No. 25-604

IN THE

Supreme Court of the United States

DREW CRAIG, 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

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether police officers are entitled to qualified immunity when they asphyxiate someone by standing and kneeling on the back of his body even though he is prone, handcuffed, and subdued, and he poses no significant risk of danger to himself or others.

2. Whether the Tenth Circuit evaluated the constitutional right at issue at too high a level of generality when it relied on a prior precedent with strikingly similar facts that raised the precise legal question at issue.

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INTRODUCTION

This case arises out of Jeffery Krueger's asphyxiation by Petitioners Tyler McFarland, Drew Craig, Elizabeth Crockett, and Matthew Lott.[1] While those four Petitioners kneeled and stood on the back of Krueger's body until they asphyxiated him, Petitioners Corey Nevitt and Ben Blair watched their colleagues' fatal misconduct without intervening.

The fatal encounter began when Petitioners responded to a call for assistance from two other officers following a traffic stop. At the time Petitioners arrived on the scene, Krueger was prone, handcuffed, and pinned under the knees of an officer. His head was covered in blood from a grievous head wound, and his blood was streaked across the road. He was visibly exhausted and his cries for help were becoming increasingly unintelligible.

Although Petitioners had been trained that the use of prone restraints created a significant risk of asphyxiation, they piled onto Krueger's back, rather than rolling him on to his side so that he could breathe. Petitioner McFarland rested his full, 230-pound bodyweight squarely on Krueger's back for four minutes. Petitioner Craig kneeled on Krueger's upper back. Petitioner Crockett kneeled on the upper part of Krueger's buttocks and thigh. Petitioner Lott stood on Krueger's shoulder. And two additional officers rested

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[1] Petitioners in this case—McFarland, Craig, Nevitt, and Blair—are co-defendants and co-appellants with Petitioners Crockett and Lott, who filed a separate petition for certiorari. *See* Case No. 25-594. Because the two petitions are largely copied and pasted from each other, Respondents' two briefs in opposition are similar.

on Krueger's legs. The officers ultimately applied several hundred pounds of pressure to Krueger's back, breaking seventeen of his ribs, and suffocating him to death.

Following Krueger's death, his estate sued Petitioners for excessive force, and Petitioners moved for summary judgment on qualified immunity grounds. The District Court denied Petitioners' motions, and the Tenth Circuit affirmed that judgment against every Petitioner. Of note, the Tenth Circuit's ruling determined that most Petitioners were liable for excessive force on two separate grounds: Petitioners McFarland, Craig, Crockett and Lott used excessive force themselves, and all of the Petitioners, including Nevitt and Blair, failed to intervene in their colleagues' unconstitutional conduct.

Petitioners now seek immunity for their role in Krueger's death. They ask this Court to grant certiorari to address a series of fact-bound questions, none of which implicate a circuit split, and each of which the Tenth Circuit correctly decided. This Court should deny the petition for the following reasons.

First, Petitioners assert that the Tenth Circuit conducted an impermissible group assessment of Petitioners' liability that disregarded Petitioners' individual conduct. Not so. Petitioners' argument simply ignores the Tenth Circuit's express determination that the summary judgment record supported a finding of individual liability for every Petitioner. The panel did conduct an alternative analysis that nominally addressed "group" liability, but they did so only for Petitioners Crockett and Lott in Case No. 25-594—not for the Petitioners in this

case. Furthermore, that analysis still included an individualized qualified immunity assessment.

Second, the Tenth Circuit's qualified immunity analysis creates no conflict with any established precedent of this Court. In an effort to manufacture a conflict, Petitioners cite general legal propositions from cases addressing unrelated legal issues and assert without explanation that their cases create a conflict. They do not.

Third, even if Petitioners' group analysis argument otherwise warranted certiorari, this case would be a poor vehicle to decide that issue because this Court's intervention would not change the judgment below. As mentioned above, the Tenth Circuit did not rely on a group liability analysis to hold Petitioners liable. Instead, it expressly found that they were each individually liable for excessive force, a ruling that would be unaffected by any revision of its group analysis. Furthermore, the Tenth Circuit ruled that Petitioners were liable for excessive force on another separate basis: the failure to intervene. Petitioners do not challenge this determination.

Fourth, the Tenth Circuit's analysis of Respondent's excessive force claim creates no split with any other circuit. Rather than identifying cases that apply principles contrary to those applied by the Tenth Circuit, Petitioners seek to create the illusion of a split by citing broad statements of law from materially different factual contexts. Petitioners' error is further demonstrated by the fact that the same circuits that comprise their "split" have decided other cases applying the same legal approach as the Tenth Circuit.

Fifth, Petitioners purport to challenge the Tenth Circuit's analysis of when a suspect can be considered effectively subdued, but their true complaint is that the Tenth Circuit rejected Petitioners' view of the factual record below. This factual dispute presents an unsuitable ground for certiorari, is inappropriate in an interlocutory qualified immunity appeal, and is factually mistaken.

The petition should be denied.

STATEMENT OF THE CASE

I. The Petitioners Asphyxiate Krueger[2]

On the evening of July 1, 2019, Jeffrey Krueger was driving through Wagoner, Oklahoma when Deputy Kaleb Phillips pulled him over for a minor moving violation. Appx. 17a. For no apparent reason, Phillips and his colleague, Deputy Nicholas Orr,[3] approached Krueger's car with guns drawn and shouted conflicting commands at him, including an order to stay in his car. Appx. 18a. Krueger heeded the order to stay in his car. Appx. 18a.

While Krueger tried to locate his driver's license and registration, and before he had a chance to comply with any additional commands, the deputies dragged him from the car by his hair and threw him to the ground with enough force to leave a bloody wad of hair in the street. Appx. 24a–25a. Krueger also "suffered a severe blow to the head, opening a gash in his forehead that covered the highway with blood." Appx. 24a.

