No. 16-67

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

BRIEF IN OPPOSITION

LEE R. HUNT
HUNT & MARSHALL
532 Old Santa Fe Trail
Santa Fe, New Mexico 87505
Telephone: (505) 954-4868
Facsimile: (505) 819-0022
Email:
lee@huntandmarshall.com

PIERRE LEVY
Counsel of Record
AIMEE BEVAN
O'FRIEL AND LEVY, P.C.
644 Don Gaspar Avenue
Santa Fe, New Mexico 87505
Telephone: (505) 982-5929
Facsimile: (505) 988-5973
Email:
pierre@ofrielandlevy.com
aimee@ofrielandlevy.com

Attorneys for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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QUESTIONS PRESENTED

1. Did the Tenth Circuit correctly analyze Officer White's use of force from the perspective of a reasonable officer on the scene?

2. Did the Tenth Circuit correctly hold that Officer White's conduct in this case was so obviously a violation of the Fourth Amendment in light of *Graham* and its progeny that other decisions with greater specificity were not required to put an objectively reasonable officer on fair notice that an unidentified officer who surreptitiously approached a rural residence late at night with no probable cause and no exigent circumstances, and who was fifty feet away in the dark and under cover of a stone wall, could not shoot without warning an innocent citizen standing in his living room window pointing a weapon toward unknown persons in his yard when the officers had recklessly created a situation where the occupants of the home would reasonably believe that they were under attack by intruders?

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STATEMENT OF THE CASE

I. FACTUAL HISTORY

On the night of October 4, 2011, Daniel Pauly was involved in a road rage incident with another car on the interstate that involved mutual allegations of tailgating, shining bright lights, abrupt braking, and other inappropriate driving. App. at 4. The women in the other car called 911 to report the incident. *Id.* At the time they called 911, the women were tailgating Daniel. *Id.* When Daniel exited the interstate for his home, the women followed him. *Id.* Feeling threatened, Daniel stopped on the exit ramp and asked them why they were following him. *Id.* Daniel then returned to his car and drove the short distance to his house, where his brother, Samuel Pauly, was on the sofa playing video games. App. at 72. The Pauly home was located in a rural wooded area. *Id.*

Three New Mexico State Police Officers, Kevin Truesdale, Michael Mariscal and Ray White, responded to the 911 call. App. at 72-73. Officer Truesdale arrived at the exit ramp first, spoke with the women about the incident, and then watched them drive back to the interstate. App. at 73. Officers White and Mariscal arrived shortly thereafter. *Id.* At this point, the officers knew that both cars had participated in the incident, that the incident was over, that no one was in danger, and that no crime was in progress. *Id.* The officers agreed that no exigent circumstances existed and that they did not have sufficient evidence or

probable cause to make an arrest. App. at 73-74. Nonetheless, and despite the fact that it was after 11:00 p.m., the officers decided to proceed to the address obtained from the license plate information provided by the women. *Id.*

Officer White waited at the exit ramp in case Daniel came back that way. App. at 74. Officers Truesdale and Mariscal drove separately to the address associated with the license plate and parked in front of the main residence, leaving on their headlights and take-down lights. *Id.* The officers did not see Daniel's truck at the main residence but saw a second residence behind the main residence. *Id.* Between the two residences are trees, a building and other obstructions that prevent the people in the rear residence from seeing lights or vehicles in front of the main residence. App. at 72; Aplt. App. at 552, ¶ 19. Despite their approach to the main residence in patrol cars with headlights on and take-down lights activated, the officers decided to approach the upper residence in a manner that intentionally concealed their presence – on foot, under cover of night, and only illuminating the road when necessary by momentarily turning on their flashlights. App. at 74-75. Officers Mariscal and Truesdale located Daniel's truck at the upper residence and so advised Officer White, who then proceeded to the residence. App. at 75.

