No. 24-1214

IN THE

Supreme Court of the United States

JARED COSPER, IN HIS INDIVIDUAL CAPACITY, *et al.*,

Petitioners,

v.

PERLA ENRIQUEZ BACA, AS PERSONAL REPRESENTATIVE OF AMELIA BACA, DECEASED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

This appeal arises out of the Tenth Circuit's failure to apply the "totality of the circumstances" analysis to Officer Jared Cosper's ("Officer Cosper") use of deadly force against Amelia Baca ("Baca"). As discussed in the Petition, the Tenth Circuit did not apply the totality of the circumstances analysis required by this Court, instead using the "*Tenorio* rule" created from the Tenth Circuit's own case law: *Tenorio v. Pitzer*, 802 F.3d 1160 (10th Cir. 2015), *Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006), and *Zuchel v. City & Cnty. of Denver, Colo.*, 997 F.2d 730 (10th Cir. 1993).

The *Tenorio* rule reduces the totality of the circumstances analysis to a two factor bright line rule. As stated by the Tenth Circuit, the *Tenorio* rule "establish[es] that where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him, that it [is] unreasonable for the officer to use deadly force against the suspect." *Tenorio*, 802 F.3d at 1165-66.

In its Brief, Respondent makes three (3) main arguments. First, Respondent argues that the Tenth Circuit considered the totality of the circumstances when drafting the opinion below. Respondent makes the bold assertion that "there is no '*Tenorio* rule,'" a position which is disproven by the Tenth Circuit's own words. Respondent points to the fact section of the Tenth Circuit's opinion to show that the Tenth Circuit considered the totality of the circumstances. However, the opinion's analysis looks only to: 1) whether Baca walked, instead of charged, at Officer

Cosper, and 2) whether Baca waived her knife through the air in sufficient threatening manner. *Tenorio*, 802 F.3d at 1165-66.

Next, Respondent argues that no circuit split exists as the facts of this case differ from those of the cases cited by the Petition. Respondent attempts to shift the view of this Court from the court of appeals' legal analysis to their recitation of facts. The present appeal pertains to the proper analysis of use of force cases – not their facts. Respondent points to a non precedential Eleventh Circuit case, *Teel v. Lozada*, 826 F. App'x 880 (11th Cir. 2020), to support its position. However, the *Teel* court expressly rejected a two factor analysis almost identical to the *Tenorio* rule. Thus, *Teel* only deepens the existing circuit split.

Finally, Respondent argues that the *Tenorio* rule does not create clearly established case law at a high level of generality. This position fails because the *Tenorio* rule clearly reduces the totality of the circumstances to only two (2) facts. Therefore, the *Tenorio* rule violates this Court's mandate that "the clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 580 U.S. 73, 79 (2017).

The Tenth Circuit's departure from this Court's case law, creation of a circuit split, and establishment of clearly established case law at a high level call out for this Court's review.

ARGUMENT

I. The Tenth Circuit Failed to Consider the "Totality of the Circumstances" by Applying Its *Tenorio* Rule.

A. The *Tenorio* rule exists as evidenced by the Tenth Circuit's plain words.

Respondent contends that the Tenth Circuit considered the totality of the circumstances, bluntly stating that "[t]here is no *Tenorio* [r]ule. Rather, in a routine application of the qualified immunity framework, the Tenth Circuit held the facts of this case are sufficiently analogous to *Tenorio*..." This contention fails due to a simple review of *Tenorio*.

In the *Tenorio*, the Tenth Circuit fabricated the following hard line rule from its own case law: "[W]here an officer had reason to believe that a suspect was holding only a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him, that it was unreasonable for the officer to use deadly force against the suspect." *Tenorio*, 802 F.3d at 1165-1166. This rule "narrow[ed] a robust totality-of-circumstances inquiry to two meager factors..." *Id*. at 1167 (Judge Phillips dissenting). Indeed, Judge Phillips recognized that this "minority-of-circumstances approach" "derailed [the] qualified immunity analysis from its previously sensible course and rerouted it away from Supreme Court and Tenth Circuit precedent." *Id*. at 1170. Thus, the *Tenorio* rule does exist.

B. Listing facts and precedents is not, in itself, indicative of meaningful analysis.

In asserting that the Tenth Circuit considered the totality of the circumstances, Respondent states that the Tenth Circuit provided a recitation of the undisputed facts. Respondent spills much ink outlining the Tenth Circuit's statement of facts and precedents. According to Respondent, Officer Cosper arrived to a calm situation and chose only to aggravate the situation. Despite his alleged callousness, Officer Cosper attempted to listen to Baca, though her speech was unintelligible. Officer Cosper shot Baca twice. With respect to the Tenth Circuit's analysis under *Graham v. Connor*, 490 U.S. 386 (1989) and *Est. Of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255 (10th Cir. 2008), Respondent states that the Tenth circuit relied on its own precedent including *Tenorio*, *Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006), and *Zuchel v. City & Cnty. of Denver, Colo.*, 997 F.2d 730 (10th Cir. 1993).