After the deputies threw Krueger to the ground, a struggle ensued as the officers sought to handcuff Krueger. At this juncture, Orr and Phillips were the only officers on scene, and Petitioners had not yet arrived. The deputies repeatedly shouted at Krueger to roll over while preventing him from doing so, and Krueger asked them how he was supposed to comply with their orders, pleaded for help, Appx. 27a,

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[2] This factual recitation reflects the summary judgment record viewed in the light most favorable to Krueger.

[3] Phillips and Orr did not petition this Court for certiorari.

and told them he could not breathe. A.II-395.[4] Over the course of several minutes, Phillips and Orr punched Krueger multiple times in the torso, struck him three times in the face, and Tased him at least eight times with 50,000 volts of electricity. Appx. 28a–29a. As this was happening, Phillips cursed at Krueger, "Goddamn! You motherfucker!" Appx. 20a.

Phillips and Orr handcuffed Krueger's wrists behind his back with the assistance of two EMTs and continued to hold Krueger down "as [his] cries for help grew increasingly faint and unintelligible." Appx. 28a. Meanwhile, nine additional officers arrived on scene, including Petitioners Drew Craig, Tyler McFarland, Ben Blair, and Corey Nevitt from this case, and Petitioners Elizabeth Crockett and Matthew Lott from Case No. 25-594. A.II-1575–76. Upon seeing Krueger, one of the newly arrived officers "called out, 'God damn! There's a lot of blood. He's covered in blood!'" Appx. 28a.

Although the responding officers had been trained that prone restraints could cause asphyxiation and that they should place subjects in a "sitting position or laying on the side" to help them breathe "[o]nce the individual is… under control," *see* A.VI-1580 at 81:15–82:1; A.VI-1616–17 at 52:24–53:5, Petitioners piled onto the back of Krueger's body as he was prone, handcuffed, and suffering from obvious injuries. Petitioner McFarland took over from Phillips and kneeled on Krueger's back for four minutes, Appx. 37a; A.II-480, "rest[ing] his full weight on both knees." Appx. 31a. Petitioner Craig joined him, kneeling on

[4] Citations to the appellate record are presented in the format: A.[volume]-[page(s)]. Thus, a citation to page 395 of the second volume of the appendix would be A.II-395.

the back of Krueger's right shoulder for approximately 45 seconds. Appx. 30a. Petitioners McFarland and Craig had a combined weight of approximately 500 pounds, while Krueger was 6'3" and weighed 156 pounds. Appx. 36a. Together, Petitioners McFarland and Craig applied so much force to Krueger's back that they broke seventeen of his ribs, including three consecutive ribs with multiple fractures (a flail chest), and further compromised his breathing. *See* Appx. 36a; *see also generally* A.V-1238, 1245, 1247.

When Petitioner McFarland first placed his full body weight on Krueger's back, Krueger was still moving his legs to some degree, likely because the "prone restraint… caused Krueger to panic and struggle in an attempt to breathe." Appx. 36a. But Krueger "did not meaningfully resist or speak throughout the encounter," Appx. 37a, and for the last few minutes of his life, he did not move, struggle, or speak. Appx. 35a–36a; A.II-472.

A short time after Petitioner McFarland kneeled on Krueger, Crockett and Lott joined him. Crockett, who weighed approximately 200 pounds, kneeled on the "top portion of" Krueger's buttocks and thigh, for more than one minute. A.VI-1619; Appx. 31a. Lott "put significant weight on Krueger's shoulder" for approximately one minute. Appx. 71a. Two additional officers, Cody Standifird and Travis Potts, knelt on Krueger's legs. *See* A.II-472. Petitioners Nevitt and Blair were also present and watched their colleagues kneel on Krueger's back. Appx. 79a. And Phillips, Orr, and one additional officer, Clarence Collins, were present, A.VI-1576, leaving eleven officers to detain Krueger.

During this period, an EMT performed a wellness check on Krueger. *See* A.II-472 at 2:15–2:38. The EMT asked Krueger if he was okay, but Krueger was unable to respond. Instead, he was "just grunting and moaning and not giving a reply." A.VIII-1927. As Plaintiffs' medical expert explained, "if you're not responding and grunting and moaning, that's what happens when you're about to die." A.V-1266. Both Lott and Petitioner McFarland were inches from the EMT and within earshot during this exchange. *See* A.II-472 at 2:15–2:38.

Although Krueger was exhibiting signs that he was "about to die" and remained "unmoving," Appx. 67a n.21, 35a–36a, Petitioner McFarland, Lott, Crockett, Potts, and Standifird stayed on top of him. *See* A.II-472. Petitioner McFarland would remain on Krueger's back for approximately two additional minutes until Krueger stopped breathing. *See id.* Petitioner Craig and Crockett eventually shackled Krueger's feet together, Appx. 31a, yet the officers continued to violate their training by leaving Krueger in a prone position with Petitioner McFarland kneeling on his back. Approximately one minute later, Petitioners McFarland and Craig connected Krueger's ankle shackles to his wrist shackles with a hobble chain as Petitioner McFarland stayed on his back. Appx. 32a–33a. As all of this was happening, Petitioners Blair and Nevitt watched without taking any action to stop their colleagues.

Soon thereafter, Petitioner Blair noticed that Krueger had stopped breathing, and said, "He's still breathing, ain't he?" Appx. 33a. Petitioner McFarland responded, "Yeah… hey… no, he ain't." A.II-472. By the time EMTs loaded Krueger into the ambulance, he

had stopped breathing altogether, and his pupils were fixed and dilated, revealing a lack of brain activity. A.VIII-1893. His heart flatlined before he arrived at the hospital, and the EMTs could not administer lifesaving cardiac medication because his wrists were shackled to his ankles, making an IV impossible. A.VIII-1893, 1931.

The Estate's medical expert explained that restraining Krueger in a prone position with the weight of the officers on his back broke many of his ribs and led to his death, with the broken ribs contributing to his asphyxiation. Appx. 36a. In the expert's words, "[t]hese restraint procedures used against Krueger will predictably and foreseeably cause death or serious injuries," and "[i]f [Krueger] was not restrained, he absolutely would be alive today." A.VI-1454, 1456. "It is abundantly clear that the manner of death is a homicide," A.VI-1455, and every officer who applied weight to Krueger's back—including the back of his shoulder and near his waistline—contributed to his asphyxiation. A.V-1251.