At approximately 11:00 p.m., the Pauly brothers saw people approaching their home using flashlights intermittently. App. at 75. It was a dark and rainy night and the brothers could not see who held the

flashlights. *Id.* The brothers feared that the people outside their home were intruders, possibly related to the road incident earlier in the night. *Id.* It did not enter Daniel's mind that the persons could have been police officers. *Id.* The brothers sought to have the intruders identify themselves by repeatedly yelling "Who's out there?" and "What do you want?" *Id.* Despite hearing the brothers' inquiries, Officers Mariscal and Truesdale did not identify themselves and did not approach the front door to knock and announce. App. at 75-76; Aplt. App. at 554, ¶ 35. Instead, the officers escalated the situation by yelling threatening statements in a hostile tone. App. at 84. The officers yelled "Open the door! Open the door!" and "Hey, motherf**kers, we've got you surrounded. Come out or we're coming in!" App. at 75-76. During the entire encounter, only one identification of "State Police" was made and it was not made until ninety seconds before shots were fired. App. at 76.

Officer White arrived on the scene in less than a minute, parked at the main house and walked up to the Pauly home in the dark using his flashlight intermittently. App. at 77. Officer White heard Officers Mariscal and Truesdale yelling threats at the Pauly residence. *Id.* When Officer White arrived at the Pauly home, Officer Mariscal was standing in the dark at the front of the house. *Id.* Officer White did not identify himself as a police officer. App. at 84. Officer White was at the scene for several minutes prior to shots being fired. App. at 77 & 121; Aplt. App. at 118.

The Pauly brothers were scared and felt that their lives were threatened by these unknown intruders.

App. at 76. The brothers decided to call the police and then stay together in the master bedroom with their dogs until the police arrived. *Id.* Before they could call the police, however, they heard "We're coming in! We're coming in!" *Id.* Scared and believing that they needed to protect themselves from an imminent home invasion, Samuel grabbed a pistol and Daniel grabbed a shotgun. App. at 76-77. The brothers then tried to scare the intruders away by yelling out "We have guns." App. at 77.

When the officers heard "We have guns," Officer Mariscal took cover behind a pick-up truck and Officer White took cover behind a stone wall located fifty feet away from the house. App. at 77-78. Daniel then stepped partially out of the back of the house and fired two warning shots up into a tree while screaming to scare the intruders away. App. at 78. Officers Mariscal and White assert that they then saw Samuel walk to the front window and point a handgun in the general direction of Officer White's position behind the stone wall. App. at 78 & 119. Despite the fact that they were in protected positions in the dark, neither Officer Mariscal nor Officer White identified themselves or provided a warning. App. at 6 & 39.

Officer Mariscal shot at Samuel but missed. App. at 79. Samuel did not return fire.[1] *Id.* As soon as Samuel appeared in the window with a gun, Officer White

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[1] Officer White asserts that he used deadly force only after Samuel fired a shot at him. The district court found, however, that Samuel did not fire any shots. "In measuring the objective reasonableness of Officer White's use of deadly force, the jury will be free

focused solely on getting a kill shot. App. at 122. Officer White could not say what Samuel had done between the time he appeared in the window and the time Officer White shot, including whether Samuel had lowered his gun. *Id.* Approximately five seconds after Officer Mariscal shot at Samuel, Officer White, who was fifty feet away in the dark and under cover behind a stone wall, without providing any warning, fired a single shot that killed Samuel as he stood in his living room. App. at 79.

II. PROCEDURAL HISTORY

Samuel Pauly's father, on behalf of Samuel Pauly's estate, filed a civil rights action against the three officers, the State of New Mexico Department of Public Safety, and two state officials, claiming, in part, that defendants violated his son's Fourth Amendment right against the use of excessive force. The officers moved for summary judgment on the basis of qualified immunity.

Viewing the facts in the light most favorable to plaintiffs, the district court determined that a reasonable jury could find the following:

> [T]here were no exigent circumstances requiring the Officers to go to Daniel Pauly's house at 11:00 p.m.; Officers Truesdale and Mariscal purposefully approached the house in a surreptitious manner; despite the porch light and

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to consider this apparently false claim of self-defense." App. at 120.

> light from the house, the rain and darkness made it difficult for the brothers to see who was outside their house; the fact that the brothers' house is located in a rural wooded area would have heightened the brothers' concern about intruders; the Officers provided inadequate police identification by yelling out "State Police" once; the Officers' use of a hostile tone in stating, "we got you surrounded. Come out or we're coming in" was threatening; statements by Officers Truesdale and Mariscal of "open the door" and other statements of "we're coming in" were, likewise, threatening; it would have been reasonable for the Officers to conclude that Daniel Pauly could believe that persons coming up to his house at 11:00 p.m. were connected to the road rage incident which had occurred a couple of hours previously; that under these circumstances, the occupants of the house would feel a need to defend themselves and their property with the possible use of firearms; and the incident occurred in less than five minutes.

