16-67

No. _____

In The

Supreme Court of the United States

RAY WHITE, MICHAEL MARISCAL,
and KEVIN TRUESDALE,

Petitioners,

v.

DANIEL T. PAULY, as Personal
Representative of the ESTATE OF SAMUEL PAULY,
and DANIEL B. PAULY, individually,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Three New Mexico State Police Officers investigating a "road rage" incident went to the suspect's house on the evening of October 4, 2011. The first two officers arrived and attempted to contact the suspect. As the third officer arrived on scene, someone inside the house shouted "We have guns," and the road rage suspect fired two shotgun blasts at the rear of the house, near one of the officers. The suspect's brother pointed a handgun in the direction of the third officer from the house's front window. The third officer fired his duty weapon, killing the suspect's brother. The questions presented are:

1. Did the Tenth Circuit's panel opinion improperly deny qualified immunity to the officers by considering the validity of the use of force from the perspective of the suspects rather than from the perspective of a reasonable police officer on the scene?

2. Did the panel opinion consider clearly established law at too high a level of generality rather than giving particularized consideration to the facts and circumstances of this case?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Tenth Circuit, whose judgment is sought to be reviewed, are:

- Daniel T. Pauly, as Personal Representative of the Estate of Samuel Pauly, and Daniel B. Pauly, individually, plaintiffs, appellees below, and respondents here.
- New Mexico State Police Officers Ray White, Michael Mariscal and Kevin Truesdale, defendants, appellants below, and petitioners here.

The State of New Mexico Department of Public Safety ("NMDPS"), former NMDPS Secretary Gorden E. Eden, Jr., and former New Mexico State Police Chief Robert Shilling were defendants in the underlying action; Secretary Eden and Chief Shilling were dismissed with prejudice from the lawsuit prior to this appeal being taken and NMDPS was not a party on appeal. Consequently, they are not parties to this petition.

No corporations are involved in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ray White, Kevin Truesdale and Michael Mariscal respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The panel opinion and dissent of the Court of Appeals for the Tenth Circuit is reported at 814 F.3d 1301 and is reprinted in the Appendix hereto, pp. 1-66.

The opinion and dissents of the Court of Appeals for the Tenth Circuit denying rehearing and rehearing *en banc* is reported at 817 F.3d 715 and is reprinted in the Appendix hereto, pp. 116-25.

The memorandum opinion of the United States District Court for the District of New Mexico denying the motion for summary judgment and qualified immunity filed by Petitioner Ray White has not been reported. It is reprinted in the Appendix hereto, pp. 67-89.

The memorandum opinion of the United States District Court for the District of New Mexico denying the motion for summary judgment and qualified immunity filed by Petitioners Michael Mariscal and Kevin Truesdale has not been reported. It is reprinted in the Appendix hereto, pp. 90-115.

JURISDICTION

The Tenth Circuit had appellate jurisdiction because the district court's orders denying Petitioners' motions for summary judgment were "final decisions" within the meaning of 28 U.S.C. § 1291 and the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 527-30 (1985).

An equally divided Tenth Circuit denied *en banc* review on April 11, 2016. The author of one of the dissenting opinions openly invited this Court to review this case and "clarify the governing law." Accordingly, Petitioners filed this timely petition for writ of certiorari on July 11, 2016. *See* Sup. Ct. R. 13(1), (3). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,

> except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondents allege that petitioners violated their rights under the United States Constitution's Fourth Amendment, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On the evening of October 4, 2011, Daniel Pauly became involved in a road rage incident with a car driven by two women on the interstate highway going north from Santa Fe, N.M. App. 4. One of the women called 911 and reported a "drunk driver" who was swerving and turning his lights on and off. *Id.* Pauly stopped at the highway's Glorieta, N.M. exit, as did the female drivers. *Id.* Pauly confronted the women at the

exit and one of the women claimed Pauly was "throwing up gang signs." *See id.*

Pauly then drove a short distance to a house that he rented with his brother, Samuel Pauly. App. 4. The house is located in a rural wooded area on a hill behind another house. *Id.*

A New Mexico State Police dispatcher contacted Officer Kevin Truesdale regarding the 911 call received from the young women. App. 4. Officer Truesdale arrived at the Glorieta off-ramp to speak to the two women about the incident. *Id.* Officers Raymond White and Michael Mariscal were en route to provide Officer Truesdale with back-up assistance. *Id.* The women informed Officer Truesdale about Daniel Pauly's reckless and dangerous driving. *Id.*; App. 73. The women also described Pauly's vehicle as a gray Toyota pickup truck and provided a license plate number. App. 4-5. The dispatcher informed Officer Truesdale that the Toyota was registered to an address on Firehouse Road near the Glorieta off-ramp. App. 5.

Officers Mariscal and White joined Officer Truesdale at the Glorieta off-ramp. App. 5. Officer Truesdale decided to speak with Daniel Pauly to determine if he was intoxicated, "to make sure nothing else happened," and to get Pauly's version of the incident. *Id.*; App. 73. The officers then determined that Officers Truesdale and Mariscal should go, in separate patrol units, to see if they could locate Daniel Pauly's pickup truck at the Firehouse Road address, while Officer White should

stay at the off-ramp to prevent Daniel Pauly from circling back and re-entering the Interstate. *See id.*

Officers Truesdale and Mariscal drove a short distance down Firehouse Road and parked their vehicles in front of the main house. App. 5. Both vehicles had their headlights on, and one vehicle had its takedown lights on. *Id.* As the officers got out of their vehicles, they did not see Daniel Pauly's truck at the main house. *Id.*

Officers Truesdale and Mariscal did see a porch light and lights on in another house behind the main house. App. 5. They decided to walk up to the second house, which was the Pauly residence, to see if Daniel's truck was there. *Id.* The officers approached the house cautiously in an attempt to ensure officer safety. App. 6. They used their flashlights periodically until they got close to the front of the house, when Officer Truesdale turned his flashlight on. *Id.* The officers observed Daniel's truck in front of the house and saw two males moving back and forth through the front window. App. 75. They radioed Officer White to notify him they had located the truck, and Officer White left the Interstate off-ramp to join the other officers. *See id.*

Back at the house, the Paulys noticed the flashlights outside, and called out "Who are you?" and "What do you want?" App. 6. The officers responded, "Open the door, State Police, open the door." *See id.* Although Officers Truesdale and Mariscal did not intend to go inside the house, in an attempt to get the brothers to come out and talk with them, one of the officers also

said "Come out or we're coming in." *See* App. 75-76; 76 n.5.

