No. 20-1668

In The
Supreme Court of the United States

CITY OF TAHLEQUAH, OKLAHOMA;
BRANDON VICK; JOSH GIRDNER,

Petitioners,

v.

AUSTIN P. BOND, as Special Administrator
of the Estate of Dominic F. Rollice, deceased,

Respondent.

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

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL FRATERNAL ORDER OF POLICE, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS CITY OF TAHLEQUAH, OKLAHOMA, BRANDON VICK, AND JOSH GIRDNER

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MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL FRATERNAL ORDER OF POLICE, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS CITY OF TAHLEQUAH, OKLAHOMA, BRANDON VICK, AND JOSH GIRDNER

Now comes the National Fraternal Order of Police ("FOP"), by and through the undersigned counsel, and pursuant to Supreme Court Rule 37.2(b) respectfully moves this Court for leave to file the attached *amicus* brief in support of Petitioners. The FOP timely notified the parties of its intention to submit its *amicus* brief more than ten (10) days prior to filing. It sought consent to file its *amicus* brief from the counsel of record for all parties pursuant to Supreme Court Rule 37.2(a). This Motion is necessary because Respondent Austin P. Bond, as Special Administrator of the Estate of Dominic Rollice, withheld consent. Petitioners granted the FOP written consent to file its *amicus* brief as required by Supreme Court Rule 37.2(a).

The National FOP is the world's largest organization of sworn law enforcement officers, with more than 356,000 members in more than 2,100 state and local lodges. The FOP is the voice of those individuals we ask to protect our constitutional rights and serve our communities. The FOP offers its service as *amicus curiae* when important law enforcement and public safety interests are at stake, as in this case.

The Tenth Circuit's approach to assessing the objective reasonableness of a law enforcement officer's

use of force is problematic both as a matter of law and in its application. From a legal perspective, the Tenth Circuit's decision conflicts with this Court's decision in *Graham v. Connor* and its post-*Graham* cases that assessed the objective reasonableness of a use of force. In *Graham*, this Court held that whether a particular use of force is reasonable should be determined based on the moment the force was used. *Graham*, 490 U.S. at 396. In contrast, the Tenth Circuit employed a retroactive approach in the decision below that requires consideration of whether, during an undefined time period, "the officers approached the situation in a manner they knew or should have known would result in escalation of the danger" to determine whether the officers' use of force was objectively reasonable. *Bond v. City of Tahlequah*, 981 F.3d 808, 816 (10th Cir. 2020).

In practice, the Tenth Circuit's procedure will have deadly consequences for both law enforcement officers and the public they have sworn to protect. Officers will be caught second-guessing and proceeding uncertainly in scenarios that require split-second actions to save lives. The number of violent confrontations with law enforcement and the incidents of serious injury and death will increase where offenders know that officers may still violate a constitutional right even in the face of a raised deadly weapon. Lastly, the approach will be exceedingly difficult for departments to effectively incorporate into their training.

According to a 2018 report from the U.S. Department of Justice, over a 12-month span, 61.5 million U.S. residents aged 16 and older reported at least one

contact with police. There is an open legal question for this Court to address that will help instruct law enforcement officers and provide clarity in how to proceed with their *many* encounters with the public. Should the Tenth Circuit's approach (and similarly the First, Third, Ninth, and Eleventh Circuits) continue, officers will find themselves second-guessing their actions, looking backward at the tactics employed in the face of an immediate threat, and proceeding uncertainly in scenarios that require split-second actions to save lives, including their own or innocent bystanders. By highlighting the chilling effect the decision below will have on law enforcement and the perils that may result to the public, the FOP requests this Court, in granting Petitioners' Writ of Certiorari, evaluate the objective reasonableness of an officer's use of force based upon the actions at the moment force is used, rather than the officer's conduct for an undefined time prior to the use force.

