

No. 17-1078

In The
Supreme Court of the United States

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DANIEL T. PAULY, et al.,

Petitioners,

v.

RAY WHITE, et al.,

Respondents.

—◆—

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

—◆—

REPLY BRIEF

—◆—

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REPLY BRIEF FOR PETITIONERS
ARGUMENT

“In an appropriate case,” Justice Thomas said in *Ziglar v. Abbasi*, “[this Court] should reconsider [its] qualified immunity jurisprudence.” 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment).

New Mexico State Police Officers Michael Mariscal, Kevin Truesdale, and Ray White caused Samuel Pauly’s death. Officer White unlawfully shot Pauly, and Officers Mariscal’s and Truesdale’s reckless conduct proximately caused White to fire the fatal shot. App. 47, 49. The Tenth Circuit Court of Appeals concluded that, although Officer White violated Pauly’s right against excessive force by fatally shooting him, and even though White’s reckless conduct created the need for him to use deadly force, White was entitled to qualified immunity because it was not clearly established that his shooting was unconstitutional. App. 47, 49–51. The Tenth Circuit then held, as to Officers Mariscal and Truesdale, because Officer White was entitled to qualified immunity, White’s unconstitutional shooting of Pauly “cannot serve as the basis of liability for Officers Mariscal and Truesdale.” App. 52 (citing *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1549 (2017)).

The Tenth Circuit’s conclusion that Officer White was entitled to qualified immunity followed this Court’s opinion that, on the record described by the panel in *Pauly I*, White’s constitutional violation was

not clearly established. *See* App. 51. The record relating to Officer White's conduct has been corrected and, on the corrected record, Officer White recklessly caused the need to use deadly force. The Tenth Circuit's holding as to Mariscal and Truesdale, however, contradicted Justice Ginsburg's view, emphasized in her concurring opinion, that "the Court's opinion [as to White's entitlement to qualified immunity] * * * does not foreclose the denial of summary judgment to Officers Truesdale and Mariscal." App. 70.

Justice Ginsburg was correct. The Tenth Circuit erred in holding that, because Officer White was entitled to qualified immunity, Officers Mariscal and Truesdale cannot be liable even though they proximately caused Pauly's constitutional deprivation. Section 1983 creates liability for any state official who "subjects, *or causes to be subjected*, any citizen . . . to the deprivation of any rights" protected by federal law. 42 U.S.C. § 1983 (emphasis added). Furthermore, by 1871, the common law included basic principles of proximate causation and joint liability among tortfeasors. The Tenth Circuit's holding as to Officers Mariscal and Truesdale is therefore inconsistent with both Section 1983's text and its common-law backdrop.

The Response argues that the Petition merely requests this Court to grant certiorari to correct the Tenth Circuit's error. *See* Resp. 5. To be clear, Petitioners do not seek review simply because the lower court erred. Petitioners also seek review because the lower court's holding breaks sharply with this Court's Section 1983 jurisprudence, misapplying the

qualified-immunity doctrine in contravention of not only Section 1983's text but also this Court's guidance to apply qualified immunity in harmony with the common-law principles that the statute incorporates. For that reason, this Court should grant certiorari, vacate the lower court's opinion, and allow the Paulys their rightful opportunity to pursue their remedy through trial. *See* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 4.5, at 252–53 (10th ed. 2013) (“Certiorari is often granted and the matter clarified where the court of appeals has allegedly misconstrued, misapplied, or misconceived an applicable Supreme Court opinion, where the decision below seemed to be out of line with the authorities, where the ruling below appeared to be in conflict with our precedents, or where the lower court's decision runs contrary to well-settled principles of constitutional law.”) (quotation marks and citations omitted).

I. This Court Should Grant Certiorari To Consider Qualified Immunity Jurisprudence In Light Of Section 1983's Text And Common Law Background.

This is the “appropriate case” for this Court to clarify that the lower courts' application of the qualified-immunity doctrine is bounded by Section 1983's text and common law background. For over two-and-a-half decades, members of this Court have expressed reservations about the drift of successive applications of the qualified-immunity doctrine from its common-law origins. *See, e.g., Ziglar v. Abbasi*, 137 S. Ct. at 1871

(Thomas, J., concurring in part and concurring in the judgment) (“In further elaborating the doctrine of qualified immunity . . . we have diverged from the historical inquiry mandated by the statute.”); *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (“[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume.”); *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) (“In the context of qualified immunity for public officials, . . . we have diverged to a substantial degree from the historical standards.”). As a result, qualified immunity has become detached from the statute’s text and its common-law roots. *See Ziglar*, 137 S. Ct. at 1872 (Thomas, J., concurring in part and concurring in the judgment) (“Even if we ultimately reach a conclusion consistent with the common-law rules prevailing in 1871, it is mere fortuity. Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress.”).