Samuel Pauly retrieved a shotgun and a box of shells for Daniel, and procured a loaded handgun for himself. App. 7. Samuel then went back to the front room, and Daniel went to the back of the house. *Id.* Observing Daniel run towards the back of the house, Officer Truesdale headed to the far back corner of the house. *Id.* Officer Mariscal stayed in front of the house, where he was then joined by Officer White, who had not been present at the Pauly house until this point. *See id.*

Moments after Officer White arrived, from inside the house, one of the Pauly brothers yelled out "We have guns." *Id.* Upon hearing that threat, Officer White took cover behind a short stone wall located fifty feet from the front of the house and drew his duty weapon; Officer White's head and arms remained fully exposed as he kneeled behind the wall. *See id.*; App. 57 n.5. Officer Mariscal took cover behind a Ford pickup truck. App. 7.

Seconds after one of the brothers yelled "We have guns," Daniel Pauly stepped out of the back of the house and fired off both barrels from his shotgun. App. 8. Having heard the two shotgun blasts adjacent to Officer Truesdale's position at the back of the house, Officer White thought that Officer Truesdale had been shot. *See id.*; App. 54 n.1.

Just after hearing Daniel Pauly's shotgun blasts, Officers White and Mariscal saw Samuel Pauly open

the front window and hold his arm out with a handgun, pointing the handgun towards Officer White. App. 8. The District Court found that Officer Mariscal then shot towards Samuel Pauly, missing him. App. 79. Four to five seconds after Samuel Pauly pointed his handgun at Officer White, Officer White shot Samuel Pauly, killing him. App. 8. At no time did Officer Truesdale fire, attempt to fire, or utilize any force at all against either of the Pauly brothers.

Petitioners moved the District Court for summary judgment and qualified immunity, arguing that the use of force against Samuel Pauly was objectively reasonable under the tense, uncertain and rapidly-evolving circumstances presented on the night of October 4, 2011. Specifically, Petitioners argued that Officer White's use of deadly force to defend himself was reasonable where, *inter alia*: (1) moments after Officer White arrived on scene, one of the men inside the house suddenly yelled out "We have guns"; (2) seconds later, someone inside the house fired two shotgun blasts near Officer Truesdale's position at the back of the house; (3) given Officer Truesdale's location in relation to the gunshots, Officer White believed Officer Truesdale had just been shot; and (4) a man then aimed a handgun directly at Officer White out the front window of the house.

United States District Judge Kenneth Gonzalez denied Petitioners' summary judgment motions in February of 2014. The District Court found that the record contained disputes of material fact regarding whether Officers Truesdale and Mariscal's conduct prior to the

shooting of Samuel Pauly was reckless and unreasonably precipitated Officer White's need to shoot Samuel Pauly. These purported disputes included whether or not (1) the Officers adequately identified themselves; (2) the Pauly brothers could, nonetheless, see the Officers considering the ambient light and other light sources; and (3) it was feasible for Officer White to warn Samuel Pauly before firing. App. 83-84. The District Court ruled that a reasonable jury could then find that, under the totality of the circumstances, the Officers' conduct was "immediately connected" to Samuel Pauly arming himself and pointing a handgun at Officer White, and the Officers' conduct reflected "wanton or obdurate disregard or complete indifference" to the risk of an occupant of the house being subject to deadly force in the course of protecting his house and property against threatening and unknown persons. App. 85.

Relying upon the facts as found by the District Court, Petitioners appealed to the Tenth Circuit under the collateral order doctrine. On appeal, a divided Tenth Circuit panel affirmed the District Court. Purporting to "tak[e] the facts as the district court determined them in the light most favorable to plaintiff estate," the panel majority surmised that this case involved

> an officer outside someone's home in the dark of night with no probable cause to arrest anyone and behind the cover of a wall 50 feet away from a possible threat, with no warning shot a man pointing his gun out of his well-lighted window at an unknown person in his

> yard while the man's brother fired protective shots in the air from behind the house.

App. 48. The panel found that "a reasonable jury could find that Officer White was not in immediate fear for his safety or the safety of others." *Id.*

Tenth Circuit Judge Nancy Moritz issued a compelling dissent. *See generally* App. 49-66. Judge Moritz found that, "[e]ven under plaintiffs' version of the facts . . . Officer White's use of deadly force was unquestionably justified." App. 54. Judge Moritz also disagreed with the majority's ultimate conclusion that a reasonable officer in Officer White's position should have understood, based on clearly established law, that (1) he was not entitled to use deadly force unless he was in danger at the exact moment of the threat of force; and (2) he was required, under the circumstances, to warn Samuel Pauly to drop his weapon. App. 61-62 (quotation omitted). Ultimately, Judge Moritz concluded that "Officer White did what any objectively reasonable officer in his position would do – respond in kind to the immediate threat of deadly force." App. 65. As such, Judge Moritz concluded that all three Officers were entitled to qualified immunity. *Id.*

Petitioners then sought both rehearing and *en banc* review in the Tenth Circuit. Petitioners' request for panel rehearing was denied. By an equally divided vote of all Tenth Circuit judges who are in regular active service, Petitioners' request for rehearing *en banc* was also denied. As she did with the original panel opinion, Judge Moritz issued a dissent from the denial

of rehearing, noting that the majority opinion flouted the Tenth Circuit's prior "admonitions against second-guessing officers' split-second judgments and defining clearly established law at a high level of generality . . . first by finding Officer White's use of deadly force objectively unreasonable, and second by finding his actions violated clearly established law." App. 125. Judge Harris Hartz joined in Judge Moritz's dissent. App. 123-24.