Finally, the FOP emphasizes that this case presents this Court with another opportunity to remind the lower courts of the importance of the clearly established prong of the qualified immunity analysis and why that must not be assessed at too high of a level of generality. The reasonable officer needs to be afforded a certain degree of discretion to make split-second decisions in the face of imminent and sometimes deadly force, based upon experience and training. The clearly established requirement for qualified immunity ensures officers will be protected when they make reasonable, but mistaken judgments about open legal

questions and the facts before them have not placed the constitutional right at issue "beyond debate."

Accordingly, the FOP respectfully requests that this Honorable court grant its Motion for Leave to file an *amicus* brief in support of the Petitioners and that the Court grant the Petitioners' Writ of Certiorari. The FOP's *amicus* brief is filed simultaneously herewith as required by Supreme Court Rule 37.2(b).

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

According to a 2018 report from the U.S. Department of Justice, approximately 61.5 million U.S. residents aged 16 or older had at least one contact with the police during a 12-month span. Erika Harrell, Ph.D., and Elizabeth Davis, *Contacts Between Police and the Public, 2018—Statistical Tables*, U.S. Department of Justice—Bureau of Justice Statistics, 1 (2020), https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf. In 2019, the FBI's Uniform Crime Report (UCR) Program reported over 10 million arrests by law enforcement officers. *Uniform Crime Report, Crime in the United States, 2019*, U.S. Department of Justice—FBI, 2 (2020), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested.pdf. These numbers demonstrate that police-citizen encounters are a regular occurrence within the United States.

Increasingly, the narrative generated is that officer behavior during these numerous encounters runs

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[1] In accordance with Rule 37.6, the FOP and undersigned counsel make the following disclosure statements. The Office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contributions to the preparation or submission of this Brief. In addition, Petitioners have consented in writing to the filing of this Brief. Respondent Austin P. Bond, as special administrator of the Estate of Dominic F. Rollice, deceased, withheld consent. Lastly, the National Sheriffs' Association consented in writing to the filing of this Brief. Accordingly, the FOP has prepared a Motion for Leave to be filed simultaneously. All parties received notice of the FOP's intention to file an amicus brief at least ten (10) days prior to the deadline to file the brief.

amok. However, the raw data simply does not support such assertions. Of the 61.5 million U.S. residents aged 16 or older that reported at least one contact with the police, 2% experienced nonfatal threats or use of force from police. Harrell, *Contacts*, *supra,* at 5. According to the same study, fewer than 1% of members of any race or ethnicity had a gun pointed at them during their most recent police-initiated contact or traffic-accident contact. *Id.* at 5. The Washington Post's police shooting database contains records of every fatal shooting in the United States by a police officer since January 1, 2015. *Fatal Force*, THE WASHINGTON POST, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (last updated June 21, 2021). Of the 6,380 people shot and killed by police, only 6% were considered to be "unarmed." *Id.* And during a time when every decision made by police officers is being subjected to after-the-fact analysis under a microscope by the public, the media, politicians, and judges alike, this case presents this Court with the ideal opportunity to provide some much-needed instruction and clarity to officers during their constant encounters with the public.

Indeed, this case involves an off-shoot of a question this Court left open in *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017)—namely, whether a particular use of force deemed reasonable under *Graham v. Connor*, 490 U.S. 386 (1989), may ultimately be found unreasonable due to some separate, undefined conduct deemed to have recklessly or deliberately created the need to use force in the first place. In a line of

cases beginning with *Tennessee v. Garner*, 471 U.S. 1 (1985) and continuing through *Mendez*, this Court has repeatedly cautioned against considering constitutionally irrelevant pre-seizure conduct in Fourth Amendment analyses. The reasoning is cogent. The ability of police officers to wield force in high-pressure situations is literally a matter of life and death for those who put their safety at risk every day to keep our communities safe. Consequently, should the Tenth Circuit's approach—which shares similarities with approaches adopted by the First, Third, Ninth, and Eleventh Circuits—stand, officers will be caught second-guessing and proceeding uncertainly in scenarios that require split-second actions to save lives, including their own or those of innocent bystanders. It will have an unmistakable chilling effect on law enforcement officers' ability to protect and serve.

