to the facts of the case. *White*, 137 S.Ct. at 552 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *White*, 137 S.Ct. at 552 (quoting *Anderson*, 483 U.S. at 639). This Court's ruling in *White* built on prior cases. *See City and Cnty. of S.F. v. Sheehan*, 135 S.Ct. 1765, 1777 (2015) (holding that it was not clearly established that police used excessive force when they pepper sprayed and then shot a disabled person who threatened them with a knife); *Carroll v. Carman*, 135 S.Ct 348, 351-52 (2014) (holding it was not clearly established that a police decision to knock on the back door rather than the front was an unreasonable entry); *see also* Lael Weinberger, *Making Mistakes About the Law: Police Mistakes of Law Between Qualified Immunity and Lenity*, 84 U. Chi. L. Rev. 1561, 1576 & n.113 (2017).

In the sixteen months since it decided *White v. Pauly*, this Court has repeatedly reaffirmed this "particularity" or "specificity" requirement. *See Ziglar v. Abbasi*, 137 S.Ct. 1843, 1866-67 (2017); *D.C. v. Wesby*, 138 S.Ct. 577, 590 (2018) ("[t]he clearly established standard . . . requires a high degree of specificity") (quotations omitted)); *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018) (per curiam) ("police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue" (quoting *Mullenix v. Luna*, 136 S.Ct. 305, 309 (2015) (per curiam)). In that same period, the federal circuits have

properly and dutifully applied this Court's qualified immunity jurisprudence in the same manner as the Tenth Circuit did on remand in this case. *See*, *e.g.*, *Ganek v. Leibowitz*, 874 F.3d 73, 81 (2d Cir. 2017); *Thompson v. Howard*, 679 F. App'x 177, 181-82 & n.9 (3d Cir. Feb. 17, 2017) (unpublished); *E.W. v. Dolgos*, 884 F.3d 172, 185-86 (4th Cir. 2018) (even where school resource officer "used unreasonable force disproportionate to the circumstances presented . . . amount[ing] to excessive force," plaintiff's "right not to be handcuffed under the circumstances of this case was not clearly established at the time of her seizure"); *Davidson v. City of Stafford*, 848 F.3d 384, 394 (5th Cir. 2017) (assuming *arguendo* "that the specific *White/Mullenix* admonition applies to all qualified immunity cases regardless of the constitutional violation charged"); *Melton v. Phillips*, 875 F.3d 256, 265-66 & n.9 (5th Cir. 2017) (en banc); *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 992-94 (6th Cir. 2017); *Barberick v. Hilmer*, 2018 WL 1617194, *2 (6th Cir. Apr. 4, 2018) (unpublished); *Kemp v. Liebel*, 877 F.3d 346, 351-53 (7th Cir. 2017); *Walker v. Wallace*, 881 F.3d 1056, 1060-61 (8th Cir. 2018); *Thompson v. Rahr*, 885 F.3d 582, 587 (9th Cir. 2018) (although police officer's use of excessive force violated plaintiff's constitutional rights, officer was entitled to qualified immunity because plaintiff's right not to have a gun pointed at him under the circumstances was not clearly established at the time the events took place); *S.B. v. Cnty. of San Diego*, 864 F.3d 1010, 1015-16 (9th Cir. 2017); *Knopf v. Williams*, 884 F.3d 939, 946-50 (10th Cir. 2018); *Redmond v. Crowther*, 882 F.3d 927, 935, 938-39 (10th Cir.

2018); *McCoy v. Meyers*, 887 F.3d 1034 (10th Cir. 2018); *Gates v. Khokhar*, 884 F.3d 1290, 1302-03 (11th Cir. 2018).

The substance of the Paulys' Petition reveals that their chief complaint is merely an argument that the unanimous panel below misapplied or misinterpreted this Court's recent qualified immunity cases (specifically, *White v. Pauly* and *Cnty. of L.A. v. Mendez*, 137 S.Ct. 1539 (2017)). *See*, *e.g.*, Pet. at 6, 13-14, 25-27. Even if that argument were correct, however, this case is not one warranting review. "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. "[T]his Court is not equipped to correct every perceived error coming from the lower federal courts." *Boag v. MacDougall*, 454 U.S. 364, 366 (1982) (O'Connor, J., concurring); *see also Tolan v. Cotton*, 134 S.Ct. 1861, 1868 (2014) (Alito, J., concurring) (citing S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 5.12(c)(3), p. 352 (10th ed. 2013) ("error correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari")); *Cavazos v. Smith*, 132 S.Ct. 2, 9 (2011) (Ginsburg, J., dissenting).

"Because certiorari jurisdiction exists to clarify the law, its exercise 'is not a matter of right, but of judicial discretion.'" *Sheehan*, *supra*, 135 S.Ct. at 1774 (quoting Sup. Ct. R. 10). The "compelling reasons" for granting certiorari include the existence of conflicting decisions on issues of law among federal courts of

appeals, among state courts of last resort, or between federal courts of appeals and state courts of last resort. *Sheehan*, 135 S.Ct. at 1779. This Court's Rule 10 concludes: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The questions presented by Petitioners in the present case implicate, at most, the latter. *See Sheehan*, 135 S.Ct. at 1779. As discussed herein, the Tenth Circuit panel correctly applied this Court's qualified immunity precedents, and properly rejected Petitioners' call to superimpose pre-fabricated concepts of tort law over this Court's well-established principles of 42 U.S.C. § 1983 liability.