II. Proceedings Below

Following Krueger's homicide, his estate filed suit against numerous individuals involved in his death, including Petitioner McFarland, Petitioner Craig, Petitioner Nevitt, Petitioner Blair, Petitioner Crockett, Petitioner Lott, Deputy Phillips, Deputy Orr, and—in his official capacity—Sheriff Chris Elliott. Appx. 86a. The complaint alleged that all Defendants used excessive force in violation of the Fourth Amendment, and that various Defendants committed other constitutional and state-law violations that are not relevant here. Appx. 87a. Each Defendant—including the four Petitioners—moved

for summary judgment. The District Court denied each Defendant's summary judgment motion as to excessive force, denied summary judgment to the Sheriff on municipal liability grounds, and granted summary judgment to the Defendants on the remaining grounds.[5]

When assessing the Defendants' liability for excessive force, the District Court conducted an "individualized analysis of each officer's behavior" and determined "that the record supports a finding of individual liability as to each Defendant," including Petitioners McFarland and Craig. Appx. 40a n.16. Specifically, it ruled that a reasonable factfinder could determine that Petitioners McFarland and Craig were liable for their use of excessive force based on two separate theories: McFarland and Craig both used excessive force themselves when they "placed more than [Krueger]'s body weight on his back while he was handcuffed and in a prone position on his stomach," Appx. 103a, and they also failed to intervene when other officers used excessive force. Appx. 102a–03a. The District Court similarly determined that Petitioners Blair and Nevitt were liable for failing to intervene. *See id.*

Following the District Court's summary judgment decision, every Defendant except Sheriff Elliott filed an interlocutory appeal. Petitioners McFarland, Craig, Nevitt, and Blair filed an appeal together. Lott filed an appeal with Deputies Orr and

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[5] The District Court decided Defendants' various summary judgment motions in two separate decisions, one of which resolved the motions of the County Sheriff and Deputy Sheriffs, and one of which resolved the motions of the Wagoner City police officers.

Phillips. Crockett filed her own appeal after losing a motion for reconsideration. And the Tenth Circuit consolidated the three appeals.

On appeal, the Tenth Circuit unanimously affirmed the District Court's decision for each appellant: "we conclude that although the district court's recitation of the facts was incomplete and, in some instances, not stated in the light most favorable to [Plaintiffs], the court reached the correct conclusion: Defendants are not entitled to qualified immunity. We therefore affirm the district court's denials of summary judgment." Appx. 5a.

The Tenth Circuit's affirmance rested on four separate bases of liability, two of which apply to Petitioners McFarland and Craig, and one of which applies to Petitioners Blair and Nevitt. Petitioner McFarland, Petitioner Craig, Crockett, and Lott each used excessive force when they "continually applied weight to [Krueger] for up to four minutes while he did not meaningfully resist or speak." Appx. 37a. Additionally, all eight Defendants—including Petitioners McFarland, Craig, Nevitt, and Blair—were separately liable for excessive force because they failed to intervene in the unconstitutional conduct of the other officers. Appx. 81a. Defendants Phillips and Orr were liable for pulling Krueger from the car by his hair and slamming him to the ground. Appx. 62a. And Phillips and Orr were separately liable for "continu[ing] to punch and tase [Krueger] in stun mode after the point they became aware he was subdued." Appx. 62a.

The Tenth Circuit made clear that the record supported a finding that Petitioners McFarland and Craig each individually used excessive force. First, it

expressly agreed with the District Court that "the record supports a finding of individual liability as to each Defendant." Appx. 40a n.16. It explained that binding, materially indistinguishable case law "'clearly established that putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force.'" Appx. 41a (citation modified). And the Tenth Circuit determined that each of the relevant Defendants individually did just that: "a reasonable jury could find that [Krueger] was handcuffed, prone, and subject to a prone restraint that lasted for approximately four minutes." Appx. 66a. During this time, "Officer McFarland rested both his knees on [Krueger]'s back, [and] Officer Craig put his weight on [Krueger]'s right shoulder," while other officers applied weight to his buttock, thigh, and shoulder. Appx. 66a.

The Tenth Circuit further found that the Petitioners' conduct amounted to unconstitutional deadly force because "a prone restraint can constitute deadly force," and Krueger was "prone and unmoving" and "no longer posed 'a threat of serious physical harm' to himself or to other officers that could justify deadly force." Appx. 67a n.21 (citation modified).

Following the Tenth Circuit's decision, all eight Appellants moved to stay the mandate, Doc. 81, which the panel unanimously denied without awaiting a response from the Appellee. Petitioners Craig, McFarland, Nevitt, and Blair then filed the instant petition for writ of certiorari. And Crockett and Lott filed a separate petition. *See* Case No. 25-594. Appellants Orr and Phillips did not file a petition.

ARGUMENT

I. The Tenth Circuit relied on strikingly similar, binding case law in correctly determining that Petitioners violated Krueger's clearly established rights.

This is an easy case that turns on an undisputed and specific legal principle. At the time that Petitioners McFarland and Craig participated in Krueger's homicide, the Tenth Circuit had clearly established that "putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force."[6] *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008) (citation modified). A "robust consensus of cases of persuasive authority," *see District of Columbia v. Wesby*, 583 U.S. 48, 65 (2018), from the First, Fifth, Sixth, Seventh, and Ninth Circuits have reached the same conclusion. *See e.g., McCue v. City of Bangor, Maine*, 838 F.3d 55, 64 (1st Cir. 2016); *Timpa v. Dillard*, 20 F.4th 1020, 1036 (5th Cir. 2021); *Martin v. City of Broadview Heights*, 712 F.3d 951, 961 (6th Cir. 2013); *Abdullahi v. City of Madison*, 423 F.3d 763, 771 (7th Cir. 2005); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056–59 (9th Cir. 2003). Petitioners do not dispute that this principle represents clearly established law.