The National Fraternal Order of Police ("FOP") is the world's largest organization of sworn law enforcement officers, with more than 356,000 members in more than 2,100 lodges across the United States. The FOP is the voice of those who dedicate their lives to protecting and serving our communities, representing law enforcement personnel at every level of crime prevention and public safety nationwide. The FOP offers its service as *amicus curiae* when important police and public safety interests are at stake, as in this case. It is with these concerns and interests in mind that the FOP and its membership respectfully request to be heard.

SUMMARY OF ARGUMENT

In the decision below, the Tenth Circuit erred in two critical respects. First, the Tenth Circuit's determination that the officers may have recklessly escalated the situation, and therefore their use of force may have violated the Fourth Amendment's prohibition against unreasonable seizures, is inconsistent with this Court's decision in *Graham* and its progeny. Second, the lower court erred by finding that this right was "clearly established" in two prior Tenth Circuit cases from over 20 years ago and consequently denying the officers qualified immunity. Accordingly, this case presents this Court with an opportunity to address two legal areas that may better set expectations for police-citizen encounters: *Graham* and qualified immunity.

The first question in this case is whether a use of force that is reasonable at the moment it is employed can nonetheless violate the Fourth Amendment if the officers recklessly or deliberately created the need to use force. This Court held in *Graham* that the issue of whether an officer's use of force is constitutional depends on whether the officer's decision is objectively reasonable *at the moment* the officer used the force. *Graham*, 490 U.S. at 396–97. In contrast, the Tenth Circuit—like the First, Third, Ninth, and Eleventh Circuits—assesses the objective reasonableness of an officer's use of force by evaluating the officer's prior conduct for an undetermined amount of time to determine if the officer recklessly or deliberately (or some other undefined standard) created the need to use force in the first place. As this Brief will explain, such an

approach is incompatible with this Court's precedent, including *Graham* and its progeny. More importantly, such an approach is unworkable for on-the-ground officers and could result in fatal consequences for both police officers and the public. The Tenth Circuit's rule will also be exceedingly difficult to train. There are approximately 800,000 sworn law enforcement officers, across 18,000 federal, state, county, and local agencies. A better defined approach is needed. This Court should grant certiorari to clarify that the only relevant moment in determining the objective reasonableness of the use of force is the moment that force is employed.

The second question in this case is whether it was clearly established, for qualified immunity purposes, that the officers' actions recklessly escalated the situation such that the subsequent use of force was rendered unconstitutional. This Court has cautioned lower courts against defining the clearly established right at too high of level of generality, *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019), and this case presents a prime example of the adverse effects that occur when the lower courts fail to heed that instruction. In the decision below, the Tenth Circuit relied on two cases from the 1990s to find that Officers Vick and Girdner should have known that their conduct violated the Respondent's constitutional rights. Setting aside the countless qualified immunity analyses that have been undertaken by this Court and other circuit courts in the two decades since those cases were decided, neither of the cases cited by the Tenth Circuit clearly established the law at issue. Indeed, the Tenth Circuit's

determination in *Sevier* was merely dicta, whereas in *Allen*, the Tenth Circuit expressed no opinion on the merits (and even if it did, the facts here are readily distinguishable).

Police officers need to be put on fair notice that their conduct is improper, and it is fair to hold them liable if and when they act improperly. At the same time, officers need discretion to make reasonable, albeit mistaken, judgments about unresolved or open-ended legal questions. After all, officers are often forced to make split-second decisions in tense and sometimes deadly scenarios. The decision below relies on two cases from the 1990s to find that Officers Vick and Girdner should have known that their conduct violated the Respondent's constitutional rights. It is therefore critical that our law enforcement officers know the rules. For these reasons, this Court should grant certiorari.

ARGUMENT

I. The Tenth Circuit's approach to assessing the objective reasonableness of a use of force endangers the safety of law enforcement officers and the public.