A. This Court Does Not Strictly Impose Common Law Tort Principles In Section 1983 Cases

Petitioners ask that this Court reverse the Tenth Circuit's unanimous opinion based largely upon the Restatement (Second) of Torts § 880 (1979) which states that, "[i]f two persons would otherwise be liable for a harm, one of them is not relieved from liability by the fact that the other has an absolute privilege to act or an immunity from liability to the person harmed." *See generally* Pet. at 5, 20-24. Petitioners reason that—based upon the foregoing common law tort principle—the immunity granted by this Court to Officer White (the only officer who shot *and* struck Samuel Pauly) over a year ago should not also apply to Officers Mariscal and Truesdale (neither of whom actually shot

Samuel Pauly). Of course, the United States Constitution is not a "font of tort law." *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998); *see also Smith v. Half Hollow Hills Cent. Sch. Dist.*, 298 F.3d 168, 173 (2d Cir. 2000). The federal courts are "not in the business of expounding a common law of torts." *Cordova v. City of Albuquerque*, 816 F.3d 645, 661 (10th Cir. 2016) (Gorsuch, J., concurring). The job of this Court is to interpret the Constitution—that document is not "some inkblot on which litigants may project their hopes and dreams for a new and perfected tort law, but a carefully drafted text judges are charged with applying according to its original public meaning." *Id.* "If a party wishes to claim a constitutional right, it is incumbent on him *to tell us where it lies*, not to assume or stipulate with the other side that it must be in there someplace" (emphasis supplied). *Id.*; *see also Daniels v. Williams*, 474 U.S. 327, 332 (1986) ("Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society"); *Becker v. Kroll*, 494 F.3d 904, 915 (10th Cir. 2007) (noting that this Court "has been careful to tie all actions under § 1983 to specifically protected constitutional rights in order to avoid creating a free-standing constitutional tort regime under § 1983"); *B.A. v. City of Schenectady Sch. Dist.*, 209 F.Supp.3d 515, 522-23 (N.D.N.Y. 2016); *Miller v. Hawver*, 474 F.Supp. 441, 442 n.1 (D.Colo. 1979) (Section 1983 "is not a general or common law tort claims statute").

The law of torts anticipates a uniform "standard to which the defendant's conduct must conform in order that he shall escape liability for harm done." *Doe v. Whelan*, 732 F.3d 151, 155 n.4 (2d Cir. 2013) (quoting Restatement (Second) of Torts § 285 cmt. a. (1965)). In the context of qualified immunity, however, a test based upon a single, objectively-reasonable standard of conduct is irreconcilable with this Court's recognition that an officer may be shielded from liability even if his actions involve errors in judgment. *See Doe*, 732 F.3d at 155 n.4 (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("[t]he protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact") (internal quotation marks omitted); *Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law")); *see also Benson v. Hightower*, 633 F.2d 869, 870-71 (9th Cir. 1981) (refusing to deny qualified immunity under Restatement provision regarding mistake of law); *Pierce v. Gilchrist*, 359 F.3d 1279, 1288-90 (10th Cir. 2004) (explaining that common law rules "are applicable by analogy—but only by analogy—to constitutional torts" because "the ultimate question is the existence of a constitutional violation"); *Margheim v. Buljko*, 855 F.3d 1077, 1084 n.7 (10th Cir. 2017).

In *Manuel v. City of Joliet*, 137 S.Ct. 911 (2017)—decided less than three months after this Court decided *White v. Pauly*—this Court reiterated that, while

42 U.S.C. § 1983 creates a "species" of tort liability, "[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims, serving 'more as a source of inspired examples than of prefabricated components.'" *Manuel*, 137 S.Ct. at 921 (quoting *Hartman v. Moore*, 547 U.S. 250, 258 (2006); *see also Anderson*, *supra*, 483 U.S. at 644-45 ("we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law"); *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012) (noting that "§ 1983 is [not] simply a federalized amalgamation of pre-existing common-law claims" and that the "federal claim created by § 1983 differs in important ways from pre-existing common-law torts"). Contrary to what Petitioners suggest, the common law of torts does not control the outcome of a Section 1983 lawsuit, and this Court is not bound to apply the Restatement provisions cited by Petitioners.

Nonetheless, Petitioners claim that the Tenth Circuit's unanimous decision below conflicts with this Court's opinion in *Filarsky v. Delia*, 566 U.S. 377 (2012). Pet. at 19-20, 24. *Filarsky* concerned whether a private individual temporarily retained by the government to carry out its work was entitled to seek qualified immunity from suit under Section 1983. In that case, this Court reiterated that, 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.' " *Filarsky*, 566 U.S. at 383 (quoting *Wasson v. Mitchell*, 18 Iowa 153, 155-56 (1864)). This Court also reiterated that qualified immunity "protect[s] government's ability to perform its traditional 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 often accompany damages suits." *Filarsky*, 566 U.S. at 389-90 (quoting *Wyatt v. Cole*, 504 U.S. 158, 167 (1992); *Richardson v. McKnight*, 521 U.S. 399, 409-11 (1997)). The same considerations of the public good that motivated common law protections have driven the development of official immunity even as it has evolved beyond the contours of the common law. *Hammett v. Paulding Cnty.*, 875 F.3d 1036, 1046 (11th Cir. 2017) (citing *Spalding v. Vilas*, 161 U.S. 483, 498 (1896); *Anderson*, *supra*, 483 U.S. at 644-45).

Petitioners also cite *Kalina v. Fletcher*, 522 U.S. 118 (1997), for the proposition that "Congress intended § 1983 to be construed in light of common law principles well-settled at the time of its enactment." Pet. at 22-23. *Kalina*, however, involved an allegation that a state actor violated the plaintiff's right to be free of unreasonable seizures, a right explicitly protected by the Fourth Amendment. *Kalina*, 522 U.S. at 122. This Court considered common law doctrine only to identify "both the elements of the cause of action and the defenses available to state actors," such as whether

prosecutorial immunity applied to bar the plaintiff's claim. *Id.* at 123. *Kalina* does not stand for the principle that an individual can base a Section 1983 action on the violation of some common law principle. *Cf. id.* ("[t]he text of the statute purports to create a damages remedy against every state official for the violation of any person's federal *constitutional* or *statutory* rights") (emphasis supplied); *see also Foster v. City of St. Paul*, 837 F.Supp.2d 1024, 1029 (D.Minn. 2011).