BASIS FOR FEDERAL JURISDICTION

Respondents filed their complaint in New Mexico state district court. Petitioners, along with all defendants, removed the case to the United States District Court for the District of New Mexico based upon federal question jurisdiction, 28 U.S.C. § 1331. The petitioners sought qualified immunity and summary judgment. The respondents filed a cross-motion for summary judgment. The district court denied petitioners' motions and denied respondents' motion. Petitioners appealed to the United States Court of Appeals for the Tenth Circuit; the Tenth Circuit exercised jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE TENTH CIRCUIT PANEL'S OPINION CONTRAVENES LONG-STANDING JURISPRUDENCE FROM THIS COURT AND THE CIRCUIT COURTS BY ASSESSING THE USE OF FORCE NOT FROM THE PERSPECTIVE OF A REASONABLE POLICE OFFICER ON THE SCENE, BUT FROM THE PERSPECTIVE OF THE PERSON ASSAULTING THE OFFICER.

Police officers confronted by armed assailants must assess issues of officer safety and the protection of the general public within the confines of the Fourth Amendment. This Court has long required courts to apply an objective reasonableness test when considering whether officers used excessive force, which requires that a court carefully balance the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *See generally Graham v. Connor*, 490 U.S. 386, 395-96 (1989) (internal quotation marks omitted); *see also Plumhoff v. Rickard*, 134 S.Ct. 2012, 2020 (2014); *accord Ciminillo v. Streicher*, 434 F.3d 461, 466-67 (6th Cir. 2006). Such a test "is not capable of precise definition or mechanical application," *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), and no precise or "rigid preconditions" exist for determining when an officer's use of deadly force is excessive. *See Scott v. Harris*, 550 U.S. 372, 382 (2007).

When determining reasonableness in the use of excessive force context a court considers, among other factors: (1) the severity of the suspected crime; (2) whether the suspect posed an immediate threat to the safety of officers; and (3) the suspect's degree of resistance. *See, e.g.*, *Graham*, 490 U.S. at 396; *Fogarty v. Gallegos*, 523 F.3d 1147, 1160 (10th Cir. 2008); *see also McCullough v. Antolini*, 559 F.3d 1201, 1206 (11th Cir. 2009) ("[i]n determining the reasonableness of the force applied, we look at the fact pattern from the perspective of a reasonable officer on the scene with knowledge of the attendant circumstances and facts, and balance the risk of bodily harm to the suspect against the gravity of the threat the officer sought to eliminate.").

It is well settled that excessive force evaluations and judgments of officer decisions regarding safety in the field should not be evaluated from the perspective of judges sitting in the comfort and peace of their chambers with 20/20 hindsight, but rather from the perspective of the officer in the field. *See generally Saucier v. Katz*, 533 U.S. 194, 209 (2001). The use of force is to be "assessed from the perspective of a reasonable officer on the scene making a split-second judgment under tense, uncertain, and rapidly evolving circumstances without the advantage of 20/20 hindsight." *See Burgess v. Fischer*, 735 F.3d 462, 473 (6th Cir. 2013); *accord Graham*, 490 U.S. at 396. This Court has cautioned judges against "second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn v. Huff*,

132 S.Ct. 987, 991-92 (2012). The Court must consider only the facts known to the officer "when the conduct occurred." *Saucier*, 533 U.S. at 207.

This Court recently reiterated that, under 42 U.S.C. § 1983, the plaintiff must show that the force purposely or knowingly used against him was objectively unreasonable to prevail on an excessive force claim. *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2470 (2015). This determination must be made from the perspective of a reasonable officer on the scene, including what the officer knew at the time. *Id.* (citing *Graham*, *supra*, 490 U.S. at 396). Considerations such as the following may bear on the reasonableness or unreasonableness of the force used: the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting. *Kingsley*, 135 S.Ct. at 2473 (citing *Graham*, 490 U.S. at 396). Of course, this list of factors is not exclusive, and merely illustrates the types of objective circumstances potentially relevant to a determination of excessive force. *Kingsley*, 135 S.Ct. at 2473. While much of *Kingsley*'s holding pertains only to due-process issues that arise in the context of operating a detention facility, the aspects cited here would apply to excessive-force claims against police officers regardless of whether the purported violation occurred during an arrest or during pretrial detention. *See*, *e.g.*,

Ondo v. City of Cleveland, 795 F.3d 597, 610 n.5 (6th Cir. 2015).

Against the well-established legal backdrop set forth above, the Tenth Circuit took precisely the opposite view of the law. Instead of examining the incident underlying this case from the perspective of a reasonable officer on the scene, the Tenth Circuit panel took the opposite tack, viewing the facts from the perspective of Daniel and Samuel Pauly. In so doing, the Tenth Circuit ignored this Court's well-established legal guidance and its own precedent. Its failure to follow established precedent is reversible error.

The Tenth Circuit's panel opinion specifically focused on issues such as whether the Pauly brothers could hear the Officers identify themselves as State Police officers, and whether the Pauly brothers could see the Officers considering the ambient light and other light sources. The panel's opinion also focused on the brothers' fear that the Officers were in fact assailants from the road rage incident, notwithstanding the Officers' clear and unmistakable identification of themselves as "State Police." In doing so, the panel opinion requires officers to determine what their assailants perceive before responding to a threat, a burden that has never been imposed upon police officers by this Court.