Police officers are frequently faced with dangerous, violent, and/or deadly situations during the course of their normal job duties. In those situations, officers are expected to rely on their training and experience to protect the public and save lives. That means acting

immediately and decisively. The Tenth Circuit's decision, however, places officers in a scenario in which they may save a life by acting immediately and decisively in the face of an apparent deadly threat, but nevertheless be held liable for a constitutional violation due to their actions leading up to that moment. In other words, the ruling below expects officers to have a crystal ball each time they respond to a call so that should they need to employ force, officers can be certain that none of their individual actions created the need to do so. That expectation is directly contrary to *Graham*, which teaches that whether an officer's use of force is constitutional depends on whether the officer's decision is objectively reasonable at the moment force was used. *Graham*, 490 U.S. at 396–97. In the best interests of law enforcement officers and the public at-large, the decision below must be corrected.

A. This Court should grant certiorari to resolve the question it left open in *Mendez* and the circuit split that exists.

In *Mendez*, this Court held that the Ninth Circuit's "provocation rule" was "incompatible" with the Court's excessive force jurisprudence. *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017). In reaching its conclusion, the *Mendez* Court declined to address one of the arguments raised by the respondent, which happens to be the question before the Court today:

> Respondents do not attempt to defend the provocation rule. Instead, they argued that the judgment below should be affirmed under

> Graham itself. Graham commands that an officer's use of force be assessed for reasonableness under the "totality of the circumstances." On respondent's view, that means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it. We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here. . . . All we hold today is that once a use of force is deemed reasonable under Graham, it may not be found unreasonable by reference to some separate constitutional violation.

Id. at n*. In the aftermath of *Mendez*, the lower courts have developed markedly different approaches to assess the totality of the circumstances in use-of-force cases, leading to drastically different outcomes in similar cases depending on the circuit.

Because the Petition already thoroughly outlines the current circuit split for this Court, this Brief will not discuss it at length. Simply put, the Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits do not take into consideration an officer's actions *prior* to the use of force when determining whether the use of force was objectively reasonable. *See, e.g.*, *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996); *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005); *Fraire v. City of Arlington*, 957 F.2d 1268, 1275–76 (5th Cir. 1992); *Thomas v. City of Columbus*, 854 F.3d 361, 365 (6th Cir. 2017); *Carter v. Buscher*, 973 F.2d 1328, 1333 (7th Cir. 1992); *Schulz v. Long*, 44 F.3d 643, 648 (8th Cir. 1995). Conversely, the First, Third, Ninth, Tenth, and

Eleventh Circuits *do* take into consideration an officer's actions *prior* to the use of force when determining whether the use of force was objectively reasonable. *See, e.g.*, *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 22–23 (1st Cir. 2005); *Johnson v. City of Philadelphia*, 837 F.3d 343, 351 (3d Cir. 2016); *Winkler v. City of Phoenix*, 19-16034, 2021 WL 982276, at *2 (9th Cir. Mar. 16, 2021); *Estate of Ceballos v. Husk*, 919 F.3d 1204 (10th Cir. 2019); *Brown v. City of Hialeah*, 30 F.3d 1433, 1436 (11th Cir. 1994). In the latter group, it is worth noting that the First and Third Circuits are slightly more nuanced in their approach than the other circuits. Under their precedents, while the court will consider the totality of the circumstances when determining objective reasonableness under the Fourth Amendment, the plaintiff must also prove the officer's prior actions proximately caused the injury. *Johnson*, 837 F.3d at 351 (holding that, while the "totality of circumstances analysis should account for whether the officer's own reckless or deliberate conduct unreasonably created the need to use deadly force," the plaintiff must still prove that the officer's allegedly unconstitutional actions proximately caused the injury). According to the First and Third Circuits, not all "preceding events are equally important, or even of any importance. Some events may have too attenuated a connection to the officer's use of force. But what makes these prior events of no consequence are ordinary ideas of causation, not doctrine about when the seizure occurred." *Abraham v. Raso*, 183 F.3d 279, 292 (3d Cir. 1999). To be sure, these circuits still fall into the category of jurisdictions that *will* take into account the

prior conduct of the officer when assessing whether a seizure (or use of force) was reasonable.