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[6] This section focuses solely on the affirmative commission of excessive force because Petitioners do not dispute that they are liable for excessive force on a failure to intervene theory if any individual officer used excessive force.

Additionally, *Weigel* placed Petitioners on unusually clear notice of their constitutional violation due to its factual similarity: in *Weigel*, as here, an individual was involved in a struggle with the police, the police effectively subdued the individual, and then the police killed the individual by applying significant pressure to his back and buttocks while he was face-down and effectively restrained. *See* 544 F.3d at 1143. The differences between *Weigel* and the instant case only underscore the clarity of the constitutional violation here: Weigel engaged in a far more violent struggle with the police than did Krueger; Krueger was more thoroughly restrained than Weigel; and officers applied much more weight to Krueger's back than they did to Weigel's.

Relying on *Weigel*, *inter alia*, the Tenth Circuit determined that the summary judgment record would allow a reasonable factfinder to find that McFarland and Craig both violated clearly established law. Petitioners each individually applied significant weight to the back of Krueger's body while he was face-down and handcuffed: Petitioner McFarland, who weighed about 230 pounds, Appx. 36a, "rested both his knees on [Krueger]'s back," Appx. 66a, and "continually applied weight to [Krueger] for up to four minutes while he did not meaningfully resist or speak." Appx. 37a. As Petitioner McFarland knelt on Krueger's back, Petitioner Craig, who weighed approximately 235 pounds, Appx. 36a, knelt on his right shoulder. Appx. 31a. While Petitioners McFarland and Craig applied significant weight to the back of Krueger's body, he was "prone, handcuffed, and restrained by multiple officers," Appx. 35a–36a, and "did not meaningfully resist or speak." Appx. 37a. He also had "several broken ribs," which Plaintiffs'

medical expert attributed to the prone restraint, Appx. 36a, and "was prone and unmoving." Appx. 67a n.21. At the time, the Defendants had "gained control over him," Appx. 70a, he posed no immediate threat to anyone, and he could not even attempt to flee. Appx. 66a.

In short, the Tenth Circuit determined that a reasonable jury could find that both Petitioners McFarland and Craig individually engaged in the precise activity that *Weigel* forbade. On this record, Petitioners McFarland and Craig have no serious argument, as a matter of law, that their conduct is protected by qualified immunity.

II. Petitioners have failed to identify any precedent of this Court that remotely conflicts with the ruling below, and even if such a conflict existed, this case would be a poor vehicle to address it.

Petitioners contend that the Tenth Circuit decided an important legal issue in a manner inconsistent with this Court's established case law, but their entire argument rests on the false premise that the panel eschewed an individual assessment of Petitioners' liability for an impermissible group analysis. *See, e.g.,* Pet. 11–12. On the contrary, the panel specifically found that the record supported a finding of individual liability for Petitioners. Appx. 40a n.16, 63a–74a. The panel did state, in the alternative, that Crockett and Lott could be found liable because they "'actively participated in a coordinated use of force," Appx. 72a (citation modified), but it did not apply this analysis to Petitioners McFarland and Craig.

Petitioners have identified no precedents from this Court that conflict with the Tenth Circuit's analysis and have resorted, instead, to general statements of law from unrelated cases that have no bearing on the resolution of this case. This Court should reject Petitioners' meritless claims. These cases do not present even a hint of conflict, and even if they did, this case would present a poor vehicle through which to address the conflict. This Court has long observed that it reviews judgments, not statements in cases, and the Tenth Circuit's collective liability analysis has no bearing on the underlying judgment because it is also supported by two independent bases.

a. The Tenth Circuit did not abandon an individual assessment of Petitioners' liability for an impermissible group assessment.[7]

Petitioners' claim fails on three separate levels.

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[7] It is difficult to discern what, if anything, Petitioners are arguing in support of their second question presented. They do not dedicate a section to that question and advance no clear argument about it. To the extent they are arguing that the Tenth Circuit defined the right at issue at too high a level of generality by "engag[ing] in a collective qualified immunity analysis," Pet. 13—an argument that they also make in support of their first question presented—that argument fails for the same reasons described herein. *See infra* at II.a. To the extent they are arguing that the Tenth Circuit mis-defined the right because the panel did not adopt Petitioners' preferred framing—a framing that ignores most of the relevant facts and incorrectly draws inference on Petitioners' behalf—then Petitioners' true complaint is with the Tenth Circuit's factual conclusions, not its qualified immunity analysis, which does not warrant a grant of certiorari. *See infra* at IV.

First, Petitioners' claim misdescribes the Tenth Circuit's decision because the panel specifically determined that each of the Petitioners/Defendants was individually liable. Although the Tenth Circuit did observe that officer conduct could be considered together in some cases and provided an alternate holding to that effect, it expressly stated, "We agree with the district court that the record supports a finding of individual liability as to each Defendant," and then proceeded to explain why Petitioners were each individually liable for excessive force before explaining—in the alternative and limited to specific arguments from Lott and Crockett that do not apply to Petitioners here—that their conduct could also be evaluated together. Appx. 40a n.16, 63a–74a. Petitioners fail to mention this independent ground supporting the Tenth Circuit's judgment.

The Tenth Circuit first ruled, with no reference to group liability, that a reasonable jury could find the Petitioners and other Defendants all liable for excessive force. Appx. 67a. Under Tenth Circuit law, officers were forbidden from putting significant weight on the back of a prone and subdued subject's body, yet Petitioners McFarland and Craig did just that. Thus, the panel explained that Petitioner McFarland was liable because he "rested both knees on [Krueger]" while he was "handcuffed, prone, and subject to a prone restraint that lasted for approximately four minutes," Appx. 66a, which is the specific conduct proscribed by *Weigel*. Appx. 71a. Similarly, the Court denied qualified immunity to Petitioner Craig because he personally "put his weight on Krueger's right shoulder" when he was subdued and McFarland was on his back. Appx. 66a. In so

doing, he also personally violated the rule clearly established in *Weigel* and *Booker*. *See* Appx. 67a.

