

No. 25-594

IN THE
Supreme Court of the United States

ELIZABETH CROCKETT, *et al.*,
Petitioners,

v.

JOHN KRUEGER, INDIVIDUALLY
AND AS CO-ADMINISTRATOR OF THE
ESTATE OF JEFFERY KRUEGER, *et al.*,
Respondents.

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

REPLY BRIEF

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ARGUMENT

The Tenth Circuit denied Petitioners qualified immunity on the issue of excessive force without conducting an individualized qualified immunity analysis, but rather relied upon prior Tenth Circuit precedent to engage in a collective qualified immunity analysis which considered the aggregate actions of multiple officers at the scene. This holding threatens law enforcement and public well-being everywhere because it will chill law enforcement officers in the performance of their duties, and endanger them in the field.

Furthermore, there is a split of authority among the circuits regarding the importance and necessity of conducting an individualized qualified immunity analysis, especially in cases regarding alleged violations of the Fourth Amendment, rather than analyzing qualified immunity with regard to the aggregate actions of several officers. The Court should grant certiorari to resolve that split of authority among the circuits in the interest of promoting legal stability, predictability, and the equal treatment of individuals under the law.

Moreover, the Tenth Circuit's incoherent and arbitrary analysis regarding when a suspect may be considered "effectively subdued" leaves law enforcement officers without any clear guidance to enable them to conform their actions to clearly established law. This will, again, chill officers in the performance of their duties with regard to subduing struggling suspects, and will endanger them in the field.

I. In Denying Petitioners Qualified Immunity on the Excessive Force Claims, the Tenth Circuit Court of Appeals Has Decided an Important Legal Issue in a Way Which is Inconsistent with This Court's Established Precedent and Has so Far Departed from the Accepted and Usual Course of Judicial Proceedings, as to Call for an Exercise of This Court's Supervisory Power

Respondents argue the Tenth Circuit conducted an individualized qualified immunity analysis for each defendant. However, that is simply not the case. Rather, ignoring this Court's directive in *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) that, in Fourth Amendment cases, clearly established law must be defined on the basis of the specific context of the case, the Tenth Circuit panel did not conduct an individualized qualified immunity analysis for the Petitioners, but rather relied on two prior Tenth Circuit cases, *Weigel v. Broad*, 544 F.3d 1143 (10th Cir. 2008) and *Est. of Booker v. Gomez*, 745 F.3d 405 (10th Cir. 2014), to engage in a collective qualified immunity analysis which considered the aggregate actions of multiple officers at the scene. Indeed, the Tenth Circuit panel noted the striking similarities between the facts relevant to Petitioner Crockett and the *Weigel* case:

As discussed, in *Weigel*, a trooper could be liable for excessive force when he participated in a prone restraint by “straddl[ing] [the decedent's] upper thighs and buttocks and [holding the decedent's] arms in place,” even though he then left to go “to his vehicle to warm his hands” while one trooper and one bystander continued to apply weight to the decedent's back

and legs. 544 F.3d at 1148–49. We held that both troopers should have known they “subjected [the decedent] to force that they knew was unnecessary to restrain him,” constituting excessive force, and we held that each trooper could be liable even though one trooper “was in his car when [the decedent] went into cardiac arrest.” *Id.* at 1152–53 & n.4.

Here too, Lieutenant Crockett put weight on Mr. Krueger’s thigh and buttock while assisting with the placement of a leg restraint while another officer put weight on Mr. Krueger’s back. Then, she left to go to her car even while other officers continued to apply weight to the prone Mr. Krueger. She was in her car when Mr. Krueger’s breathing slowed and the EMTs were called. These facts are so strikingly similar to *Weigel* it is hard to imagine a case that could have put Lieutenant Crockett on clearer notice that her participation in the prone restraint made her subject to an excessive force claim, even though she was not the officer applying weight to Mr. Krueger’s back, and she left the scene to go to her car before the EMTs were alerted that Mr. Krueger may have stopped breathing.

(Appx. 72a – 73a, footnotes omitted).