Viewed consistently with this Court's precedent, Officer White's use of force on Samuel Pauly was plainly and unequivocally reasonable. Officer White was confronted with one man pointing a gun at him

after another man had just fired two shotgun blasts which he believed had hit his partner and after someone in the house had yelled "We have guns." Despite these uncontroverted facts, the panel opinion appears to read into this Court's existing case law the requirement that police officers must witness or perceive that someone (such as a fellow officer or member of the public) was actually hit by the suspect's shot, not just that they were shot at. App. 8 n.3; *see also* App. 33-34. Rather than asking whether Officer White made a reasonable decision, the Tenth Circuit asked whether he made the *right* decision based upon information he did not have.

Instead of considering the significance of those threats to a reasonable officer on the scene, the panel below labored to downplay the risk presented by the Pauly brothers: "Because it was objectively reasonable under the circumstances about which the officers were aware that the brothers might believe the officers were intruders, a reasonable jury could find that it was foreseeable the brothers would arm themselves in defense of their home as permitted by New Mexico state law." App. 24; *see also* App. 48.

The panel's rationalization of the Paulys' actions is misguided for several reasons. First, whether or not the Paulys actually feared that the Officers were "intruders" is irrelevant; they had already threatened the Officers by shouting "We have guns" and by firing two shotgun blasts. Of course, under clearly established precedent (including that of the Tenth Circuit), once Samuel Pauly visibly aimed a handgun towards Officer

White during the encounter, Officers White and Mariscal did not have the luxury of waiting to see if Samuel Pauly would actually fire upon Officer White; the Officers had to take the potential threat seriously. *See, e.g.*, *Estate of Larsen v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008); *Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir. 1997) ("an officer is not required to wait until an armed and dangerous felon has drawn a bead on the officer or others before using deadly force."); *cf. Scott*, 550 U.S. at 385 (rejecting the argument that police should have ceased the pursuit instead of ramming the suspect's car, explaining that "the police need not have taken that chance and hoped for the best"). Indeed, in *Scott*, an officer's use of potentially lethal force was deemed objectively reasonable because of "an actual and imminent threat to the lives of any pedestrians *who might have been present*, to other civilian motorists, *and to the officers involved*" (emphasis supplied). *Scott*, 550 U.S. at 384. The panel's opinion is quite clearly inconsistent with the wealth of authority supporting the reasonableness of Petitioners' actions when confronted by Samuel Pauly pointing a gun in their direction.

A. THE TENTH CIRCUIT DECISION STANDS IN OPPOSITION TO ITS OWN AND OTHER CIRCUITS' LONG-STANDING PRECEDENT ESTABLISHING THAT A POLICE OFFICER IS ENTITLED TO QUALIFIED IMMUNITY WHERE, WHILE REASONABLY FEARING FOR HIS SAFETY AND THE SAFETY OF OTHERS, THE OFFICER USES DEADLY FORCE IN RESPONSE TO AN APPARENT THREAT

This case warrants review because, under clearly established case law from this Court and from across the Circuit Courts, the actions of Officers Ray White, Michael Mariscal and Kevin Truesdale were reasonable under the circumstances. The Tenth Circuit's denial of qualified immunity stands in contrast to this Court's precedent, the Tenth Circuit's own precedent, and the precedent of other circuits.

Under the Tenth Circuit's own precedent, deadly force is "justified under the Fourth Amendment if a reasonable officer in Defendants' position would have had probable cause to believe that there was a threat of serious physical harm to themselves or to others" (emphasis omitted). *Larsen, supra,* 511 F.3d at 1260. Police officers may use deadly force to stop an assailant before the assailant fires a shot or otherwise attempts to use a weapon. *See, e.g., Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1317-18 (10th Cir. 2009) (officer justified in shooting armed suspect where suspect was moving a gun up and down and had previously aimed the

weapon at officers, even where, at the moment the officer fired the fatal shot, the suspect was pointing the gun towards his own head and not towards the officer); *Larsen*, 511 F.3d at 1260 (officer justified in shooting man with knife raised even if man did not make stabbing or lunging motions towards him, as a "reasonable officer need not await the 'glint of steel' before taking self-protective action; by then, it is 'often too late to take safety precautions'") (quoting *People v. Morales*, 198 A.D.2d 129, 130 (N.Y. App. Div. 1993)); *Wilson v. Meeks*, 52 F.3d 1547, 1553-54 (10th Cir. 1995) (use of deadly force reasonable where suspect aimed pistol in officer's direction).

This is consistent with the law of other circuits. *See, e.g.*, *Smith v. City of Hemet*, 394 F.3d 689, 704 (9th Cir. 2005) (*en banc*) ("where a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force"). "An officer's use of deadly force is not excessive, and thus no constitutional violation occurs, when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or to others." *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009). When deadly force is used, "the severity and immediacy of the threat of harm to officers or others are paramount to the reasonableness analysis." *Cole v. Carson*, 802 F.3d 752, 758 (5th Cir. 2015). The panel opinion below not only diverges immensely from the Tenth Circuit's own jurisprudence, it also creates a split with other circuits' approach to analyzing the use of deadly force by police officers.

In *Estate of Larsen v. Murr*, *supra*, the Tenth Circuit affirmed the grant of qualified immunity to two officers who shot and killed a knife-wielding man who had called 911 threatening to "kill someone or himself." *Larsen*, 511 F.3d at 1258. Standing at a distance of twenty feet from the officers, Larsen lifted the knife above shoulder-level and pointed it toward them. *Id.* at 1258, 1260-61. After commanding him to drop the knife, one of the officers fired twice at Larsen, killing him. *Id.* at 1258-59. Notably, even where Larsen stood twenty feet from the officers when he took his first step, the officers were outside and had the ability to safely retreat to avoid any need to use deadly force, no other people were at risk, and where Larsen would have to negotiate steps, hedges, and other obstacles before reaching the officers, the Tenth Circuit found that the officers were entitled to qualified immunity. *See generally id.* at 1262-64.