Filarsky and *Kalina* in no way deviate from the long-standing rule that construction of Section 1983 is guided—*not* controlled—by common law tort principles. Of course, the ruling *sub judice* here is whether the Petitioners met their burden of showing—by way of particularized law that squarely governs this case—that the Respondent Officers violated a clearly established constitutional right. This is a separate question from whether or not the Respondents' actions, individually or in concert, proximately caused any injury to the Petitioners. Indeed, to interpret whether a right is "clearly established" by reference to state tort law would undermine qualified immunity and convert Section 1983 into "a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Osborne v. Rose*, 133 F.3d 916, 1998 WL 17044, *3 (4th Cir. Jan. 20, 1998) (unpublished table decision) (per curiam) (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)); *see also Weigel v. Broad*, 544 F.3d 1143, 1168 (10th Cir. 2008) (O'Brien, J., dissenting) (questioning "the majority's cavalier treatment of clearly established law" which "seem[ed] to incorporate

concepts from tort law," whereas "qualified immunity in § 1983 cases narrows the focus" to whether government actors have "fair warning, embodied in clearly established law, that their conduct violates established norms"). Strikingly, Petitioners have failed to identify any clearly established law applying Restatement of Torts § 880, *supra*, to a Fourth Amendment excessive force case such as this one.

Petitioners suggest that "Section 1983 is the central remedy to recover from police shootings that violate the Fourth Amendment." Pet. at 29. Even assuming *arguendo* that Section 1983 is the preferred vehicle for plaintiffs seeking compensation in officer-involved shootings, the "Constitution is not the only source of American law." *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2479 (2015) (Scalia, J., dissenting). In this case, Petitioners' claims under New Mexico state law remain, and will likely proceed to trial in spite of the Tenth Circuit's proper ruling that the Officers are entitled to qualified immunity on Petitioners' federal civil rights claims. *See*, *e.g.*, *Reese v. Cnty. of Sacramento*, ___ F.3d ___, 2018 WL 1902416 (9th Cir. Apr. 23, 2018) (slip op.) (affirming ruling that deputy was entitled to qualified immunity on plaintiff's Fourth Amendment excessive force claim but reversing grant of summary judgment on plaintiff's claim under California state statute).

B. Petitioners Cannot Conflate An Unpleaded Wrongful Seizure Claim With Their Excessive Force Claim, Nor Can They Show That The Officers' Pre-Seizure Conduct "Proximately Caused" Officer White's Use Of Force

The threshold inquiry in a 42 U.S.C. § 1983 suit requires that the Court "identify the specific constitutional right" at issue in a given case. *Manuel v. City of Joliet*, *supra*, 137 S.Ct. at 920 (quoting *Albright v. Oliver*, 510 U.S. 266, 271 (1994)). The "specific constitutional right" identified by the Petitioners (in broad strokes) is the right to be free from excessive force, not the right to be free from an allegedly unlawful seizure under the Fourth Amendment. In *Cnty. of L.A. v. Mendez*, *supra*, this Court ruled that the Fourth Amendment provides no basis for the Ninth Circuit's "provocation rule," which had previously permitted an excessive force claim where an officer intentionally or recklessly provoked a violent confrontation, if such provocation was itself an independent Fourth Amendment violation. This Court found that the "fundamental flaw" of the Ninth Circuit's rule was that it relied on a separate constitutional violation to manufacture an excessive force claim where one would not otherwise exist. *Mendez*, 137 S.Ct. at 1546. The "basic problem" with the provocation rule was that "it instruct[ed] courts to look back in time to see if there was a *different* Fourth Amendment violation that [wa]s somehow tied to the eventual use of force" (emphasis in original). *Id.* at 1547. "[T]he objective reasonableness analysis

must be conducted separately for each search or seizure that is alleged to be unconstitutional." *Id.* "By conflating excessive force claims with other Fourth Amendment claims," the Ninth Circuit improperly permitted excessive force claims that could not succeed on their own terms. *Id.* This Court similarly concluded that the Ninth Circuit's "proximate cause analysis . . . conflated distinct Fourth Amendment claims and required only a murky causal link between the warrantless entry and the injuries attributed to it." *Id.* at 1549. Notably, in the present case, Petitioners did not actually plead any separate Fourth Amendment violation (apart from excessive force) in their Complaint. *See generally* 10th Cir. Aplt. App.[1] at 13-26; *cf. Estate of Serrano v. Trieu*, 713 F. App'x 631, 632 (9th Cir. Feb. 23, 2018) (unpublished). Under *Mendez*, Petitioners cannot conflate any alleged Fourth Amendment violation occurring prior to Officer Ray White's single shot with Officer White's use of force.

It is not enough to show that a plaintiff's injury would not have occurred "but for" a defendant's actions—rather, the Court must consider the "foreseeability or the scope of the risk created by the predicate conduct" *and* whether there was "some direct relation between the injury asserted and the injurious conduct alleged." *Mendez*, 137 S.Ct. at 1548-49 (quoting

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[1] "10th Cir. Aplt. App." refers to the Appellate Appendix filed by Respondents in the Tenth Circuit. Respondents cite to portions of that Appendix herein pursuant to Sup. Ct. R. 12(7) ("In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court").

Paroline v. U.S., 134 S.Ct. 1710, 1719 (2014)); *see also Bank of Am. Corp. v. City of Miami*, 137 S.Ct. 1296, 1305 (2017) ("foreseeability alone is not sufficient to establish proximate cause. . . . Proximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits") (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1390 (2014)). Per *Mendez*, "[a]n excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances. *It is not a claim that an officer used reasonable force after committing a distinct Fourth Amendment violation such as an unreasonable entry*" (emphasis supplied). *Mendez*, 137 S.Ct. at 1547. While noting that plaintiffs can, "subject to qualified immunity—generally recover damages that are proximately caused by any Fourth Amendment violation," and that "[t]he harm proximately caused by . . . two [Fourth Amendment] torts may overlap," this Court was also quick to clarify that "the two claims should not be confused." *Id.* at 1548; *see also Frederick v. Motsinger*, 873 F.3d 641, 646 (8th Cir. 2017); *Tolentino v. City of Yonkers*, 2017 WL 4402570, *5 (S.D.N.Y. Oct. 2, 2017) (slip op.).