Considered alone, each Petitioner’s actions would not be shown to be objectively unreasonable. Indeed, a quick review of the *Graham* factors demonstrate the objective reasonableness of Petitioners’ actions: (1) severity of the

crime at issue: Prior to their arrival, Petitioners were informed that the Decedent was being combative and was fighting Deputies Orr and Phillips. Therefore, they had reason to believe the Decedent had committed assault and battery of a law enforcement officer. (2) Whether the Decedent posed an immediate threat: At the time of Petitioners' arrival, the Decedent continued to struggle against the officers attempting to restrain him and Petitioner Crockett observed him kick another Deputy as he tried to restrain the Decedent's legs. As such, the Petitioners had reason to believe that the Decedent presented an immediate threat. (3) Whether the Decedent was actively resisting or attempting to resist: Again, the Decedent was actively resisting at the time of the Petitioners' use of force despite numerous law enforcement officers attempting to restrain him, including kicking a deputy. As such, considered alone, each Petitioner's minor and brief use of force in restraining the Decedent's legs so they could be placed in leg irons was completely reasonable.

Respondents further assert that "Petitioners' argument also rests on a misdescription of the panel's alternative holding. Although the panel did state that it could analyze the officers' culpability together, it did not treat the Petitioners as a collective and undifferentiated whole, or ignore their individual conduct as Petitioners complain...Instead, the panel merely explained that Petitioners could each be liable if they actively participated in a coordinated use of force." (Brief in Opposition, p. 18). However, holding that Petitioners can be held liable for participating in a coordinated use of force is indistinguishable from treating the Petitioners' and the other officers' actions as a collective and undifferentiated whole.

Respondents further argue the actions of other officers can be considered under the “totality of the circumstance” and that liability under § 1983 is analogous to tort liability and that tort liability “require[s] joint consideration of multiple tortfeasors’ actions.” (Brief in Opposition, pp. 19-20). However, the relevant issue before this Court is whether the Tenth Circuit is required to conduct an individualized qualified immunity analysis with regard to claims of excessive force, not whether the actions of other officers can be considered in determining whether there was an underlying constitutional violation.

Application of the Tenth Circuit’s precedent which allows the court to engage in a collective qualified immunity analysis which considers the aggregate actions of multiple officers at the scene flies in the face of this Court’s established precedent that, for claims under 42 U.S.C. § 1983, a defendant may only be held liable for their own misconduct. *See, Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). Indeed, this precedent is contrary to the Tenth Circuit’s own pronouncement in *Pahls v. Thomas*, 718 F.3d 1210, 1233 (10th Cir. 2013) that defendants’ “entitlement to qualified immunity, turn on an individual assessment of each defendant’s conduct and culpability.” In the *Pahls* case, the Tenth Circuit stated that “[p]laintiffs must do more than show that their rights ‘were violated’ or that ‘defendants,’ as a collective and undifferentiated whole, were responsible for those violations.” *Id.* at 1228 (citations omitted).

Moreover, the Tenth Circuit panel’s decision ignores this Court’s directive to define clearly established law in Fourth Amendment cases on the basis of the specific context of the case. *Tolan*, 572 U.S. at 657. The Tenth

Circuit panel's holding threatens law enforcement and public well-being everywhere because it will chill law enforcement officers in the performance of their duties, and endanger them in the field. Further, such precedent is simply contrary to the concepts of fundamental fairness and equal treatment of individuals under the law.

II. The Petition Should be Granted to Resolve a Split of Authority Among the Circuits

In their Brief in Opposition, Respondents argue there is no real circuit split to resolve here. However, as set forth in the Petition, unlike the Tenth Circuit, the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have all held that individualized qualified immunity analyses are required. *See, e.g., Poe v. Leonard*, 282 F.3d 123, 134-35 (2d Cir. 2002); *Spikes v. McVea*, 12 F.4th 833 (5th Cir. 2021); *Stoudemire v. Michigan Dep't of Corr.*, 705 F.3d 560, 570 (6th Cir. 2013); *Est. of Williams by Rose v. Cline*, 902 F.3d 643, 651-52 (7th Cir. 2018); *Manning v. Cotton*, 862 F.3d 663, 668 (8th Cir. 2017); *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir. 2000), as amended (Oct. 31, 2000); *Alcocer v. Mills*, 906 F.3d 944, 951 (11th Cir. 2018). Petitioners attempt to distinguish these cases on various grounds, but fail to undermine the underlying holdings therein that emphasize the necessity of conducting individuals' qualified immunity analyses.