Similarly, in *Wilson v. Meeks*, the Tenth Circuit found that the officer was entitled to qualified immunity, reasoning that the confrontation leading to the fatal shooting "transpired in less than a minute," the plaintiffs failed to produce evidence to rebut the officer's assertion that the decedent aimed a handgun at the officer, and "[a]ny police officer in [the officer's] position would reasonably assume his life to be in danger when confronted with a man whose finger was on the trigger of a .357 magnum revolver pointed in his general direction." *Wilson*, 52 F.3d at 1549, 1554. As was the officer in *Wilson*, Officer White was in danger of being shot: the uncontroverted evidence was that

White knelt behind a rock wall, resting his arms on top of it as he pointed his gun in the direction of the Pauly house while his head and arms remained fully exposed. *See* App. 43; *see also* App. 57 n.5. As in *Wilson*, any reasonable officer in the position of either Officer White or Mariscal would reasonably assume his life to be in danger when confronted with a man pointing a handgun out a window in the officer's direction (especially within the context of another man having just yelled "We have guns" and firing off both barrels of a 12 gauge shotgun near the location of the third officer).

In *Mullins v. Cyranek*, 805 F.3d 760 (6th Cir. 2015), an officer pushed a young man to the ground that he suspected of illegally carrying a gun. The suspect eventually brandished a gun. The officer, still pinning the suspect to the ground, told him to drop the gun, and in response the suspect threw the gun over the officer's shoulder. *Id.* at 763. Five seconds later, the officer fired two shots at the suspect, killing him. *Id.* at 764. Nonetheless, the Sixth Circuit affirmed the district court's decision to grant qualified immunity to the officer, holding that the officer's actions were not unreasonable. Noting that the suspect initially had his finger on the trigger of a gun (posing a significant threat to the officer and others), the Sixth Circuit reasoned that "[w]hile [the officer]'s decision to shoot [the suspect] after he threw his weapon away may appear unreasonable in the 'sanitized world of our imagination,' [the officer] was faced with a rapidly escalating situation, and his decision to use deadly force in the face of a severe threat to himself and the public was reasonable."

Mullins, 805 F.3d at 767 (quoting *Dickerson v. McClellan*, 101 F.3d 1151, 1163 (6th Cir. 1996)). Based upon a host of cases from various circuits, the Court concluded that "[w]hile hindsight reveals that [the suspect] was no longer a threat when he was shot," officers should not be denied qualified immunity "in situations where they are faced with a threat of severe injury or death and must make split-second decisions, albeit ultimately mistaken decisions, about the amount of force necessary to subdue such a threat." *Mullins*, 805 F.3d at 767-68 (collecting cases).

Similarly, in *Quiles v. City of Tampa Police Dep't*, 596 F. App'x 816 (11th Cir. Jan. 5, 2015) (unpublished) (per curiam), the Eleventh Circuit held that an officer did not violate the Fourth Amendment by shooting an unarmed suspect who was attempting to escape from an arrest on foot. Because the officer "believed reasonably (although mistakenly) that [he] had stolen and was still in possession of [another officer's] gun," the use of deadly force was reasonable even though the suspect "was running away . . . when he was shot and had not threatened definitely the officers with a gun." *Quiles*, 596 F. App'x at 819. Here, the decedent actually had a gun pointed at two of the Petitioner Officers, only moments after his brother had fired two shotgun blasts in the proximity of the third.

In *Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012), the Eighth Circuit ruled that an officer did not violate the Fourth Amendment when he fired eight shots at an unarmed suspect who was approaching him on foot with his hands raised or extended to his

sides. The victim had not brandished a firearm and bystanders yelled that the suspect was unarmed. The officer's use of deadly force was nevertheless deemed reasonable because the suspect was intoxicated, the officer had been told that the suspect was armed, and the officer "was in no position – with [the victim] continuing toward him – to verify which version was true." *Loch*, 689 F.3d at 966-67. Again, in the present case, the decedent was in fact armed, and had his gun aimed at Officer White.

Strikingly, the Majority opinion acknowledged that "this case presents a unique set of facts and circumstances, particularly in the case of Officer White who arrived late on the scene and heard only 'We have guns,' . . . before taking cover behind a stone wall fifty feet away from the Pauly's residence." App. 31. However, the Majority repeatedly refers to Daniel Pauly's two shotgun blasts as "warning shots" or "protective shots," *see* App. 7-8, 48, and notes that the Pauly brothers subjectively believed that the Officers might have been "intruders related to the prior road rage altercation." App. 6. Neither of these purported facts – that the Pauly brothers surmised that the officers were intruders notwithstanding the officers being in uniform and having loudly identified themselves as State Police officers, or that the two shotgun blasts fired near Officer Truesdale were mere "warning shots" could have been readily apparent to Officer White when he arrived on the scene.

The Tenth Circuit's panel opinion consequently requires police officers to divine exactly what suspects

are thinking when the suspects are threatening or firing upon them, despite the Tenth Circuit having previously held that "qualified immunity does not require that the police officer know what is in the heart or mind of his assailant. It requires that he react reasonably to a threat." *Wilson v. Meeks*, *supra*, 52 F.3d at 1553-54 (rejecting plaintiffs' contention that the way decedent was holding his gun suggested he intended to surrender: "the inquiry here is not into [decedent's] state of mind or intentions, but whether, from an objective viewpoint and taking all factors into consideration, [the officer] reasonably feared for his life"); *see also Bell v. City of East Cleveland*, 125 F.3d 855, 1997 WL 640116, *3 (6th Cir. Oct. 14, 1997) (unpublished) ("In determining whether the use of deadly force was justified, the relevant consideration 'is whether a reasonable officer in [Defendants]' shoes would have feared for his life, not what was in the mind of [the decedent] when he turned around with the gun in his hand."). The panel opinion directly contravenes this Court's mandate that the facts must be viewed from the vantage point of a reasonable police officer on the scene, and that only the manifest intentions of the suspect are to be considered.