In *Mendez*, this Court declined to consider the argument that assessing the "totality of the circumstances" under *Graham v. Connor*, 490 U.S. 386 (1989), "means taking into account unreasonable police conduct prior to the use of force that foreseeably created

the need to use it." *Mendez*, 137 S.Ct at 1547 n.*. In fact, this Court "did not grant certiorari on that question." *See id.* The "*relevant* constitutional violation" at issue in *Mendez* was "the warrantless entry" into the plaintiff's shack (emphasis in original). *Mendez*, 137 S.Ct. at 1549. In the present case, the only constitutional violation at issue (*i.e.*, the only constitutional violation identified in Petitioners' Complaint) was whether Officer Ray White used excessive force by shooting Samuel Pauly, an act for which this court previously found Officer White is entitled to qualified immunity.

Contrary to what is asserted in their Petition, the Paulys cannot establish that the death of Samuel Pauly was proximately caused by the Officers' alleged pre-shooting conduct. They have failed to show a "direct relation" between the injury asserted and the "injurious conduct" alleged; not simply a causal relationship, "but one with a sufficient connection to the result." *Paroline*, *supra*, 134 S.Ct. at 1719; *Bank of Am. Corp.*, *supra*, 137 S.Ct. at 1306 (proximate cause generally bars suits for alleged harm that is too remote from the Defendant's unlawful conduct) (quoting *Lexmark*, *supra*, 134 S.Ct. at 1390); *see also Moya v. Garcia*, ___ F.3d ___, 2018 WL 1916322, *2 n.2 (10th Cir. Apr. 24, 2018) (slip op.) (citing Martin A. Schwartz, *Section 1983 Litigation* 91 (3d ed. 2014) ("[t]he proximate cause requirement applies to all § 1983 claims")). In the Section 1983 context, a plaintiff can recover only such damages as are "tailored to the interests protected by the particular right in question." *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

In the present case, the Officers' approach to the Pauly house and alleged use of "coercive statements" did not constitute a seizure or an application of force under the Fourth Amendment. *See Moore v. City of Memphis*, 853 F.3d 866, 870 (6th Cir. 2017). Even assuming *arguendo* that police officers employ tactics that the Court believes to be unwise—including choosing a course of action that may jeopardize the officers' lives along with a criminal suspect's—unless the officers' use of force is actually excessive, there is no Fourth Amendment violation. *See id.* at 872; *cf. Young v. Borders*, 620 F. App'x 889 (11th Cir. Oct. 21, 2015) (unpublished), *reh'g denied*, 850 F.3d 1274 (11th Cir. 2017) (upholding qualified immunity where Sheriff's Deputy shot apartment resident who made a sudden movement while holding a gun), *cert. denied*, 138 S.Ct. 640 (2018).

As they did below, Petitioners rely heavily on the Tenth Circuit's opinion in *Trask v. Franco*, 446 F.3d 1036 (10th Cir. 2006), asserting that this case provides that "[a] governmental actor may be liable for the constitutional violations that another committed where the actor 'set in motion a series of events that the defendant[s] knew or reasonably should have known would cause others to deprive the plaintiff of [his] constitutional rights.'" Pet. at 16; *see also* 2017 WL 771886, *supra*, at *11. However, *Trask* was not an excessive force case: instead, that case involved claims "of an unreasonable residential search" as well as "unlawful detention and arrest." *Trask*, 446 F.3d at 1039. *Trask* involved a disputed issue of fact as to whether

or not one of the persons seized by probation and parole officers was actually on probation. The present case involves no similar factual dispute—on the contrary, it is undisputed that the Officers announced themselves as State Police at least once, as the District Court found, *see* App. at 80-81. Thus, it would have been reasonable for the Officers to assume that the Paulys heard the Officers announce themselves as "State Police." On the contrary, it is "not ordinarily reasonable to foresee" that a person will attack or threaten a police officer. *See Hundley v. District of Columbia*, 494 F.3d 1097, 1105 (D.C. Cir. 2007). It is also undisputed that Daniel Pauly fired two shots and that Samuel Pauly pointed a gun toward Officer White.

This Court previously stated that, "[o]n the assumption that the conduct of Officers Truesdale and Mariscal did not adequately alert the Paulys that they were police officers, [the Paulys] suggest[ed] that a reasonable jury could infer that White witnessed the other officers' deficient performance and should have realized that corrective action was necessary before using deadly force." *White v. Pauly*, *supra*, 137 S.Ct. at 552. Given the above (that the Officers announced themselves at least once), that assumption cannot be credited. In fact, doing so is completely inconsistent with viewing the scene from the perspective of reasonable officers in Respondents' position[2] and fails to

[2] In analyzing the first prong of qualified immunity—whether a constitutional right was violated—the panel majority below improperly viewed the scene from the perspective of the Paulys instead of a reasonable officer. *See*, *e.g.*, *Pauly v. White*,

"consider[] only the facts that were knowable to the defendant officers." *White*, 137 S.Ct. at 550; *see also Kingsley v. Hendrickson*, *supra*, 135 S.Ct. at 2474 (the Court "must judge the reasonableness of [an action] from the perspective and with the knowledge of the defendant").