Second, Petitioners' argument also rests on a misdescription of the panel's discussion of group liability. Although the panel did state that it could analyze officers' culpability together in some circumstances, it never applied this analysis to Petitioners McFarland or Craig. Instead, the panel raised the possibility of group liability when responding directly to arguments from Crockett and Lott about their own individual actions and liability. *See* Appx. 71a–73a. And the panel did not mention group liability when initially explaining the liability of every Defendant or when rejecting McFarland's and Craig's arguments earlier in the same section. *See* Appx. 68a–70a.

But even if the panel had considered Petitioners McFarland and Craig's conduct together with that of their co-defendants, that approach would be wholly consistent with the Fourth Amendment on the facts of this case. It is a Fourth Amendment truism "[t]hat inquiry into the reasonableness of police force requires analyzing the 'totality of the circumstances.'" *Barnes v. Felix*, 605 U.S. 73, 80 (2025) (citation modified). And here, the most relevant "circumstances" are the actions of the other officers. Neither Petitioner McFarland nor Petitioner Craig applied weight to the back of a restrained, motionless subject alone. Petitioner Craig applied significant weight to the back of Krueger's shoulder *while* Petitioner McFarland rested his full body weight on Krueger's back, and then McFarland continued to rest his full body weight on Krueger's back *while* Crockett, Lott, and two additional officers also knelt and stood

on the back of Krueger's legs, buttocks, back, and shoulder at the same time. Put simply, Petitioners McFarland and Craig's actions were more unreasonable because they kneeled on Krueger's back when others were already doing so—the combination of officers meant that Petitioners' weight was more likely to asphyxiate Krueger than if they acted alone while also serving less purpose than if they acted alone. Because of this, there is no meaningful difference on the facts of this case between performing an individualized analysis that considers the totality of the circumstances and "analyzing the culpability for the prone restraint together." Appx. 72a.

Third, Petitioners are simply incorrect that collective consideration of defendants' conduct is always inappropriate. This Court has made clear that § 1983 claims are properly understood as claims of tort liability, which should be assessed in the context of principles of tort law. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 689 (1999). And tort law has long recognized that some circumstances require joint consideration of multiple tortfeasors' actions. One such circumstance applies where, as here, multiple people act in concert: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him…." Restatement (Second) of Torts § 876 (1979). This background principle closely mirrors the Tenth Circuit's statement that individuals "'who actively participated in a coordinated use of force' on [a] decedent could be liable…." Appx. 72a (citation modified). It is found in the Section 1983 law of various other circuits. *See, e.g.*, *Grandstaff v. City of*

Borger, 767 F.2d 161 (5th Cir. 1985) (analyzing officers' liability collectively because they "acted in concert"); *Skrtich v. Thornton*, 280 F.3d 1295, 1302 (11th Cir. 2002), overruled on other grounds by *Pearson v. Callahan*, 555 U.S. 223 (2009) (same). And it is also consistent with the language of Section 1983, which extends liability to "[e]very person who, under color of [state law], subjects, *or causes to be subjected*, any… person… to the deprivation of any rights…." 42 U.S.C. § 1983 (emphasis added).

b. Petitioners have identified no established precedent from this Court that is inconsistent with the decision below regarding an important legal issue.

Petitioners claim that the Tenth Circuit's decision conflicts with this Court's general principle, repeated in many cases, that clearly established law must be defined "on the *basis* of the specific context of the case," Pet. 18 (citing *Tolan v. Cotton*, 572 U.S. 650, 657 (2014)), or by "identify[ing] a case that put [Petitioners] on notice that [their] *specific conduct* was unlawful." Pet. 17 (quoting *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021)). But there is no dispute that the Tenth Circuit provided just that. This is not a case where the panel "proceeded to find fair warning in the general tests set out in *Graham* and *Garner*." *Brousseau v. Hogan*, 543 U.S. 194, 198 (2004). Instead, it's a case where the panel identified a binding prior case with "strikingly similar" facts that addressed the specific, individual conduct of Petitioners. Appx. 72a–73a. *Weigel* stated that it is "'clearly established that putting substantial or significant pressure on a suspect's back while that

suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force.'" 544 F.3d at 1155; *see also Est. of Booker v. Gomez*, 745 F.3d 405, 424 (10th Cir. 2014) (same). Petitioners McFarland and Craig both put substantial or significant pressure on Krueger's back while he was in a face-down position after being subdued and/or incapacitated. It is hard to imagine a case that would more clearly put McFarland and Craig on notice that their conduct violated clearly established law. And the Tenth Circuit's reliance on a factually analogous case like *Weigel* can in no way be construed as deciding an issue that conflicts with this Court's established precedent.

Petitioners also claim that the Tenth Circuit's decision "flies in the face of this Court's established precedent" in *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). Pet 16. Petitioners contend that the Tenth Circuit violated *Ashcroft*'s requirement that "a defendant may only be held liable for their own misconduct" "for claims under 42 U.S.C. § 1983" because the panel "engaged in a collective qualified immunity analysis and considered the aggregate actions of multiple officers at the scene." Pet. 16.

This argument fails because the cited language in *Ashcroft* is making a separate point that has no bearing on this case. In *Ashcroft*, the respondent urged the Court to hold a supervisor responsible under a theory of vicarious liability. *Ashcroft*, 556 U.S. at 677. This Court rejected the respondent's argument "[b]ecause vicarious liability is inapplicable to *Bivens* and § 1983 suits" so "petitioners may not be held accountable for the misdeeds of their agents." *Id.* *Ashcroft* has no relevance here because the Tenth

Circuit plainly did not rely on a theory of vicarious liability. The Tenth Circuit's analysis made clear, at all times, that Petitioners McFarland and Craig faced potential liability because they actively, individually participated in the use of excessive force, not because the other officers qualified as their agents.

c. This case represents a poor vehicle to resolve any questions related to the Tenth Circuit's collective analysis because the judgment below is supported by alternate holdings.