Nonetheless, the Ninth and Tenth Circuits remain the most committed to consideration of an officer's pre-seizure conduct. *See Estate of Ceballos*, 919 F.3d at 1214 ("The district court . . . correctly recognized that '[t]he reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment they used force but also on whether the officers' own conduct during the seizure unreasonably created the need to use such force. However, only reckless and deliberate conduct that is 'immediately connected to the seizure will be considered.' ") (internal citations omitted); *Nehad v. Browder*, 929 F.3d 1125, 1135 (9th Cir. 2019) (noting that "[s]ometimes . . . officers themselves may 'unnecessarily creat[e] [their] own sense of urgency" and that "[r]easonable triers of fact can, taking the totality of the circumstances into account, conclude that an officer's poor judgment or lack of preparedness caused him or her to act unreasonably.").

Law enforcement officers need instruction and clarity, *especially* on matters of life and death. The bottom line is this: the objectively reasonable use of force in the face of an immediate—and potentially deadly—threat in order to save lives should *never* be considered unreasonable under the Constitution. By accepting this case for review, this Court can provide much needed expectation-setting that will benefit both officers and the public.

B. The Tenth Circuit's approach is fundamentally at odds with this Court's precedent in *Graham* and its progeny.

"The framework for analyzing excessive force claims is set out in *Graham*. If there is no excessive force claim under *Graham*, there is no excessive force claim at all." *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1547 (2017). In *Graham*, this Court was explicit in its instructions to lower courts in their assessment of the reasonableness of a law enforcement officer's use of force:

> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

490 U.S. at 396–97 (internal citations and quotations omitted). Despite continued attempts by the lower courts to chip away at the standard set in *Graham*—such as the Ninth Circuit's "provocation rule" that was tested in *Mendez*—this Court has remained steadfast

in its application. *See, e.g.*, *Saucier v. Katz*, 533 U.S. 194, 210 (2001) ("The proper perspective in judging an excessive force claim . . . is that of a reasonable officer on the scene and at the moment the force was employed.") (Ginsburg, J., concurring in the judgment) (citation and internal quotation marks omitted); *City of San Francisco v. Sheehan*, 575 U.S. 600, 615 (2015) ("[a plaintiff] cannot 'establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided' ") (quoting *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002)). And it must do so again here.

Simply put, the Tenth Circuit's approach focuses on the wrong point in time. As noted above, *Graham* established a "reasonableness at the moment" standard to account for the fact that a police officer's decision to use force is often made in a "split-second" under "tense, uncertain, and rapidly evolving" circumstances. 490 U.S. at 396–97. The approach used by the lower court, however, expands the time period and range of police action relevant to assessing an officer's liability for the use of force. Accordingly, even if a particular use of force is considered reasonable "at the moment" it occurs, an officer can nevertheless be held liable for that action. But such a result is incompatible with *Graham*.

It is also difficult to square the Tenth Circuit's approach with *Mendez*. Without being explicit, it seems the Tenth Circuit's approach attempts exactly what this Court rejected in the Ninth Circuit's "provocation rule." To be sure, this Court identified the fundamental

problem with the Ninth Circuit's "provocation rule" as the fact that "it instruct[ed] courts to look back in time to see if there was a different Fourth Amendment violation that is somehow tied to the eventual use of force" and allowed "[t]hat distinct violation, rather than the forceful seizure, [to] serve as the foundation of the plaintiff's excessive force claim." *Mendez*, 137 S. Ct. at 1547. It would seem the same logic should apply here, given that the decision below explicitly instructs courts to look back in time to see if "the officers approached the situation in a manner they knew or should have known would result in escalation of the danger" to determine whether officers used excessive force. *Bond v. City of Tahlequah*, 981 F.3d 808, 816 (10th Cir. 2020). Moreover, the Tenth Circuit neglected to define precisely *how long* a court should look back under its approach. Is it from the moment the officer receives the call? The moment the officer arrives on the scene? As this Court instructed in *Mendez*, that sort of backward-facing scrutinization of police conduct incorrect.

C. The Tenth Circuit's approach will result in officers second-guessing their actions and proceeding uncertainly in scenarios that require split-second decision making to save lives.