Contrary to the panel opinion's assertion regarding Samuel Pauly's manifest intentions being "somewhat neutral," App. 36, the Paulys' manifest intentions to an objectively reasonable officer in Officer White's position were both plain – and plainly hostile – from the time White arrived at the scene. The Paulys' intentions as manifested consisted in threatening "We have

guns," followed moments later by two shotgun blasts adjacent to Officer Truesdale at the back of the house, which Officer White believed were fired at Truesdale, and Samuel Pauly aiming his handgun directly towards Officer White from the front window. The Paulys' manifest intentions were not "somewhat neutral." A reasonable police officer would have believed the Paulys' actions to have been objectively hostile.

The Tenth Circuit's panel opinion violates its own and this Court's precedent – that the scene must be viewed from the perspective of the officer based on facts known to the officer – by failing to consider the facts from Petitioners' perspective. Instead, with the benefit of 20/20 hindsight, the panel judged Petitioners' conduct to be unreasonable based on facts not available to them, i.e., that the Paulys were afraid and only intended to fire "warning" or "protective" shots at the suspected "intruders." As noted above, Officer White fired shots only seconds after seeing Samuel Pauly point a gun in his direction, and without knowing any of what had transpired prior to his arrival. "Within a few seconds of reasonably perceiving a sufficient danger, officers may use deadly force even if in hindsight the facts show that the persons threatened could have escaped unharmed." *Untalan v. City of Lorain*, 430 F.3d 312, 315 (6th Cir. 2005).

The panel opinion repeatedly emphasized two facts in order to arrive at its conclusion that Officer White did not have probable cause to believe Samuel Pauly posed an immediate threat: one, that Officer White was positioned fifty feet away when he fired, and

two, that Officer White fired from a position of some cover. *See*, *e.g.*, App. 31, 33, 34, 36, 42, 45, 48, 53-55. However, with regard to distance, there is no clearly established law – and indeed, Petitioners are unaware of any published case law which suggests – that a distance of fifty feet is in any way relevant when the suspect is armed with a firearm as opposed to a knife or similar weapon. From the perspective of a reasonable officer, an assailant fifty feet away and armed with a gun is far more threatening than one twenty feet away and armed with a knife. *See Larsen*, *supra*, 511 F.3d at 1258, 1260-61.

With regard to cover, the Tenth Circuit has previously "suggested that an officer's failure to take cover is 'at issue only insofar as it [bears] upon whether the officer's life [is] truly in danger.'" *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) (quoting *Wilson*, 52 F.3d at 1554). Here, the fact that Officer White ran to the nearest available cover simply suggests that his life was "truly in danger," and, in fact, forms part of the totality of circumstances confirming the immediacy of the threat. Officer White's split-second decision to seek cover from threatening suspects should not be held against him when evaluating the reasonableness of his subsequent use of force, and again, Appellants are unaware of any prior case law which does so. Had Officer White failed to seek cover, that fact would surely be asserted to show he exaggerated the nature of the threat, lending credence to the Dissent's astute observation that the Majority's reasoning on this point "seems the epitome of 'second guessing.'" App. 58.

Finally, Appellants note that it is undisputed that the upper portion of Officer White's body (and particularly, his head) remained exposed throughout this encounter – this is an uncontroverted fact, and does not require that any particular reasonable inference be drawn in favor of the non-movant. *See* App. 42-43; *see also* App. 57 n.5. As such, the panel's emphasis on Officer White's cover is misplaced and inconsistent with prior opinions from both this Court and the Circuit Courts.

B. THE OFFICERS' FAILURE TO PROVIDE ANOTHER WARNING TO THE PAULY BROTHERS PRIOR TO DEFENDING THEMSELVES IS INSUFFICIENT TO DENY QUALIFIED IMMUNITY

The District Court and the Tenth Circuit identified as an issue of disputed material fact whether it was feasible for Officer White to have warned Samuel Pauly before shooting him. App. 39-40, 83-84. The panel opinion also faulted Officer White for failing to order Samuel Pauly to drop his pistol in the four to five seconds White had to process the threat and respond. App. 38-39, 49. This Court has cautioned that, in excessive force situations, a warning need only be given "*where feasible*" (emphasis supplied). *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985); *see also Thomson v. Salt Lake Cnty.*, *supra*, 584 F.3d at 1321 (rejecting plaintiff's argument that unleashing police dog without a warning created the need to use deadly force and concluding "[a] warning is not invariably required even

before the use of deadly force"); *Wilson, supra*, 52 F.3d at 1554 (rejecting plaintiffs' argument that the defendant officer "must verbally warn a suspect before using lethal force").

Officers facing armed assailants "are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving." *Kingsley, supra*, 135 S.Ct. at 2474 (quoting *Graham*, 490 U.S. at 397); *cf. Pasco v. Knoblauch*, 566 F.3d 572, 580 (5th Cir. 2009) ("it would be unreasonable to expect a police officer to make the numerous legal conclusions necessary to apply *Garner* to a high-speed car chase"). Given the extremely short interval between the Paulys' objectively threatening actions and White's use of force, a warning was not clearly mandated. Not only was giving a warning not feasible, even if it had been feasible, Officer White's failure to give such a warning under the stressful, rapidly evolving circumstances he faced (in a matter of seconds Daniel Pauly firing off both barrels of his shotgun and Samuel Pauly aiming a handgun directly at him) would not rise to the level of recklessness, nor would it render his use of force unconstitutional.