This Court should grant certiorari review now because the Tenth Circuit’s error marks a new and troubling expansion of the qualified-immunity doctrine. According to the lower court, if a state official who ultimately caused the deprivation of a federal right is entitled to qualified immunity, then no other official who proximately caused the deprivation can be liable under Section 1983 regardless of how reckless the conduct. *See App. 51–52*. The lower court’s holding breaks with

the common-law principles regarding the liability and immunities of joint tortfeasors, which Section 1983 incorporated at the time of its enactment. Moreover, the lower court’s ruling effectively excises Section 1983’s text—specifically, the statute’s provision establishing liability in a state official who “*causes [a citizen] to be subjected to*” the deprivation of a federal right. (emphasis added). This Court should grant certiorari not only to correct the lower court’s error but also to establish that, because the qualified-immunity doctrine is grounded in common-law principles that inform Section 1983’s application, the application of qualified immunity cannot contravene those common-law principles, much less the statutory text.

Standing alongside these doctrinal concerns are deeply practical considerations also counting in favor of certiorari review. According to the Washington Post, 987 people in the United States were shot and killed by police officers in 2017. *See Fatal Force* (2017), WASHINGTON POST, <https://tinyurl.com/zyz2tpq> (last viewed May 17, 2018). In 2018, as of the time of this Reply, police officers have shot and killed 399 persons. *Fatal Force* (2018), WASHINGTON POST, <https://tinyurl.com/y73cexhe> (last viewed May 17, 2018). Many of these victims’ survivors will pursue a remedy under Section 1983, and many of their excessive-force claims will involve multiple officers. This Court should grant certiorari review to clarify that, in excessive-force actions brought against multiple officers, courts must separately analyze the conduct of all officers. Section 1983 explicitly and independently grounds liability on official conduct that *causes* a deprivation of a person’s

federal right; therefore, even if the officer who fired the fatal shot is entitled to qualified immunity, his immunity from suit does not necessarily protect other officers' reckless conduct who proximately caused the use of excessive force from liability.

Respondents mischaracterize Petitioners' argument. First, contrary to Respondents' suggestion, Petitioners do not request that this Court reconsider the level of generality which lower courts apply when determining whether a federal right is clearly established. *See* Resp. 3–5. Petitioners are aware of this Court's series of holdings relating to that issue. *See, e.g., D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018) (citations omitted). Instead of asking this Court to clarify how well defined a right must be so that a reasonable officer could clearly ascertain whether his particular conduct was unlawful, Petitioners request that this Court grant certiorari to establish that lower courts cannot apply the qualified-immunity doctrine in a manner that both ignores Section 1983's text and contradicts the common law that the statute subsumes.

Second, the Respondents say that Petitioners ask this Court to reverse the Tenth Circuit under the Restatement (Second) of Torts § 800 (1979). *See* Resp. 6–9. That is a straw caricature of Petitioners' argument. It is familiar law that Section 1983 incorporates common-law tort doctrines that existed when the statute was enacted, *see Kalina v. Fletcher*, 522 U.S. 118, 123 (1997), and is read “in harmony with general principles of tort immunities and defenses,” *Filarsky v. Delia*, 566 U.S. 377, 389 (2012). In fact, when this Court

in *Pierson v. Roy* “pioneered the key intellectual move” that gave birth to the current qualified immunity doctrine, the Court cited the Restatement (Second) of Torts in support. William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 52 (2018); see *Pierson v. Roy*, 386 U.S. 547, 555–57 (1967) (citing Restatement (Second) of Torts § 121 (1965)). The Tenth Circuit’s conclusion that Officers Mariscal and Truesdale cannot be liable because Officer White enjoys qualified immunity from suit breaks with common-law principles regarding the immunity of joint tortfeasors—particularly the common law principle 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 immunity from liability to the person harmed.” Restatement (Second) of Torts § 880 (1979); accord Restatement (First) of Torts § 880 (1939). That principle is traceable from the time of Section 1983’s enactment in 1871 right through to the Second Restatement. Compare T. Cooley, *Law of Torts* 133–134 (1880); 2 C.G. Addison & H.G. Wood, *Treatise on the Law of Torts* 233–234 (1876); 2 F. Hilliard, *The Law of Torts or Private Wrongs* 441 (1859), with Restatement (Second) of Torts § 880, and Restatement (First) of Torts § 880. Because “Congress intended the statute to be construed in the light of common-law principles that were well settled at the time of its enactment,” *Kalina*, 522 U.S. at 123, that principle bounds the expansion of qualified immunity and demonstrates the lower court’s error when applying qualified immunity notwithstanding Section 1983’s textually grounded causation basis of liability.