Not only is the lower court's approach incorrect under this Court's precedent, but it also places officers in an untenable position. At the moment when an officer is deciding whether to use force—especially if the

situation necessitates deadly force—the officer is laser-focused on the immediate threat they are facing and the safety of those in the immediate vicinity. In that moment, the officer is not thinking back to an earlier point in time to assess whether they will be held personally liable. In short, encouraging officers to look backwards during quickly-evolving, high-stakes encounters to consider their tactical decisions leading up to a confrontation will have an undesirable chilling effect on policing.

For one, the number of violent confrontations with law enforcement and the incidents of serious injury and death will increase where offenders know that officers may still violate a constitutional right even in the face of a raised deadly weapon depending on the actions of the officer that took place for an undetermined amount of time beforehand. It is already a serious issue confronting officers today and will only get worse. Kevin Rector, *LAPD Shootings of Unstable People Wielding Sharp Objects a Deadly Problem*, LOS ANGELES TIMES (June 13, 2021, 6:00 AM), https://www.latimes.com/california/story/2021-06-13/lapd-shootings-edged-weapons ("LAPD data reviewed by The Times show suspects were allegedly armed with 'edged weapons' in about 18% of police shootings between 2015 and 2019, and with 'impact devices' like bats in 4%. In 2020, edged weapons were identified in 23% of cases.").

Moreover, the Tenth Circuit's approach adds a layer of complexity to the already complex decision-making process for officers on whether to use force in the first place, and it almost certainly will increase

officers' reaction times in dangerous situations where every millisecond counts. *Brief of Amicus Curiae Major County Sheriffs' Association in Support of Petitioners* at 12, *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017) (No. 16-369). As cited by the Major County Sheriffs' Association in their *amicus* brief to this Court in *Mendez*, one study demonstrated an officer who is "faced with a complex decision-making process . . . will take an average of anywhere from .46 to .70 second(s) to begin" his or her response. W. Lewinski, et al., *Ambushes Leading Cause of Officer Fatalities—When Every Second Counts: Analysis of Officer Movement from Trained Ready Tactical Positions*, 15 Law Enforcement Executive Forum 1, 2 (2015). In comparison, a suspect in the driver's seat during a traffic stop can draw a weapon and fire at an officer in as little as .23 seconds, with an average time of .53 seconds. *Id.*

There is no benefit to the public when police officers are caught second-guessing and proceeding uncertainly in scenarios that require split-second decision-making. Rather, such a rule will endanger the lives of officers and the public by causing officers to stand down and refrain from using force, even when it is objectively justified, due to concerns over the events that led to that point. Surely the state's interest in a police officer's safety does not diminish when their actions—during some undefined period of time and in some undefined way—create a situation where force is necessary.

Lastly, departments cannot incorporate the Tenth Circuit's approach into their training. The ruling from

the court below allows officers to be held personally liable for what may be an objectively reasonable use of force, due to some undefined conduct for an unspecified period of time prior to the eventual use of force. Here, the officers were called out to what boils down to a domestic dispute. Domestic calls have proven to be some of the most dangerous calls for law enforcement officers. Cheryl Mercedes, *Domestic violence calls proven to be most dangerous for responding law enforcement officers*, KHOU, https://www.khou.com/article/news/local/domestic-violence-calls-proven-to-be-most-dangerous-for-responding-law-enforcement-officers/285-c7fef991-320d-4d4d-9449-2ede67c10829 (last updated Dec. 13, 2019, 12:50 PM) ("The U.S. Department of Justice studies officer deaths and which calls are the deadliest. The most recent reports illustrate 40% of fatal calls, from 2010 to 2016, were related to domestic violence."). The officers here also knew that the Respondent was intoxicated and he would need to be removed from the home. After talking to the Respondent, the officers were faced with a raised, clawed hammer. There is no clear policy or procedure to be implemented to demonstrate what officers can (or must) do differently in future domestic calls, or general interactions with the public. And with 800,000 law enforcement officers across approximately 18,000 departments in the United States, it is paramount that law enforcement receive clarity.

II. Officers Vick and Girdner are entitled to qualified immunity because there was no clearly established law in the Tenth Circuit that put the officers on notice they were violating that law.