II. THE PANEL OPINION IMPROPERLY DENIES QUALIFIED IMMUNITY BY ASSESSING THE OFFICERS' CONDUCT AT A HIGHLY GENERALIZED LEVEL

The Tenth Circuit's panel opinion also fails to heed numerous admonitions from this Court about defining

"clearly established" constitutional rights too generally. This Court's recent repeated unanimous awards of qualified immunity emphasize the narrow circumstances in which government officials may be held personally liable for their actions in suits for money damages. *See, e.g., Taylor v. Barkes*, 135 S.Ct. 2042, 2044 (2015); *Carroll v. Carman*, 135 S.Ct. 348, 350-52 (2014) (per curiam); *Lane v. Franks*, 134 S.Ct. 2369, 2383 (2014); *Wood v. Moss*, 134 S.Ct. 2056, 2070 (2014); *Plumhoff v. Rickard*, *supra*, 134 S.Ct. at 2023-24; *Stanton v. Sims*, 134 S.Ct. 3, 7 (2013). Because of the importance of qualified immunity "to society as a whole," *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), this Court often corrects lower courts when they wrongly subject individual officers to liability. *See City and Cnty. of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1774 n.3 (2015) (collecting cases); *see also Wesby v. Dist. of Columbia*, 816 F.3d 96, 102 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of rehearing *en banc*) ("in just the past five years, the Supreme Court has issued 11 decisions reversing federal courts of appeals in qualified immunity cases, including five strongly worded summary reversals") (collecting cases), *petition for cert. filed* June 8, 2016; *cf. Wearry v. Cain*, 136 S.Ct. 1002, 1007 (2016) ("th[is] Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law").

Strikingly, the panel below gave scant consideration to this Court's recent opinion in *Mullenix v. Luna*, 136 S.Ct. 305 (2015) (per curiam), a deadly force case,

simply concluding that *Mullenix* was distinguishable "because there were clearly other cases on point there that had rejected the argument used to form the basis of the Fifth Circuit's decision." App. 46-47. In *Aldaba v. Pickens*, 777 F.3d 1148 (10th Cir. 2015), the Tenth Circuit affirmed the denial of qualified immunity to police officers in an excessive force case. However, in *Pickens v. Aldaba*, 136 S.Ct. 479 (2015), this Court vacated the Tenth Circuit's opinion and remanded the case for further consideration in light of *Mullenix*. *See also Middaugh v. City of Three Rivers*, 2015 WL 6457994 (6th Cir. Oct. 26, 2015) (unpublished) (affirming denial of qualified immunity to police officers in due process/wrongful seizure case), *vacated and remanded*, *Piper v. Middaugh*, No. 15-964 (June 6, 2016) (slip op.). Over the past several months, this Court has signaled that *Mullenix* should be applied broadly to Section 1983 claims made against police officers. The panel below applied this Court's opinion too narrowly, warranting review and reversal.

This Court's recent precedent has generally expanded the qualified immunity defense, beginning with *Ashcroft v. al-Kidd*, 131 S.Ct. 2074 (2011), where this Court reformulated the qualified immunity standard to require "*every* 'reasonable official . . . [to] understand that what he is doing violates that right.'" *Ashcroft*, 131 S.Ct. at 2083 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added). Qualified immunity now protects "all but the plainly incompetent or those who knowingly violate the law."

Mullenix, 136 S.Ct. at 308. Absent from this Court's recent statements of qualified immunity law is any reference to the plaintiff's countervailing interests in vindicating constitutional rights and compensation for constitutional injury, which this Court previously recognized in *Harlow v. Fitzgerald*, *supra*, 457 U.S. at 813-14.

An officer enjoys qualified immunity and is not liable for excessive force unless he has violated a "clearly established" right, such that "it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Kingsley v. Hendrickson*, *supra*, 135 S.Ct. at 2474 (quoting *Saucier v. Katz*, *supra*, 533 U.S. at 202). The plaintiff's burden to rebut a showing of qualified immunity is a demanding standard. *See Kingsley*, 135 S.Ct. at 2474-75; *see also Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015). It is one which can only be met by assessing the specific evidence and context of the case, and not by taking refuge in lofty principles wholly divorced from the realities actually confronted by police officers.

The correct inquiry is "whether the violative nature of *particular conduct* is clearly established" (emphasis supplied). *Ashcroft v. al-Kidd*, *supra*, 131 S.Ct. at 2084. "[E]xisting precedent must have placed the statutory or constitutional question *beyond debate*" (emphasis supplied). *Id.* at 2083; *see also Mullenix*, 136 S.Ct. at 308; *Stanton*, *supra*, 134 S.Ct. at 5. To find the existence of a clearly established right, the court must "conclude that the firmly settled state of the law, established by a forceful body of persuasive precedent,

would place a reasonable official on notice that his actions obviously violated a clearly established constitutional right." *Spady v. Bethlehem Area Sch. Dist.*, 800 F.3d 633, 639 (3d Cir. 2015).

This Court has repeatedly warned the lower courts not to analyze clearly established law at too high a level of generality. *See Mullenix*, 136 S.Ct. at 311; *see also City and Cnty. of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1775-76 (2015); *Wilson v. Layne*, 526 U.S. 603, 615-16 (1999); *Anderson v. Creighton*, *supra*, 483 U.S. at 639. In all Section 1983 cases, courts must undertake the qualified immunity analysis "in light of the specific context of the case, not as a broad general proposition." *Mullenix*, 136 S.Ct. at 308 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993) (a plaintiff cannot rely on "general, conclusory allegations" or "broad legal truisms" to show that a right is clearly established) (quotations omitted). Put another way, the court must enunciate "a concrete, particularized description of the right." *Hagans v. Franklin Cnty. Sheriff's Office*, 695 F.3d 505, 508 (6th Cir. 2012); *see also Spady*, 800 F.3d at 638 (the right at issue must be framed "in a more particularized, and hence more relevant, sense, in light of the case's specific context").

In the present case, the panel opinion stated that "all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and

its 'reasonableness' standard." App. 15 (quoting *Graham v. Connor*, *supra*, 490 U.S. at 396). The panel also noted that "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." App. 28 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (internal quotation marks omitted)). Relying on, *inter alia*, *Graham*, the panel concluded that "a reasonable officer in Officer White's position should have understood, based on clearly established law, that . . . he was not entitled to use deadly force unless he was in danger at the exact moment of the threat of force." App. 48-49.