Ultimately, the facts of *Trask* do not squarely govern this case. At most, *Trask* sets forth a general statement of tort law, not a clear and particularized articulation of a federal constitutional right as required by this Court. The Tenth Circuit's general statement regarding causation in constitutional tort cases—made in *Trask* against the backdrop of an unreasonable search and seizure claim—is not particularized to the facts of this case, and thus is inapposite. Without "fair notice," an officer is entitled to qualified immunity. *Sheehan*, *supra*, 135 S.Ct. at 1777. Again, viewing this from the perspective of a reasonable officer on scene, the Officers announced themselves as State Police as set forth in the facts found by the District Court. Tort principles such as "proximate cause" are a starting point and might inform whether a constitutional violation occurred. However, that analysis goes only to the *first* prong of qualified immunity. There is still the very striking absence of clearly established law that Petitioners have failed to overcome.

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supra, 874 F.3d at 1204 ("[f]rom the Pauly brothers' perspective, the officers' approach to their residence was confusing and terrifying"). Nonetheless, the panel correctly found in favor of the Respondents on the second prong—the lack of clearly established law—as discussed *infra*.

II. PETITIONERS FAILED—AND STILL FAIL—TO IDENTIFY CLEARLY ESTABLISHED LAW SQUARELY GOVERNING THE FACTS OF THIS CASE

As the Paulys admit, the claims against each Officer must be analyzed separately. *See* Pet. at 18 n.3. However, the problem remains the same for the Paulys as it did when this Court first remanded this case last year: there was no clearly established law in October 2011 giving each individual Officer fair notice that *his* particular conduct was unlawful, particularly since Truesdale did not shoot or use force at all and Mariscal, even if he fired a single shot, did not actually strike either of the Paulys. The Paulys do not acknowledge their failure to supply either the Tenth Circuit or this Court with any clearly-established law that would put the Officers on notice that their alleged conduct (standing outside of the Paulys' residence and shouting at them) would constitute a violation of Samuel Pauly's Fourth Amendment right to be free from excessive force.

Tellingly, Petitioners have not identified a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation "under similar circumstances." *D.C. v. Wesby*, *supra*, 138 S.Ct. at 591 (citing *White v. Pauly*, 137 S.Ct. at 552); *see also Anderson*, *supra*, 483 U.S. at 640 ("our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense"). The burden is—and always has been—on the Paulys to

identify a case where police officers acting under similar circumstances as Officers Truesdale, Mariscal, and White were held to have violated the Fourth Amendment. *See White*, 137 S.Ct. at 552; *see also Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1208 (10th Cir. 2017); *Hess v. Ables*, 714 F.3d 1048, 1051 (8th Cir. 2013).

As they did below, the Paulys rely upon the Tenth Circuit's prior opinions in *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997), and *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir. 1995). *See* Pet. at 30-31; *see also* 2014 WL 2916607, *20, *24-26; 2017 WL 771886, *supra*, at *11. However, the facts of these two cases were markedly different from those which confronted the Officers on October 4, 2011—*Allen* and *Sevier* each involved suicidal individuals who were shot and killed by police officers who had been summoned to their respective homes. In *Allen*, officers shot the decedent after they approached his car and tried to remove his gun which lay next to him inside the vehicle. *Allen*, 119 F.3d at 841. In *Sevier*, the plaintiffs phoned police to request assistance with their son, who had twice before tried to commit suicide, and whom they found in his room with a butcher knife on his lap. *Sevier*, 60 F.3d at 697. The officers shot the decedent inside the house: while the officers asserted that the decedent lunged with his knife in a raised position, the plaintiffs claimed that the officers shot the decedent while he was standing with the knife at his side. *Id.* at 698. By contrast, in the present case, there is no evidence that Samuel Pauly was suicidal, and none of the three NMSP Officers entered the Paulys' house before Samuel Pauly was shot.

There is also no dispute that 1) one of the Paulys yelled out "We have guns," 2) Daniel Pauly fired two blasts from a shotgun near Officer Truesdale's position, and 3) Samuel Pauly pointed a gun at Officer White. In short, neither *Allen* nor *Sevier* could have put any of the Officers on notice that their conduct in October of 2011 was unlawful. *See Kisela v. Hughes*, *supra*, 138 S.Ct. at 1153.

In *Pickens v. Aldaba*, 136 S.Ct. 479 (2015), this Court vacated a judgment of the Tenth Circuit, *Aldaba v. Pickens*, 777 F.3d 1148 (10th Cir. 2015), and remanded "for further consideration in light of" *Mullenix v. Luna*. As it did in the present case, the Tenth Circuit then properly reversed its prior decision denying qualified immunity. *See Aldaba v. Pickens*, 844 F.3d 870 (10th Cir. 2016). Following remand from this Court, the Tenth Circuit held "that the three law-enforcement officers are entitled to qualified immunity because they did not violate clearly established law." *Aldaba*, 844 F.3d at 871. The Tenth Circuit did "not decide whether they acted with excessive force," but still "reverse[d] the district court's judgment and remand[ed] with instructions to grant summary judgment in favor of the three law-enforcement officers." *Id.* The Tenth Circuit had erred in its prior opinion "by relying on excessive-force cases markedly different from this one." *Id.* at 876. "[N]one of those cases remotely involved a situation" as that presented in the *Aldaba* case: "three law-enforcement officers responding to a distress call from medical providers seeking help in controlling a disruptive, disoriented medical patient so they could provide

him life-saving medical treatment." *Id.* Similarly, in *McKnight v. Petersen*, 137 S.Ct. 2241 (2017) (Mem.), this Court vacated a judgment of the Ninth Circuit, *Petersen v. Lewis Cnty.*, 663 F. App'x 531 (9th Cir. Oct. 3, 2016) (unpublished), and remanded for further consideration in light of *White v. Pauly*. On remand, the Ninth Circuit found that, even if the Defendant Officer had acted unreasonably, the plaintiff "failed to identify any clearly established law putting [Defendant] on notice that, under these facts, his conduct was unlawful." *Petersen v. Lewis Cnty*., 697 F. App'x 490, 491 (9th Cir. Sep. 22, 2017) (unpublished).