In further support of their argument that there is no real circuit split to resolve, Respondents cite to several cases as applying the same legal principle that "when assessing whether force was reasonable or excessive under the totality of circumstances, a court may consider the force used together by a group of officers working in

concert.” (Brief in Opposition, pp. 30-31). *See, e.g., Brown v. City of New York*, 798 F.3d 94, 103 (2d Cir. 2015); *Moore v. LaSalle Management Company, L.L.C.*, 41 F.4th 493, 506 (5th Cir. 2022); *Simpson v. Hines*, 903 F.2d 400, 403 (5th Cir. 1990); *Martin v. City of Broadview Heights*, 712 F.3d 951, 960 (6th Cir. 2013); *Phillips v. Community Ins. Corp.*, 678 F.3d 513, 526 (7th Cir. 2012); *Ryan v. Armstrong*, 850 F.3d 419, 427-28 (8th Cir. 2017); *Martinez v. City of Pittsburg*, 809 Fed. App’x 439, 440 (9th Cir. 2020); *Blankenhorn v. City of Orange*, 485 F.3d 463, 479-81 (9th Cir. 2007); *Skrtich v. Thornton*, 280 F.3d 1295, 1302 (11th Cir. 2002).

However, the relevant issue before this Court is whether the Tenth Circuit is required to conduct an individualized qualified immunity analysis with regard to claims of excessive force, not whether the actions of other officers can be considered in determining whether there was an underlying constitutional violation. In that regard, many of the cases cited by Respondents are simply not applicable. The *Brown* and *Moore* cases did not involve any qualified immunity analysis with regard to the excessive force claim therein, and are therefore inapposite. The *Martin* and *Blankenhorn* cases did not involve a collective qualified immunity analysis. Rather, the courts in those cases considered the individual actions of each of the defendants and did not lump them in together in a collective. Likewise, the *Skrtich* case also did not involve a collective qualified immunity analysis. Moreover, the *Skrtich* case’s discussion of qualified immunity was pure dicta as it had already determined that no qualified immunity defense was even available to the defendants in the first instance. *Skrtich*, 280 F.3d at 1302. Given the inapplicability of these cases to the issue before this

Court and the contrary case law of the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits holding that individualized qualified immunity analyses are required, Petitioners contend that there is a significant circuit split on this issue which this Court should resolve.

III. The Tenth Circuit’s Incoherent and Arbitrary Analysis Regarding When a Suspect May be Considered “Effectively Subdued” Leaves Law Enforcement Officers Without any Clear Guidance to Enable Them to Conform Their Actions to Clearly Established Law

The Tenth Circuit’s jurisprudence regarding when a suspect is “effectively subdued” such that any further use of force against them constitutes excessive force is inconsistent at best and incoherent and arbitrary as applied to the Petitioners in this case. No court has held that it constitutes excessive force to restrain an arrestee in a prone position when the person is actively resisting arrest. In fact, the Tenth Circuit rejected that very argument in *Giannetti v. City of Stillwater*, 216 F. App’x 756 (10th Cir. 2007) (unpub). In this appeal, the Tenth Circuit panel held that the *Giannetti* case was inapplicable, finding that, unlike the suspect in that case, “the facts—viewed in the light most favorable to the Estate—could show that Mr. Krueger was not meaningfully struggling during much of the prone restraint, and that Mr. Krueger was effectively subdued.” (Appx. 69a). However, the panel’s analysis is both incoherent and arbitrary as applied to the Petitioners.

Respondents argue the Petitioners are requesting a fact-bound review in this regard, unworthy of this Court’s consideration, and that they have either contradicted or

disregarded the summary judgment record. However, that is simply not the case. The Petitioners do not take issue with the Tenth Circuit’s factual findings. Rather, they contend the Tenth Circuit’s legal analysis and legal conclusions regarding whether the Decedent was “effectively subdued” at the time the Petitioners used force against him is fundamentally flawed.