Although the Tenth Circuit recited certain facts, that does not mean that it performed the totality of circumstances analysis announced in *Graham v. Connor*, 490 U.S. 386 (1989). Indeed, the Tenth Circuit determined whether "a reasonable officer on the scene would have believed that Baca posed an immediate threat of serious physical harm..." in three (3) sentences – one (1) of which was a recitation of the *Tenorio* rule. The Tenth Circuit stated:

> We have held that it is unreasonable for an officer to use deadly force where the "officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and made no slicing or stabbing motions toward him." Here, it is

> undisputed that Baca was holding only knives and that she made no slicing or stabbing motions toward Officer Cosper. And we agree with the district court that a jury could conclude that Baca was not charging Officer Cosper.

Id. at 11a-12a (citations omitted).

As displayed by the court's brief analysis, the Tenth Circuit did not analyze the totality of the circumstances. Instead, it relied on the *Tenorio* rule. Despite Respondent's confusion as to the applicability of *Barnes v. Felix*, 605 U.S. 73 (2025), it is clear that *Barnes* highlights the Tenth Circuit's mistake. In that case, the Court explained that with respect to the totality of the circumstances analysis, "'in-the-moment' facts cannot be hermetically sealed off from the context in which they arose." *Id.* at 80. (internal quotations omitted). Thus, this Court rejected rules like that of *Tenorio*, stating, rules "that preclude[] consideration of prior events in assessing a police shooting is reconcilable with the fact-dependent and context-sensitive approach [this Court has] proscribed." *Id.* at 82.

II. A Circuit Split Exists As To Whether the "Totality of the Circumstances" Analysis Applies to Cases Involving a Suspect that Threatened an Officer's Life with an Edged Weapon.

A. Respondent fails to disprove the existence of a circuit split as it focuses on facts in place of the proper use of force analysis.

A circuit split exists where "a Circuit Court of Appeals has rendered a decision in conflict with the decision of

another Circuit Court of Appeals on the same matter." *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938). The present appeal pertains to a difference in use of force *analysis* among the circuit courts – namely whether the "totality of the circumstances" analysis applies to cases in which a suspect threatened an officer's life with an edged weapon.

Respondent argues that the Tenth Circuit's *Tenorio* rule does not create a circuit split. In doing so, Respondent merely recites the facts of the cases cited in the Petition: *Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998), *Napouk v. Las Vegas Metro. Police Dep't*, 123 F.4th 906 (9th Cir. 2024), and *Smith v. LePage*, 834 F.3d 1285 (11th Cir. 2016).

Although Respondent concludes that each court of appeals was "just presented with very different circumstances," Respondent never discusses the heart of the circuit split – whether the Tenth Circuit reduce the "totality of the circumstances" analysis to "a neat set of legal rules." *See United States v. Arvizu*, 534 U.S. 266, 274 (2002) (noting that the Court has "deliberately avoided reducing [the 'totality of the circumstances' analysis"] to a neat set of legal rules.").

The circuit split at issue arises from the *analysis* applied by the various circuit courts. Thus, the underlying facts of the cases cited in the Petition are almost irrelevant. In cases involving a suspect threatening an officer with an edged weapon, other circuit courts apply the "totality of the circumstances" analysis. *See Sova*, 142 F.3d at 903 ("The proper application of Fourth Amendment reasonableness requires careful attention to the facts

and circumstances of each particular case....") (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)); *Napouk* ("... the totality of the circumstances based on the undisputed facts shows that [a suspect] posed an immediate threat to the officers..."); *Smith* 834 F.3d at 1296-97 (applying the totality of the circumstances where law enforcement shot a suspect after he dropped his knife and hid before fleeing.). Conversely, the Tenth Circuit applies its own analysis, reducing the totality of the circumstances to "what's highlighted in the single sentence" *Tenorio* rule. *Tenorio*, 802 F.3d at 1167 (Judge Phillips dissenting). Accordingly, a circuit split exists.

B. Respondent's reliance on *Teel* fails as *Teel* rejected an analysis similar to that of the *Tenorio* rule.

Respondent partially relies on a non precedential Eleventh Circuit case, *Teel v. Lozada*, 826 F. App'x 880 (11th Cir. 2020), to assert that there is no circuit split as to the Tenth Circuit's use of the *Tenorio* rule. This reliance fails first because the Eleventh Circuit saw fit to designate this *Teel* as non-precedential. Moreover, the *Teel* court rejected a two factor analysis nearly identical to the *Tenorio* rule..

In *Teel*, Dr. Teel brought a 42 U.S.C. § 1983 claim for excessive force after Officer Lozada shot and killed his suicidal wife. *Id*. at 884. During the encounter, Ms. Teel began walking gradually at Officer Lozada, stating "Fuck you. Kill me." *Id*. at 883. Officer Lozada never instructed Ms. Teel to drop the knife, never clearly instructed her to stop moving, and never warned that he would shoot her if she failed to comply. *Id*. Officer Lozada shot Ms. Teel

when she was approximately 6 to 10 feet away. *Id*. Notably, Officer Lozada "understood that [Ms.] Teel had not tried to harm Dr. Teel." *Id*. at 882. Dr. Teel appealed after the district court granted Officer Lozada summary judgment based on qualified immunity. *Id*. at 884.