As in *Aldaba* and *Kisela*, the cases relied upon by the Paulys "differ too much from this one, so reading them would not apprise every objectively reasonable officer" that their actions would amount to excessive force. *Aldaba*, 844 F.3d at 877. As in these cases and *Petersen*, the Petitioners have failed to identify the required clearly established law putting the Officers on fair notice that their conduct was unlawful. None of the cases cited by the Paulys would have advised "every reasonable official" that their actions would amount to excessive force under the Fourth Amendment. *See id.* The Paulys cannot and do not point to a single case where police officers in the position of Officers Truesdale, Mariscal and White (in particular), in similar circumstances, violated the Fourth Amendment. On the "clearly established" prong alone, the three Officers remain entitled to qualified immunity to Petitioners' Section 1983 claims in this case. *See Reese*, *supra*, 2018 WL 1902416 at *6 ("[n]one of Reese's cases "squarely

govern" the situation that Rose confronted such that they would have given Rose clear warning that his use of deadly force was objectively unreasonable") (citing *Mullenix v. Luna*, *supra*, 136 S.Ct. at 310) (quotation marks omitted)).

Petitioners have failed to identify a true circuit split on the one issue (the lack of clearly established law) that the unanimous Tenth Circuit panel below actually ruled upon in this case. As noted above, the circuits have unfailingly applied this Court's qualified immunity cases—particularly *Mullenix*, *White*, and *Kisela*—in holding plaintiffs to their strict burden of identifying clearly established law. Ultimately, no clearly established law required Officer White to take "corrective action," or put him on fair notice that failing to do so would subject him to liability under Section 1983, and no clearly established law would have put the other Officers on notice that their alleged conduct might violate Samuel Pauly's right to be free from excessive force.

III. RESPONDENTS DID NOT "MISLEAD" THE TENTH CIRCUIT

In its opinion below, the panel majority stated it was "misled by defendant's [sic] briefs on appeal," *i.e.*, that the panel was "misled by the erroneous assertions about the record that defendants made to [the Court] on appeal." *Pauly v. White*, *supra*, 874 F.3d at 1212. Petitioners have, unsurprisingly, seized on this erroneous assertion. Pet. at 12, 32-33. The Tenth Circuit panel

stated that Defendants "framed the case as one where Officer White entered the situation without participation in, or knowledge of, the alleged reckless conduct of the officers that escalated into a gunfight." However, the panel cited only one example of these purportedly "misleading" statements: "[f]or instance, Officer White's opening brief stated, 'Officer White did not arrive at the Paulys' house until just before one of the Pauly brothers yelled out "We have guns."'" *Pauly*, 874 F.3d at 1211.

The above-cited passage comes from the opening paragraph of Respondents' Statement of Facts "As Known to Officer White" from their May 12, 2014 Opening Brief to the Tenth Circuit. *See* 2014 WL 2154794, *9. In its February 10, 2014 order denying Officer White's motion for summary judgment, the District Court set forth a "recitation of material facts and reasonable references reflect[ing] the Plaintiffs' version of the facts as gleaned from the evidence of record and exclude[d] facts, contested or otherwise," which the Court deemed not to be "properly before this Court in [Officer White's] Motion." App. at 101. The District Court found:

> While Officers Truesdale and Mariscal were trying to get the [Pauly] brothers to come out of the house and before one of the brothers yelled out, "We have guns," Officer White arrived at the Firehouse Road address and walked up towards the brothers' house, using his flashlight periodically. . . . Officer White could also see two males walking in the front

> living room. . . . In addition, Officer White heard a male from inside of the house say, "We have guns.". . . . When Officer White reached the front of the house, Officer Mariscal was still in the front of the house while Officer Truesdale was already at the rear of the brothers' house . . . After hearing, "We have guns," Officer White took cover behind a stone wall located 50 feet from the front of the house and drew his duty weapon while Officer Mariscal took cover behind a Ford pickup truck and unholstered his duty weapon.

App. at 107.

In their Tenth Circuit Opening Brief, Respondents—relying upon the facts as set forth by the District Court—correctly and truthfully stated that Officer White arrived "moments" before the Pauly brothers yelled out from inside the house, and at all times cited to the relevant portions of the Tenth Circuit Appellate Appendix to support this assertion. *See* 2014 WL 2154794, *supra*, at *24 ("[w]ithin moments of [Officer White] arriving at the front of the Pauly residence, one of the Pauly brothers yelled out 'We have guns' ") (citing 10th Cir. Aplt. App. at 117-18, 217); *see also id.* ("the undisputed facts as set forth by the District Court demonstrate that Officer White arrived just moments before Daniel Pauly began firing and Samuel aimed a handgun at Officer White") (citing 10th Cir. Aplt. App. at 680). Respondents repeated this assertion in their July 17, 2014 Tenth Circuit Reply Brief. 2014 WL 3696881, *10 ("Officer White . . . arrived on scene moments before hearing Daniel Pauly say 'We have

guns'"); *see also id.* *12 (arguing that Officer White's "actions were sensible and justifiably taken in response to the threat that unexpectedly materialized just moments after he arrived at the Pauly residence").

In their February 23, 2017 Supplemental Brief filed in the Tenth Circuit, Respondents further elucidated the precise time that Officer White was in the vicinity of the Pauly residence. *See generally* 2017 WL 771887, *supra*, *11 n.2. As stated therein, Officer Truesdale's COBAN video[3] recording (submitted as part of the Appellate Appendix in the Tenth Circuit) indicates that Officer White arrived just before 11:17:00 at the "lower" residence located at the Paulys' address. Officer White was visible until 11:17:35, at which point he proceeded to the upper residence. Once at the upper residence, Officer White personally announced "State Police," and heard Officers Mariscal and Truesdale announce "State Police" approximately five times each. 2017 WL 771887, *11 n.2 (citing 10th Cir. Aplt. App. at 179, 219-20). The Officer's identification of "State Police" can be heard twice in the recording (approx. 11:18:00 to 11:18:20), putting White at the upper residence no earlier than approximately 11:18:00. Daniel Pauly's first shot was fired at 11:19:42, less than two minutes later. 2017 WL 771887, *11 n.2 (citing 10th Cir. Aplt. App. at 164).