This Court has long held that it "reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956); *see also Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (this Court's "power is to correct wrong judgments, not revise opinions"). Therefore, the Court must consider whether "the judgment [was] correct, not the ground on which the judgment professes to proceed." *McClung v. Silliman,* 19 U.S. 598, 603 (1821); *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("[S]ince this Court reviews judgments, not opinions, we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment….").

In *California v. Rooney*, for example, this Court dismissed certiorari as improvidently granted because the petitioner was not challenging the judgment of the court below, only a holding in the opinion supporting that judgment. 483 U.S. 307 (1987). The *Rooney* Court reasoned: "The fact that the [lower court] reached its decision through analysis different than this Court might have used does not make it appropriate for this

Court to rewrite the [lower] court's decision." *Id.* at 311.

As in *Rooney*, Petitioners' arguments about the Tenth Circuit's purported collective liability analysis challenge only an alternate holding in the panel's opinion and not a judgment. The Tenth Circuit's judgment below is supported by two additional holdings—namely, that Petitioners are liable for their individual use of force, and that they are separately liable for their failure to intervene. Even if this Court were to side with Petitioners regarding the Tenth Circuit's views on group liability, the ultimate judgement would be unaffected and would render any decision advisory. *See Herb*, 324 U.S. at 126 ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered… our review would amount to nothing more than an advisory opinion."); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 735 (1978) ("[F]ederal courts have never been empowered to issue advisory opinions."). This case is therefore a poor vehicle to decide the questions presented.

First, the Tenth Circuit affirmed that Petitioners were liable for their individual use of force in violation of Krueger's constitutional rights. Appx. 39a n.16; *supra* at II.a. Thus, even if this Court vacated the lower court's aggregate force analysis, the same result would obtain based on Petitioners' individual conduct.

Second, the Tenth Circuit affirmed that a reasonable jury could find that Petitioners failed to intervene. Appx. 72a n.25. The court explained that Tenth Circuit law clearly establishes that an officer is liable for failing to intervene in another officer's use of excessive force, even if they did not "actually

participate in the use of excessive force," so long as they were "present at the scene… and fail[ed] to take reasonable steps to protect the victim of another officer's use of excessive force." Appx. 78a–80a (citations modified). The Tenth Circuit found Petitioners were each liable under this theory, holding that Petitioners Nevitt and Blair "were sufficiently 'present' and 'observ[ing]' the prolonged prone restraint to be liable for failing to intervene in the use of it," Appx. 79a, and that Petitioners Craig and McFarland "are subject to liability for failing to intervene with the other's use of force, as they were both aware of the other's role in the prone restraint." Appx. 80a. Moreover, this alternate holding is unchallenged as Petitioners do not dispute that if one of the officers used excessive force, the other officers present would be liable for failure to intervene.

Because the judgment against Petitioners rests on two grounds that are unrelated to and unaffected by the panel's group liability analysis, any ruling by this Court would be merely advisory, and certiorari is unwarranted.

III. There is no circuit split to resolve.

Petitioners next contend that certiorari should be granted to resolve a purported split among the circuits. They assert that several circuits require an individualized analysis of each defendant's entitlement to qualified immunity, whereas the Tenth Circuit, they claim, has parted ways by permitting a court to consider whether an officer's active participation in a coordinated group use of force can defeat qualified immunity at summary judgment. As discussed immediately above, this case represents a poor vehicle to consider any potential circuit split

because the Tenth Circuit's decision rests on multiple independent grounds.

But more importantly, Petitioners' argument is meritless. In most circumstances, as in the cases cited by Petitioners, the Tenth Circuit requires an individualized assessment of qualified immunity. *See, e.g., Pahls v. Thomas*, 718 F.3d 1210, 1233 (10th Cir. 2013). In certain Fourth Amendment excessive force cases, however, the Tenth Circuit permits a limited form of group analysis if a group of defendants are actively participating in a coordinated effort with each other. *See* Appx. 40a n.16. For these cases, a court may consider the force used by the group of defendants together.[8] Rather than point to cases that apply principles contrary to those articulated by the Tenth Circuit in this subset of cases, Petitioners instead cite broad statements regarding individual analysis from materially different factual and legal circumstances to prop up their illusory split between the "individualized" versus "collective" analysis circuits. These cases (only one of which involves excessive force) indicate no circuit split and, indeed, each circuit that supposedly splits with the Tenth has applied the very principle that the Tenth Circuit articulated here.

When put into proper context, none of the cases that Petitioners cite evince any split among the circuits. For instance, *Poe v. Leonard*, which Petitioners point to as evidence that the Second Circuit departs from the Tenth on the necessity of "individualized" analysis, concerns the standard for

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[8] As discussed above, *see supra* at II.a, the panel's alternate collective analysis still focused on whether prior case law provided Petitioners with fair notice that their specific, individual conduct violated the law.

assessing qualified immunity for a supervisor sued under a theory of vicarious liability for the unconstitutional conduct of her supervisee that allegedly happened outside of the supervisor's presence. 282 F.3d 123 (2d Cir. 2002). In holding that both the supervisee's constitutional violation *and* the relevant supervisory liability doctrine must be clearly established to deny the supervisor qualified immunity, the Second Circuit stated the elementary point that "[t]he qualified immunity analysis depends upon an individualized determination of the misconduct alleged." *Id.* at 135. Neither that statement, nor *Poe*'s analysis or holding, are contrary to the Tenth Circuit's conclusion that officers can be denied qualified immunity for actively participating in a coordinated use of force that violates clearly established law.

Petitioners have similarly failed to identify any cases in the Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits that present a true split from the Tenth. *See Spikes v. McVea*, 12 F.4th 833 (5th Cir. 2021) (per curiam); *Stoudemire v. Michigan Department of Corrections*, 705 F.3d 560 (6th Cir. 2013); *Est. of Williams by Rose v. Cline*, 902 F.3d 643 (7th Cir. 2018); *Manning v. Cotton*, 862 F.3d 663 (8th Cir. 2017); *Alcocer v. Mills*, 906 F.3d 944 (11th Cir. 2018). Again, Petitioners cling to a single sentence from each cited case, articulating the general principle of law that qualified immunity requires an individualized analysis, to demonstrate the putative split. But even a cursory analysis of the legal claims at issue and factual circumstances of each case shows that there is no such disagreement.