The Tenth Circuit relied upon *Weigel, supra., Lynch v. Board of County Commissioners of Muskogee County, Oklahoma*, 786 F. App’x 774 (10th Cir. 2019), and *Teetz ex rel. Lofton v. Stepien*, 142 F.4th 705 (10th Cir. 2025), in so holding. However, unlike the suspects in the *Weigel* and *Lynch* cases, the Decedent’s legs were not shackled at the time that Petitioners made contact with him. Rather, Petitioner Crockett knelt down on the suspect’s left buttock and left upper thigh for approximately forty five seconds to a minute and assisted placing him in leg irons, after which she immediately left the area. Indeed, it is undisputed that Petitioner Crockett made contact with the Decedent because she saw him kick another officer. Likewise, Petitioner Lott observed Mr. Krueger fully conscious with his eyes open and kicking, continuing to resist arrest. In order to help secure the Decedent, Petitioner Lott placed his foot on Decedent’s right shoulder for approximately one minute. There were no facts, evidence, or analysis regarding whether Petitioner Lott placed substantial or significant pressure through his foot onto the Decedent’s shoulder. A suspect—even one which is handcuffed in the prone position—cannot be reasonably described as “effectively subdued” if they are still able to kick other officers. Moreover, unlike the suspect in the *Teetz* case, Petitioners Crockett and Lott did not put continuous force on the Decedent after

becoming aware that he was experiencing life-threatening harm. Neither were near Mr. Krueger when he began experiencing breathing difficulties and, until that point, Petitioner Lott believed Mr. Krueger was still breathing and not experiencing a medical emergency. (Appx. 33a). As such, none of these cases would have placed Petitioners Crockett and Lott on notice that their minor and brief uses of force in restraining the Decedent could be considered excessive.

The Tenth Circuit's inconsistent, incoherent, and arbitrary jurisprudence regarding when a suspect may be considered "effectively subdued" leaves law enforcement officers without any clear guidance to enable them to conform their actions to clearly established law. The inevitable confusion which this will cause to law enforcement officers will chill them in the performance of their duties and endanger them in the field.

IV. The Questions Presented Are Critically Important and This Case is An Ideal Vehicle to Resolve Them

Citing *California v. Rooney*, 483 U.S. 307 (1987) and other authority, Respondents argue this Court reviews judgments, not opinions and, as such, this case is a poor vehicle to resolve any questions regarding the Tenth Circuit's collective qualified immunity analysis because alternative grounds exist to support the Tenth Circuit's decision. However, certiorari review of this case is not necessarily foreclosed by the "judgments, not opinions" doctrine just because alternative grounds for the Tenth Circuit's decision may exist. In *Camreta v. Greene*, 563 U.S. 692 (2011), this Court granted certiorari review to prevailing party governmental officials who had been granted qualified immunity in a § 1983 case, and vacated

a portion the Ninth Circuit’s opinion in that case. In so holding, the Court reasoned:

The constitutional determinations that prevailing parties ask us to consider in these cases are not mere dicta or “statements in opinions.”... They are rulings that have a significant future effect on the conduct of public officials—both the prevailing parties and their co-workers—and the policies of the government units to which they belong....And more: they are rulings self-consciously designed to produce this effect, by establishing controlling law and preventing invocations of immunity in later cases. And still more: they are rulings designed this way with this Court’s permission, to promote clarity—and observance—of constitutional rules.

Id. at 704-05 (internal citations omitted). These considerations apply equally to the Petitioners in this case. If prevailing party officials that had been granted qualified immunity can obtain certiorari review under such circumstances, surely officials that have been denied qualified immunity, such as the Petitioners, may obtain it as well.

Not only does the Tenth Circuit panel’s decision here depart from this Court’s controlling precedents and from the rule of at least seven other circuits, it does so on an issue that is extremely important to officer safety and in a case in which the record is exceptionally clear with regard to Petitioners Crockett’s and Lott’s actions. That makes this case an ideal vehicle to address a critically important issue, and certiorari is warranted.

CONCLUSION

For the reasons set forth in the Petition and further discussed herein, the Petitioners Elizabeth Crockett and Matthew Lott respectfully request that the Court grant certiorari in the instant case.

Respectfully submitted,

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