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[3] Each Officer's police cruiser had a dashboard video camera, which is referred to as a "COBAN video." *See Pauly v. White*, *supra*, 874 F.3d at 1204 n.3.

Respondents did not mislead the Tenth Circuit panel by stating that Officer White arrived at the Pauly residence moments before hearing one of the Paulys shout "We have guns." A "moment" is "[a] brief, indefinite interval of time." Am. Heritage Dictionary of the English Language 1136 (5th ed. 2011). It is synonymous with, *inter alia*, "minute." *See id.* ("A *moment* is an indeterminately short but significant period: '*I'll be with you in a moment*. *Instant* is a period of time almost too brief to detect; it implies haste: *He hesitated for just an instant*. *Minute* is often interchangeable with *moment* and *second* with *instant*") (emphasis in original); *see also*, *e.g.*, *Rattray v. Woodbury Cnty.*, 788 F.Supp.2d 839, 844 (N.D. Iowa 2011) (characterizing a period of "less than ten minutes" as "mere moments"); *U.S. v. Mobile Towing and Wrecking Co.*, 144 F.Supp. 472, 473 (S.D. Ala. 1956) (characterizing a period of "not more than two minutes" as "a matter of moments").

To "mislead" is "[t]o cause (another person) to believe something that is not so" or "to deceive." Black's Law Dictionary 1151 (10th ed. 2014). The term usually "implies willful deceit." *Id.* Respondents did not intentionally or willfully mislead either the Tenth Circuit or this Court in their appellate briefs filed in this case. Respondents properly characterized Officer White as arriving "[j]ust before" or "moments before" hearing Daniel Pauly yell "We have guns." "Moments" are synonymous with "minutes" as noted above, and Officer White was indisputably at the scene of the upper house less than two minutes before Daniel Pauly yelled "We

have guns" and then fired his shotgun. In their Tenth Circuit briefs, Respondents did not state that Officer White arrived "seconds before,"[4] "instantly before," "immediately before," or "just as" Daniel Pauly yelled at the Officers (*i.e.*, the Defendants did not use any intentionally misleading language, nor did Defendants willfully seek to contort the facts of this case). In sum, the Defendants did not intentionally or willfully mislead any Court with the language employed in their briefs in this case.

In the Statement of Facts section of their Tenth Circuit Opening Brief, Respondents pulled largely from the District Court's recitation of facts. *Compare* 2014 WL 2154794, *supra*, at *5-12, with App. at 77-84, 102-09. Indeed, the vast majority of Respondents' citations to the record were to the factual recitation portions of the District Court's opinions denying summary judgment. *See generally id.* Respondents did so knowing that their qualified immunity appeal has at all times concerned whether or not "the conduct *which the District court deemed sufficiently supported for purposes of summary judgment*" meets the applicable legal

[4] The original panel dissent in this case mistakenly stated that, "[w]ithin seconds of his arrival, Officer White heard one of the Pauly brothers yell, 'We have guns.'" *Pauly v. White*, *supra*, 814 F.3d at 1086 (Moritz, J., dissenting). As set forth above, Respondents made no such contention in their original Tenth Circuit briefs—however, Respondents inadvertently repeated this assertion in the October 17, 2016 Reply brief filed in this Court. *See* 2016 WL 6092582, *4. To be clear, Respondents concede that Officer White was at the Pauly residence for at least one minute before Daniel Pauly fired the first shot. However, this is immaterial as discussed *infra*.

standards for qualified immunity (emphasis supplied). *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996); *see also* 2014 WL 3696881, *supra*, *1-2. Elsewhere, Respondents cited to specific portions of the record suggesting that Officer White was on scene moments or minutes before 1) Daniel Pauly yelled "We have guns" and 2) shots were fired. 2014 WL 2154794, *supra*, at *23-24 (citing 10th Cir. Aplt. App. at 82, 117-18, 133-34, 144, 217, 234, 324, 680). Respondents did not—and cannot—intentionally mislead the Tenth Circuit by citing to relevant portions of the record showing that Officer White was in the vicinity of the Pauly residence minutes before hearing "We have guns." Petitioners' reliance on the Tenth Circuit's erroneous characterization of Respondents' statement of facts is misplaced.

Ultimately, the fact that Officer White was present for between one and two minutes prior to the exchange of gunfire *still* does not warrant reversal of this case. In *Kisela v. Hughes*, *supra*, police officers (including Defendant Andrew Kisela) responded to "a police radio report that a woman was engaging in erratic behavior with a knife" and were on the scene between "a minute" and "a few minutes" before Kisela fired on plaintiff Hughes. *Kisela*, 138 S.Ct. at 1150. Kisela fired upon Hughes because Hughes, while "holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so." *Id.* "[A]lthough the officers themselves were in no apparent danger," Officer Kisela believed that Hughes was a threat to the other woman (Chadwick). *Id.* at 1153. Kisela "was

confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911," and he "had mere seconds to assess the potential danger to Chadwick." *Id.* As such, this Court properly found that "[t]his [wa]s far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment." *Id.*

In *Kisela*, this Court did not (and did not need to) decide whether the Defendant "violated the Fourth Amendment when he used deadly force against Hughes. For "even assuming a Fourth Amendment violation occurred—a proposition that [wa]s not at all evident—on these facts Kisela was at least entitled to qualified immunity." *Kisela*, 138 S.Ct. at 1152. Similarly, in the present case, even assuming *arguendo* that Officer Ray White violated the Fourth Amendment when he used deadly force against Samuel Pauly (which, given the latter's threatening act of pointing a loaded gun at White, is not at all evident), on the unique facts of this case White is entitled to qualified immunity as this Court has previously held. Moreover, the two Officers (Truesdale and Mariscal) who did not shoot Samuel Pauly are equally entitled to qualified immunity because 1) the Tenth Circuit correctly found that neither of these Officers "committed a constitutional violation in his own right," *see Pauly v. White*, *supra*, 874 F.3d at 1223, and 2) as noted throughout this Response, Petitioners have failed to identify any

particularized case law that squarely governs the facts presented here. *Kisela*, 138 S.Ct. at 1153.