"The inquiries for qualified immunity and excessive force remain distinct." *Saucier v. Katz*, 533 U.S. 194, 204 (2001). Accordingly, in this case, even if the officers acted unreasonably in shooting Respondent (and they did not), they are still shielded from personal liability unless existing law made clear, through factually similar cases, that it was "beyond debate" that the officers could not use force to respond to the apparent threat they faced in the garage.

A law is "clearly established" when it is so clear that "every reasonable official would [have understood] that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (citations and internal quotations omitted). "An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite [such] that any reasonable officer in the defendant's shoes would have understood that he was violating it." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (internal quotations omitted). The clearly established law must be "particularized to the facts of the case," so that the legal questions before the officers was "beyond debate." *White v. Pauly*, 137 S. Ct. 548, 551–52 (2017) (per curiam) (citations and internal quotation marks omitted). In other words, qualified immunity protects "all

but the plainly incompetent or those who knowingly violate the law." *Id.* at 55 (internal quotations omitted).

In light of the recent attention this legal doctrine has received from media outlets, politicians, and laypersons, the FOP would be remiss not to take this opportunity to make clear what exactly qualified immunity does and does not provide. Qualified immunity does not protect police officers that knowingly violate the law. Qualified immunity does not protect police officers from criminal charges, internal investigations, or employer discipline. Qualified immunity does not apply to the ministerial acts or duties of law enforcement. Qualified immunity does not prohibit suits against the city, municipality, or any other governmental entity. The defense applies *only* when the officer's conduct does not violate clearly established rights of which a reasonable officer would have known. It protects the officer from personal, civil liability *only*. It is not absolute, and it is not unlimited. And it is available not only to police officers, but also to teachers, firefighters, city officials, and school administrators.

This Court's decisions in several recent cases demonstrate how lower courts should evaluate the "clearly established" law prong of the qualified immunity analysis. In *District of Columbia v. Wesby*, several partygoers sued District of Columbia police officers for false arrest and unlawful entry after the officers responded to a complaint about loud music and illegal activities in a vacant house. *District of Columbia v. Wesby*, 138 S. Ct. 577, 583–84 (2018). Even under the assumption that the officers lacked actual probable

cause to arrest the partygoers, this Court held that the officers were entitled to qualified immunity because, "given the circumstances with which [they] w[ere] confronted, they reasonably but mistakenly conclude[d] that probable cause [wa]s present." *Id.* at 591 (internal citations omitted). This Court elaborated further:

> To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be settled law, which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority. It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that every reasonable official would know.

Id. at 589–90 (internal citations omitted) (internal quotation marks omitted).

Next, in *City of Escondido v. Emmons*, an arrestee sued a city police officer and sergeant for excessive force after the officers forcibly apprehended him at the scene of a reported domestic violence incident. *City of Escondido v. Emmons*, 139 S. Ct. 500, 502 (2019). In its analysis, the Court reasoned that the Ninth Circuit's "formulation of the clearly established right was far too general," explaining:

> The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a

> man *in these circumstances*. Instead, the Court of Appeals defined the clearly established right at a high level of generality by saying only that the right to be free of excessive force was clearly established.

Id. at 503 (emphasis added) (internal quotation marks omitted). In reversing and vacating in part the Ninth Circuit's decision, this Court remanded *Emmons* to the Court of Appeals to conduct the analysis required by this Court's qualified immunity jurisprudence. *Id.* at 504.

Like *Wesby* and *Emmons* before it, this case presents yet another example of a lower court defining the clearly established right at a "high level of generality" against this Court's instructions. Specifically, the Tenth Circuit improperly relied upon *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997) and *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir. 1995) to determine that Officers Vick and Girdner violated a clearly established law. But a review of *Allen* and *Sevier* indicates that neither placed the question here "beyond debate" such that every reasonable officer would know that what they were doing violated a constitutional right.