In *Stoudemire*, for example, the Sixth Circuit was simply reaffirming the necessity of conducting an individualized assessment of a defendant's subjective mental state before denying qualified immunity on an Eighth Amendment deliberate indifference claim. 705 F.3d at 570–71. That holding—regarding how to assess the mental state required for any finding of liability for an Eighth Amendment claim—does not demonstrate any departure from the Tenth Circuit's objective analysis of a Fourth Amendment excessive force claim. *See also Spikes*, 12 F.4th at 833 (stating in a three-sentence order that it was essential on remand to analyze the conduct and mental culpability of defendant medical staff individually, rather than collectively, to determine their entitlement to qualified immunity on Eighth Amendment deliberate indifference claim brought by incarcerated person for medical treatment). Nothing in the Tenth Circuit's decision would relieve courts of the obligation to ensure that a defendant acted with the requisite mental state.

And in *Williams*, *Manning*, and *Alcocer*, cases raising Fourth Amendment claims other than excessive force, the courts of appeals took issue with the district courts' failure to account for the defendants' differing knowledge and conduct, which directly bore on their entitlement to qualified immunity for the claims at issue. *See Williams*, 902 F.3d at 651–52 (in case raising Fourth Amendment claim for failure to adequately address plaintiff's medical needs, underscoring the need for individualized analysis when assessing qualified immunity for eleven different officers who had played different roles in apprehension, struggle, and monitoring of plaintiff in multiple locations and at

differing times during prolonged encounter); *Alcocer*, 906 F.3d at 951–52 (same, in case raising Fourth Amendment unreasonable seizure claim, where district court's denial of qualified immunity depended on facts that would not have been known to two defendant jail officials at the time they refused to release plaintiff); *Manning*, 862 F.3d at 668–71 (same, in case raising Fourth, Fifth, and Fourteenth Amendment claims where district court's denial of qualified immunity was explained in a single paragraph that failed to differentiate at all between two defendant officers' roles in allegedly planting evidence on plaintiff and testifying falsely against her).

None of these cases, arising outside of the excessive force context, undermine the Tenth Circuit's analysis here. Indeed, in many of these cases, the courts of appeals emphasized the need for individualized qualified immunity analyses when the district court orders under review fully collapsed the determination for different defendants who were not privy to the same information or who did not actively engage in the coordinated conduct.

Even the two excessive force cases on which Petitioners rely provide no evidence of the purported split. In *Cunningham v. Gates*, the Ninth Circuit admonished the district court for failing to distinguish at all between officers who had been involved in the alleged use of excessive force (shooting the plaintiffs) from those who had not—including officers who were not even present at the scene of the shootings at issue. 229 F.3d 1271, 1289 (9th Cir. 2000). Requiring a court to distinguish between the "shooting officers" and "non-shooting officers" when assessing their

entitlement to qualified immunity does not demonstrate a split from the Tenth Circuit's analysis here, which considered how each officer actively contributed to a coordinated use of excessive force. *See also Meadours v. Ermel*, 483 F.3d 417, 421–22, 422 n.3 (5th Cir. 2007) (recognizing that individualized nature of qualified immunity defense requires only that a district court "*consider* each officer's actions" but not "conduct a separate analysis for each officer in those cases" where they take the same actions).

Indeed, rather than a circuit split, the converse is true. All the circuits that Petitioners point to embrace the same principle that the Tenth Circuit applied here: 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. *See, e.g., Brown v. City of New York*, 798 F.3d 94, 103 (2nd 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*, 712 F.3d at 960; *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*, 280 F.3d at 1302. This reflects the cornerstone principle that underlies the analysis of excessive force claims—that "[t]hat inquiry into the reasonableness of police force requires analyzing the 'totality of the circumstances.'" *Barnes*, 605 U.S. at 80.

In sum, the circuits are not split on Petitioners' first question presented. Certiorari is not warranted.

IV. This Court should reject Petitioners' request to engage in fact-bound error correction that is wholly unsupported by the record at summary judgment.

Petitioners next contend that this Court should grant certiorari because the Tenth Circuit conducted its analysis of clearly established law at too high a level of generality and because existing Tenth Circuit law provides officers with insufficient guidance as to when a suspect is effectively subdued. Pet. 22. But a closer examination of Petitioners' argument reveals that their true complaint lies not in the Tenth Circuit's legal analysis but in its assessment of the factual record. Petitioners' argument is that the Tenth Circuit's analysis is arbitrary *if* one accepts a view of the summary judgment record that Petitioners advanced below and the Tenth Circuit rejected as inconsistent with the record viewed most favorable to the non-moving party. This fact-bound argument is inappropriate in an interlocutory appeal of a qualified immunity decision, unworthy of this Court's consideration, and wholly without merit.

Petitioners first argue that the Tenth Circuit's analysis of the "clearly-established prong was conducted at a high level of generality." Pet. 22. But, as discussed earlier, this case represents a uniquely straightforward application of clearly established law. *See supra* at II.a. In reality, Petitioners are not debating whether the Tenth Circuit applied the law at too high a level of generality to the record, but rather,

whether the court should have applied the law to Petitioners' version of the record.[9]

Petitions for certiorari are "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *see also* Stephen M. Shapiro et al., Supreme Court Practice § 5.12(c)(3) at 352 (10th ed. 2013) ("[E]rror correction… is outside the mainstream of the Court's functions and… not among the 'compelling reasons'… that govern the grant of certiorari"). A question that "turns entirely on an interpretation of the record in one particular case… is a quintessential example of the kind that [this Court] almost never review[s]." *Taylor v. Riojas*, 592 U.S. 7, 11 (2020) (Alito, J., concurring). Furthermore, factual grievances are inappropriate fodder for an interlocutory appeal of a qualified immunity issue, which is "'limited to cases presenting neat abstract issues of law.'" *Johnson v. Jones*, 515 U.S. 304, 317 (1995) (citation modified).