As in *Kisela*, the Officers here are entitled to qualified immunity. The plaintiff in *Kisela* relied upon several prior Ninth Circuit opinions that this Court readily distinguished, including one case (*Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001)) for which this Court "has already instructed the Court of Appeals not to read its decision in that case too broadly in deciding whether a new set of facts is governed by clearly established law." *See generally Kisela*, 138 S.Ct. at 1153-54. Similarly, the handful of circuit cases cited by Petitioners, *see* Pet. at 28, do not support denying Respondents qualified immunity. In particular, this Court previously found that *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993)—cited by Petitioners here—could not serve as clearly established law squarely governing an excessive force case. *See Brosseau v. Haugen*, 543 U.S. 194, 201 (2004). *Kisela*, *Brosseau*, and the other aforementioned qualified immunity cases control the outcome here, not the smattering of "proximate cause" cases cited by Petitioners. Under this Court's well-established rules and case law, Respondents remain entitled to qualified immunity.

IV. PETITIONERS AND THEIR *AMICUS* IMPROPERLY DEMAND THAT THIS COURT OVERRULE NEARLY FOUR DECADES' WORTH OF QUALIFIED IMMUNITY PRECEDENTS

The position advocated by Petitioners and their *amicus* would, if adopted by this Court, "undermine the values qualified immunity seeks to promote." *D.C. v. Wesby*, *supra*, 138 S.Ct. at 589 (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 735 (2011)). "[I]t is hard to imagine that any immunity threshold should hold law enforcement to a higher standard than judges when it comes to interpreting the law." *Melton v. Phillips*, *supra*, 875 F.3d at 268 (Costa, J., concurring). This Court has repeatedly stressed that lower courts "should think hard, and then think hard again," before addressing both qualified immunity and the merits of an underlying constitutional claim. *Wesby*, 138 S.Ct. at 589 n.7 (quoting *Camreta v. Greene*, 563 U.S. 692, 707 (2011)). As noted above, the Tenth Circuit panel majority spent an inordinate amount of time addressing the constitutional question in this case—however, the Tenth Circuit's unanimous result on the second prong of the qualified immunity analysis (the lack of clearly established law) was proper and consistent with this Court's qualified immunity jurisprudence.

"[T]he Constitution does not demand an individually effective remedy for every constitutional violation." *Zehner v. Trigg*, 133 F.3d 459, 462 (7th Cir. 1997); *see also Estate of Thomas v. Fayette Cnty.*, 194 F.Supp.3d 358, 380 n.21 (W.D.Pa. 2016) (it is "not

uncommon . . . that a constitutional right may be violated without any redress or legal remedy. An individual may violate a plaintiff's constitutional right, but *liability* often depends upon meeting a 'fault' requirement or getting past various 'immunity' doctrines") (emphasis in original). "It is a familiar (though not always well understood) argument that qualified immunity enables government officers to go about their business without debilitating fear of damages liability." John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale L.J. 87, 90 (1999). "The threat of overdeterrence . . . justifies limiting damage recoveries in order to protect the legitimate but nonconstitutional interests at stake in the business of government." *Id.* Notably, "[t]he values served by the doctrine of qualified immunity are not limited to easing the ordinary, workaday business of government, but extend as well to the domain of constitutional rights." *Id.*

Even if its wisdom could be questioned, the doctrine of qualified immunity "has been developed for quite some time, and its contours are fairly clear." Weinberger, *supra*, 84 U. Chi. L. Rev. at 1577 (citing David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23, 35-47 (1989)). The test for qualified immunity has been essentially the same for nearly forty years. "Readers of the Court's decisions know that the focus is on whether a reasonable person would find a right to be 'clearly established.'" Weinberger, 84 U. Chi. L. Rev. at 1577 (citing *Pearson v. Callahan*, *supra*, 555 U.S. at 231).

The Petitioners ask this Court to overrule its prior decision in *White v. Pauly*, while petitioners' *amicus* goes several steps further and demands that this Court eschew the doctrine of qualified immunity altogether, overturning decades of precedent in the process. "Overruling precedent is never a small matter." *Kimble v. Marvel Entm't, LLC*, 135 S.Ct. 2401, 2409 (2015). *Stare decisis* "is a vital rule of judicial self-government," *see Johnson v. U.S.*, 135 S.Ct. 2551, 2563 (2015), and is "a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2036 (2014). Application of the doctrine 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." *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). *Stare decisis* teaches that this Court should exercise the authority to "undecide" its prior rulings sparingly. *Kimble*, 135 S.Ct. at 2415. This Court should flatly decline to undo its qualified immunity precedents here.

CONCLUSION

The Tenth Circuit properly, if circuitously, applied this Court's qualified immunity precedents in its October 31, 2017 opinion in this case. While the two-judge majority unnecessarily analyzed the question of whether or not the Respondents violated Samuel Pauly's Fourth Amendment right to be free from

excessive force, the unanimous panel correctly found that the Petitioners failed to supply the required "clearly established" law squarely governing the particular facts of this case. Nothing in the Paulys' Petition suggests that the unanimous panel erred in this finding—indeed, the Paulys *still* fail to identify any particularized law that would support their position. As they did below, Petitioners improperly conflate generally established *tort* principles with clearly established *constitutional* rights. As such, Petitioners have failed to identify any compelling reasons warranting review of the Tenth Circuit's unanimous opinion.

This Court should deny the petition for a writ of certiorari in its entirety and affirm the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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