Third, Respondents argue that, because Officers Mariscal and Truesdale did not separately violate Pauly's Fourth Amendment rights by conduct independent from Officer White's fatal shot, Mariscal and Truesdale cannot be liable under Section 1983. *See* Resp. 17. Respondents misapprehend the law. Again, Section 1983 liability may be imposed when the defendant's conduct is a proximate cause of the plaintiff's deprivation of a federal right, even if the defendant's conduct is not itself a constitutional violation. *See* § 1983 (imposing liability who "subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights" protected by federal law); 1A Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 6.03[A], at 6–13 (4th ed. 2017) ("[Section] 1983 liability may be imposed when the private individual's conduct [that caused plaintiff's deprivation] was a reasonably foreseeable consequence of the defendant's conduct"); *cf. Martinez v. California*, 444 U.S. 277, 285 (1980) ("[A]t least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officer's action to hold them responsible under the federal civil rights law."). Moreover, the Tenth Circuit repeatedly referred to Officers Mariscal's and Truesdale's independent conduct as "reckless" and held that a reasonable jury could conclude that the Officers' reckless conduct precipitated the need to use deadly force. *See* App. 43, 47.

Last, Respondents attempt to normalize the lack of remedy for plaintiffs who have been deprived of a federal right. *See* Resp. 33–34 (citations omitted).

Notwithstanding Justice Marshall’s famous quotation of Blackstone’s ideal, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, wherever that right is invaded.”) (quoting 3 William Blackstone, COMMENTARIES 23), Petitioners do not challenge the existence of a “rights-remedy gap” in federal law. Contrary to Respondents’ suggestion, however, the federal courts’ inability to achieve the Blackstonian ideal does not itself provide a reason to further erode it. Nor does the existence of a “rights-remedy gap” count in favor of allowing lower courts to apply qualified immunity in contradiction of Section 1983’s text or the common-law principles that the statute subsumes. Section 1983 specifically imposes liability for conduct that directly violates federal rights or causes the violation of a person’s federal right. Consequently, this Court should clarify that, in light of the statutory text, the lower courts must separately analyze the conduct of each officer in a multiple-officer, excessive-force case. *See, e.g., Wyatt*, 504 U.S. at 171 (Kennedy, J., concurring) (“We need not decide whether or not it was appropriate for the Court in *Harlow* to depart from history in the name of public policy, reshaping immunity doctrines in light of those policy considerations. But I would not extend that approach to other contexts.”).

II. This Court Should Grant Certiorari Because The “Totality Of The Circumstances” Under *Graham v. Connor* Includes Unreasonable Police Conduct That Foreseeably Caused The Use Of Unreasonable Force.

As to Officer White’s conduct, the lower court determined that (i) Officer White’s use of deadly force . . . violated Samuel Pauly’s right to be free from excessive force,” App. 49, and (ii) “a reasonable jury could thus conclude that Officer White acted recklessly by precipitating the need to use deadly force,” App. 29. Section 1983 does not support a grant of qualified immunity to an officer whose own unconstitutional and reckless conduct causes the need to use excessive force. *See, e.g., Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997); *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995). Nevertheless, the lower court granted Officer White qualified immunity, following this Court’s view that, on the record described by the panel in *Pauly I*, White’s constitutional violation was not clearly established. *See* App. 51. The lower court has now corrected “the erroneous assertions about the record that defendants made to us on appeal.” App. 24. Accordingly, now that this Court has the whole picture, it should grant certiorari to clarify that, under the totality of the circumstances, Officer White is not entitled to qualified immunity.

The Court should also grant certiorari on the second question that the Petition presents to resolve an issue that the *Mendez* Court declined to consider—namely, whether *Graham v. Connor*’s instruction to

assess an officer's force for reasonableness under the totality of the circumstances "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.* (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). The *Mendez* Court did not grant certiorari on that issue because "the decision below did not address it." *Id.* Here, however, the lower court did address the issue. In the Tenth Circuit, "[t]he reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own 'reckless or deliberate conduct during the seizure unreasonably created the need to use such force.'" App. 43 (citations omitted). Because the Tenth Circuit's view conflicts with other circuits, *see, e.g., Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992), this Court should grant certiorari to resolve the split in favor of the Tenth Circuit's understanding of what is included in *Graham's* totality-of-the-circumstances analysis.



CONCLUSION

For the reasons stated above and previously, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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