Yet fact-bound error correction is exactly what Petitioners are seeking. At no point do Petitioners contest the settled legal standard that officers commit "excessive force when they apply a prolonged prone restraint and put weight on a suspect's back when that suspect is handcuffed, is subject to a leg restraint, and is effectively subdued." Appx. 68a. They do not

[9] Petitioners urged the same mistaken legal approach below, prompting the Tenth Circuit to say: "the City Defendants' argument that the law was not clearly established assumes that they were using 'controlling force on a resisting felony suspect'… [b]ut as discussed, the facts viewed in the light most favorable to [Krueger] are that he did not struggle the entire time and the Defendants gained control over him." Appx. 70a. (citations modified).

dispute that it represents clearly established law or that the Tenth Circuit applied it correctly in *Weigel*, *Teetz*, and *Lynch*. Pet. 25–27. Instead, Petitioners complain that the Tenth Circuit's analysis is "arbitrary *as applied* to Petitioners," Pet. 24 (emphasis added), because, in their view of the record facts, "no reasonable jury could find that [Krueger] was effectively subdued." Pet. 28.

The question at the heart of Petitioners' grievance—"whether a suspect was effectively subdued"—is a question of "fact in the excessive force analysis," not a question of law. Appx. 35a. Thus, even if Petitioners' factual allegations were correct, they can only contend that though the Tenth Circuit "applied all the correct legal standards," Petitioners "simply disagre[e] with the… application of those tests to the facts in a particular record." *Taylor*, 592 U.S. at 11 (Alito, J., concurring). This is not a question worthy of a grant of certiorari, and Petitioners may not use an interlocutory qualified immunity appeal to argue their preferred factual inferences.

Further, no error occurred. The Tenth Circuit conducted "a cumbersome review of the record" precisely to determine how "how effectively [Krueger] was subdued by the officers throughout the encounter," Appx. 35a, and found that the record at summary judgment showed "[Krueger] was not meaningfully struggling during much of the prone restraint, and… was effectively subdued." Appx. 70a. Under this factual context and the prevailing legal standard, Petitioners were on clear notice that their prolonged prone restraint of and application of weight on Krueger constituted excessive force. Appx. 74a.

Petitioners' argument simply asserts, without basis, that the Tenth Circuit's detailed factual conclusions are incorrect. Their central contention is that Krueger was "continuing to struggle and resist" during his encounter with officers, and thus was not effectively subdued, when the entirety of the record, including videotape footage, clearly support the Tenth Circuit's determination that a reasonable jury could find otherwise. Pet. 26.

Petitioners support this false characterization by contradicting or entirely disregarding the summary judgment record. First, their representation of Krueger as actively resisting arrest directly conflicts with the Tenth Circuit's careful review of body camera footage that shows Krueger was "not visibly moving, struggling, or speaking" for most of his restraint, as multiple officers crush him into the ground. Appx. 35a–36a. They then claim that Tenth Circuit incorrectly "discount[ed] the facts that preceded the officers' effective use of force" on Krueger, while entirely ignoring the Tenth Circuit's detailed discussion of the context in which Petitioners came to Krueger. Pet. 23; *see infra* at I. Finally, Petitioners contend that Petitioner McFarland "solely used controlling force until… Krueger was fully restrained" and that Petitioner Craig's "use of force was brief and momentary." Pet. 27. But this omits the factual reality of their encounter with Krueger: that they, along with three other officers, applied enough weight to a "prone, handcuffed, and… not visibly moving" Krueger to break his ribs, suffocate him, and end his life. Appx. 35a–36a.

The record plainly would allow a reasonable jury to determine Krueger was effectively subdued

during his fatal encounter with Petitioners. Petitioners found Krueger "on the ground exhausted, barely moving," and "covered in blood," Appx. 28a, having "suffered a severe blow to the head [that] open[ed] a gash in his forehead." Appx. 24a. Krueger could barely speak – his earlier "beg[s] for help," Appx. 54a, had grown "increasingly faint and unintelligible." Appx. 28a. After Petitioners and the other arriving officers "confirmed they had control of Krueger," *id.*, they then applied weight continuously for up to four minutes to Krueger's "prone, handcuffed, and restrained" body while he was largely motionless. Appx. 35a–37a. To the extent that Krueger initially kicked his feet, body camera footage, as analyzed by the Tenth Circuit, shows Krueger "not visibly moving, struggling, or speaking" for up to three minutes of the four minutes he was restrained. Appx 35a–36a.[10]

Despite this, Petitioner McFarland "rested his full weight on both knees," Appx. 31a, on Krueger's back and Petitioner Craig pressed his weight on Krueger's shoulder, Appx. 66a. And both Petitioners McFarland and Craig placed their weight on a prone, handcuffed, and listless Krueger while Lott simultaneously stood on Krueger's shoulder, placing "significant weight," Appx. 71a, on him, and Crockett kneeled on Krueger's buttock and upper thigh, Appx. 31a, while two other officers straddled Krueger's legs. A.II-472. Petitioners continued to apply their weight to Krueger's body even as he was unable to respond to an EMT who performed a wellness check on him to

[10] Additionally, a medical expert testified that the prone restraint would have led to Krueger to "panic and struggle in attempt to breathe." Appx. 36a. Officers came to Krueger when he was already prone, "handcuffed and face down on the pavement." Appx. 30a.

ask if he was okay. *See* A.II-472 at 2:15–38. Petitioners and the other officers applied a combined weight of 665 pounds—more than four times Krueger's body weight—onto Krueger's prone body, causing him to asphyxiate. Appx. 36a. Their collective weight broke several of Krueger's ribs, which contributed to his suffocation. *Id.*

Petitioners' factual contentions prove to be nothing more than a misrepresentation of the record. Accordingly, the Tenth Circuit's conclusion that a jury could reasonably determine that Krueger was effectively subdued, and its application of the appropriate legal standard, present no questions deserving of this Court's review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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