For starters, the Tenth Circuit's determination in *Sevier*—regarding whether or not the officers' reckless or deliberate conduct unreasonably created the need to use force—was merely dicta. *Sevier v. City of Lawrence*, 60 F.3d 695, 699–03 (10th Cir. 1995). Clearly established law, however, comes from holdings, not dicta. *Morrow v. Meachum*, 917 F.3d 870, 875 (5th Cir. 2019); *Leiser v. Moore*, 903 F.3d 1137, 1145 (10th Cir. 2018)

(concluding Supreme Court precedent did not clearly establish the law because it "express[ed] only dicta"); *Hamilton ex rel. Hamilton v. Cannon*, 80 F.3d 1525, 1530 (11th Cir. 1996) ("The law cannot be established by dicta. Dicta is particularly unhelpful in qualified immunity cases where we seek to identify clearly established law.").

Meanwhile, the lower court's determination that *Allen* defined a clearly established law is faulty for two separate reasons. First, *Allen* can be readily distinguished from the facts here, as it has been in several other cases before the Tenth Circuit. *Garrison v. Polisar*, 229 F.3d 1163 (10th Cir. 2000) (holding there was no reckless or deliberate conduct by the officers who fired at the decedent as "he was aiming his weapon at other officers were acting objectively reasonable in light of the surrounding circumstances."); *In re Estate of Bleck ex rel. Churchill*, 643 Fed. Appx. 754, 757 (10th Cir. 2016) (unpublished) (holding *Allen* does not clearly establish that "officers must keep their weapons holstered when opening a hotel door to address a volatile, intoxicated, and possibly armed suspect"); *Clark v. Colbert*, 895 F.3d 1258, 1264 (10th Cir. 2018) ("At best, the officers wrongly predicted how [the decedent] would react. . . . To say should have known the plan would create a need to shoot [] is to indulge the very sort of hindsight revision the law forbids."). In the present case, the officers approached a man in a garage with a hammer—not a man in a car with a gun. Moreover, the officers in *Allen* engaged in some sort of struggle over the gun. *Allen*, 119 F.3d at 839 ("Lt.

Smith then reached into the vehicle and attempted to seize Mr. Allen's gun, while Officer Bentley held Mr. Allen's left arm."). Officers Vick and Girdner never got closer than 8-10 feet from the hammer-wielding Respondent. *Bond v. City of Tahlequah*, 981 F.3d 808, 814 (10th Cir. 2020). Clearly, the facts here are very different from *Allen*.

Second, the Tenth Circuit in *Allen* "express[ed] no opinion on the merits." *Allen*, 119 F.3d at 841. In other words, the court took no position as to whether or not the officers' conduct was reckless and precipitated the need to use deadly force. Rather, the court merely stated that "a reasonable jury could" conclude so. *Id.* Thus, the *Allen* decision hardly makes the proposition that a use of force after deliberately or recklessly creating the need to do so constitutes a constitutional violation "settled law." *Wesby*, 138 S. Ct. at 589.

This Court has recognized that "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Law enforcement officers simply want to know the rules. In other words, a "fair and clear warning" of what the Constitution requires. *Id.* at 747 (Kennedy, J., concurring) (citing *United States v. Lanier*, 520 U.S. 259, 271 (1997)). Officers need protection in order to perform their duties which sometimes involves using force to minimize a perceived threat to themselves or the public. Every single factual scenario an officer encounters is different and unknown. Thus, unless there is existing precedent that squarely governs the facts

before the officer—which we can expect the officer to follow—the reasonable officer needs to be afforded a certain degree of discretion in carrying out law enforcement-related duties in situations that could put lives, including their own, at risk. In these scenarios, officers must rely on training and experience and should not be punished for doing so absent well-settled law otherwise.

CONCLUSION

In order for departments and agencies to train the hundreds of thousands of law enforcement officers (including the 356,000 FOP members) employed across the country, there needs to be clear parameters and expectations. Otherwise, the result is officers proceeding uncertainly in tense, rapidly evolving, and sometimes deadly scenarios. That outcome threatens the safety of the officer and the public they are sworn to protect. This case is an ideal vehicle for this Court to provide clarity to the lower courts and address an important Fourth Amendment question.

Accordingly, this Court should grant certiorari and reverse the judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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