The Tenth Circuit thus defined the right at issue as simply the Fourth Amendment right to be free from the excessive use of force absent a threat or danger. This formulation lacks the required level of specificity and does not address the question that needs to be answered in this context because it does not describe the specific situation that the officers confronted. *See Estep v. Mackey*, 2016 WL 574029, *3 (3d Cir. Feb. 12, 2016) (unpublished) (citing *Mullenix*, 136 S.Ct. at 309). Indeed, a prior Tenth Circuit panel criticized this type of generic formulation of the law, noting that "[w]hile this general principle is correct, it still begs the question of what constitutes a sufficient threat." *Cordova v. Aragon*, 569 F.3d 1183, 1193 (10th Cir. 2009). If qualified immunity depends on the application of general principles, an officer's individual liability will likely hinge on an arbitrary choice among various general

propositions. In this case, for instance, the court could have found clear support for the Officers' use of force in the general standard of *Tennessee v. Garner*: "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11. The actions of the Pauly brothers gave Officer White probable cause to believe that he and Officers Mariscal and Truesdale faced a risk of serious injury or death.

The Tenth Circuit panel fell back on general principles in holding that an officer may not use deadly force unless he or she faces the immediate threat of physical harm. Contrary to what the panel found, *see* App. 28-29, even *Graham v. Connor* is itself cast at a high level of generality and therefore cannot provide clear notice in most cases. *See, e.g.*, *Brosseau*, *supra*, 543 U.S. at 199 (holding that the court of appeals erred when it "proceeded to find fair warning in the general tests set out in *Graham* and *Garner*"). As the panel below acknowledged, this case presents a unique set of facts and circumstances; as in *Brosseau*, "[t]he present case is far from the obvious one" that can be decided upon generalities. *See id.* Consequently, the panel's reliance on *Graham* to define the clearly established law governing this case directly contravenes this Court's warnings. *Mullenix*, 136 S.Ct. at 308 (quoting *Ashcroft v. al-Kidd*, *supra*, 131 S.Ct. at 2084).

By contrast, other Circuits have become far more precise in their definition of clearly established rights

at issue in particular cases. *See*, *e.g.*, *Estate of Armstrong v. Village of Pinehurst*, 810 F.3d 892, 907-08 (4th Cir. 2016) ("[t]he constitutional right in question in the present case, defined with regard for Appellees' particular violative conduct, is Armstrong's right not to be subjected to tasing while offering stationary and non-violent resistance to a lawful seizure") (citing *Hagans v. Franklin Cnty. Sheriff's Office*, *supra*, 695 F.3d at 509 ("[d]efined at the appropriate level of generality – a reasonably particularized one – the question at hand is whether it was clearly established in May 2007 that using a taser repeatedly on a suspect actively resisting arrest and refusing to be handcuffed amounted to excessive force")).

Contrary to what was suggested by the Tenth Circuit panel below, the law was not clearly established that Officer White could not use deadly force in the circumstances actually confronting him. *See Estate of Armstrong*, 810 F.3d at 908 (citing *Mullenix*, 136 S.Ct. at 308; *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012)). Officer White, as well as the other Officers, had the right to rely on this Court's guidance as well as the Tenth Circuit's prior published opinions in *Larsen*, *Wilson* and *Thomson*, among others. Each of those opinions held that police officers were entitled to qualified immunity under similar circumstances as faced by the Officers when confronted by an armed Samuel Pauly. Given the long-standing state of the law, it is impossible for the plaintiff estate to show any excessive-force claim was clearly established as a matter of law.

In sum, the Tenth Circuit's decision below ignores this Court's clear dictates. The Tenth Circuit denied qualified immunity despite the wealth of clearly established Fourth Amendment excessive force jurisprudence by this Court and the Circuit Courts. For every police officer on the street, the clear articulation of governing law makes this a matter of exceptional importance such that review and reversal is necessary.

CONCLUSION

The Tenth Circuit's majority decision in this case muddies decades' worth of clearly-established jurisprudence on qualified immunity in Fourth Amendment excessive force cases. As astutely noted by Judge Nancy Moritz in her opinion dissenting from the denial of Petitioners' request for rehearing *en banc*, the panel's opinion

> requires an officer who has taken some form of cover to hesitate and call out a warning before using deadly force – even as a suspect points a gun directly at that officer, even as a second suspect is loose and has fired shots near a second officer, and even as a third officer has already shot and missed the suspect pointing the gun at the first officer.

App. 125. "The majority's fundamentally flawed decision doesn't just violate existing precedent; it creates new precedent with potentially deadly ramifications for law enforcement officers in" the Tenth Circuit. *Id.*

Moreover, as Judge Harris Hartz correctly recognized, there is no

> clearly established law that suggests, much less requires, that an officer in that circumstance who faces an occupant pointing a firearm in his direction must refrain from firing his weapon but, rather, must identify himself and shout a warning while pinned down, kneeling behind a rock wall, hoping that no one will be aiming in his direction when he decides to look around or move.

App. 124. Judge Hartz openly invited this Court to review this case and "clarify the governing law." *Id.*; *cf. Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 496-97 (6th Cir. 2015) (McKeague, J., dissenting) (lamenting that copyright law with respect to garment design "is a mess" such that "either Congress or the Supreme Court (or both) must" provide the lower courts with "much-needed clarification" on the matter), *cert. granted*, *Star Athletica, LLC v. Varsity Brands, Inc.*, No. 15-866 (May 2, 2016).

This Court should accept Judge Hartz's invitation to clarify the law governing the proper application of qualified immunity and reaffirm the clearly established principle that a police officer may use force – even deadly force – in response to a reasonably perceived threat.

This Court should grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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