The Eleventh Circuit began its analysis, explaining that "*Graham* generally requires that we weigh the governmental interest at stake by examining the totality of the circumstances...." *Teel*, 826 F. App'x 880 at 885. The Eleventh Circuit reversed, stating that "Ms. Teel was armed with a knife and walking in [Officer Lozada's] direction. These *two facts* drove the district court to conclude the Officer Lozada's use of force was constitutional." *Id*. at 886. (Emphasis added).

The Eleventh Circuit rejected the district court's two factor analysis, noting that the district court failed to consider many material facts:

> Officer Lozada understood that Ms. Teel had not threatened her husband or anyone else. She did not verbally threaten Officer Lozada and was not pointing the knife at him. When he shot her without any warning, Ms. Teel was 10 feet away. Her walk was gradual, and she never picked up pace or made any sudden movement. She was diminutive in size.
>
> ... Officer Lozada also was aware and conceded that alternative actions – retreating... to meet up with [another officer] or using a non-lethal method to subdue Ms. Teel...

Id. (Internal citations omitted).

Respondent's reliance on *Teel* fails because the Eleventh Circuit rejected the district court's two factor analysis. This analysis was nearly identical to the *Tenorio* rule in that it focused on: 1) whether Ms. Teel wielded a knife, and 2) whether Ms. Teel walked at Officer Lozada. Indeed, the *Tenorio* rule presumes the suspect is wielding a knife and asks: 1) whether the suspect is only walking at the officer, and 2) whether the suspect swings their knife their knife in a theatrical manner. After rejecting this two factor test, the Eleventh Circuit engaged in a "totality of the circumstances" analysis.

As the Eleventh Circuit rejected an analysis similar to the *Tenorio* rule, *Teel* only serves to highlight the growing circuit split at issue. Accordingly, a circuit split exists as to whether the "totality of the circumstances" analysis applies to cases involving a suspect that threatened an officer's life with an edged weapon.

III. Respondent Fails to Address the High Level of Generality at Which the Tenorio Rule Creates Clearly Established Law.

Respondent's final argument pertains to the "clearly established" prong of qualified immunity, which requires that the contours of Baca's constitutional right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). Respondent asserts that the Tenth Circuit did not apply the qualified immunity analysis at a high level of generality. Respondent relies on statements of this Court which broaden the definition

of "clearly established rights." For example, Respondent cites *Hope*, 536 U.S. at 741, which provides that "general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful."

Notably, Respondent entirely avoids the Petition's discussion of *City of Tahlequah, Oklahoma v. Bond*, 595 U.S. 9 (2021), likely because this case illustrates the generality of the *Tenorio* rule. Without reiterating the Petition's discussion of *Bond*, *Bond* involved the Tenth Circuit's finding clearly established law based chiefly on *Allen v. Muskogee*, Okl., 119 F.3d 837 (10th Cir. 1997). This Court explained that it has "repeatedly told courts not to define clearly established law too high a level of generality." *Bond*, 595 U.S. at 12. "[T]he rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*

The *Bond* Court overturned the Tenth Circuit's finding of clearly established law, noting several factual differences between *Bond* and *Allen*. *Id.* at 13. For instance, "[t]he officers in *Allen* responded to a potential suicide call by sprinting toward a parked car, screaming at the suspect, and attempting to physically wrest a gun from his hands." *Id.* The officers in *Bond* "by contrast, engaged in a conversation with [the suspect], followed him into a garage at a distance of 6 to 10 feet, and did not yell

at him until after he picked up a hammer." *Id*. The Court thus explained that the clearly established law at issue was defined too high a level of generality, stating that "a reasonable officer could miss the connection between [*Allen*] and [*Bond*]." *Id*. at 14.

The *Tenorio* rule similarly attempts to define clearly established law at too high a level of generality. The generality of the *Tenorio* rule is seen in the fact that it reduces Officer Cosper's encounter with Baca to two (2) sentences: "Baca was not charging Officer Cosper and made no slicing or stabbing motions toward him. So it was clearly established that Officer Cosper's use of deadly force against... Baca was unreasonable." Pet. App. 16a-17a. (Internal citations omitted). Thus, the *Tenorio* rule does away with other circumstances of the encounter, such as Baca's threats against her family, Officer Cosper's numerous instructions for Baca to drop her knives, and Baca's aggressive behavior. More importantly, the *Tenorio* rule restricts consideration of the occupants still inside the home with Baca just before the shooting. Ultimately, these occupants restricted Officer Cosper's ability to retreat as doing so would effectively abandon the occupants to a woman that previously threatened to kill them. *See* Pet. App. 29a (stating that Officer Cosper "had not been able to confirm whether the 911 caller and the other occupants were safe.).

CONCLUSION

For the forgoing reasons, and those in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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