App. at 84.

The district court denied Officers Mariscal and Truesdale's motions, finding that a reasonable jury could find that the officers' reckless conduct unreasonably created the dangerous situation leading to Officer White's use of deadly force and that the law was clearly established in the Tenth Circuit "that the requisite causal connection for establishing a Section 1983 violation is satisfied if the defendants set in motion a series of events that the defendants knew or reasonably

should have known would cause others to deprive the plaintiff of his constitutional rights." App. at 109-111 (internal punctuation and citations omitted). The district court found that Officer White was not entitled to qualified immunity because he had knowledge of, and participated in, the reckless conduct that precipitated the need for force and because disputed issues of fact existed regarding whether it was feasible for him to provide a warning prior to firing the fatal shot. App. at 84-87.

The officers appealed. The Tenth Circuit considered Officers Truesdale and Mariscal's qualified immunity claims jointly. The court found that summary judgment was not appropriate because a reasonable person in the officers' position should have understood that their reckless conduct could cause the Pauly brothers to defend their home and could result in the use of deadly force against Samuel by Officer White and that the violative nature of this conduct was clearly established under Tenth Circuit precedent. App. at 29. The Tenth Circuit's ruling related to Officers Truesdale and Mariscal is not being appealed to this Court.

The Tenth Circuit analyzed Officer White's conduct, from the perspective of a reasonable officer on the scene, using the three factors articulated in *Graham v. Conner*, 490 U.S. 386 (1999), to balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion, and the four factors listed in *Estate of Larsen ex rel.*

Sturdivan v. Murr, 511 F.3d 1255 (10th Cir. 2008), to assess the degree of threat the officer faced and whether a warning was feasible prior to using deadly force. App. at 30-41. The Tenth Circuit concluded that "a reasonable officer in Officer White's position would *not* have probable cause to believe there was an *immediate* threat of serious harm to himself or to Officer Mariscal, who was also behind cover, such that he could shoot Samuel Pauly through the window of his home without giving him a warning." App. at 45 (emphasis in original). As a result, a jury could conclude that Officer White's use of deadly force against Samuel was not objectively reasonable and violated the Fourth Amendment. *Id.* The court found that the law establishing this right was clearly established: "[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 here, to warn Mr. Pauly to drop his weapon."[2] App. at 48-49.

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[2] While the decision below is correct based on the facts that the Tenth Circuit considered, other facts found by the district court provide additional grounds for denying qualified immunity. The district court found that Officer White arrived at the scene several minutes before shots were fired while the other officers were threatening to invade the Pauly home, and therefore had knowledge of, and participated in, the reckless conduct that precipitated the need for force. App. at 84-87. The Tenth Circuit, however, incorrectly stated that Officer White "arrived late on the scene and heard only 'We have guns.' " App. at 31. As a result, the Tenth Circuit rejected the district court's determination that Officer White had knowledge of, and participated in, the reckless

The officers sought rehearing and rehearing en banc. Both motions were denied.

REASONS FOR DENYING THIS WRIT

The Tenth Circuit correctly identified and applied this Court's and the Tenth Circuit's well-developed jurisprudence on excessive force cases to the unique facts and circumstances of this case as determined by the district court. The officers' arguments that the Tenth Circuit misapplied the applicable law misstate the facts as found by the district court, misconstrue the Tenth Circuit's analysis, and cite inapposite case law. The Tenth Circuit's opinion is correct, well-reasoned, and consistent with existing precedent. The petition for writ of certiorari should be denied.

I. THIS CASE IS A POOR CANDIDATE FOR CERTIORARI BECAUSE IT IS TOO ENTANGLED WITH DISPUTED FACTS TO ALLOW FOR CLEAR RESOLUTION OF ANY LEGAL ISSUES

The petition is rife with misstated and omitted material facts in what appears to be a deliberate intent

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conduct that precipitated the need for force and focused its analysis solely on events that transpired after the brothers said "We have guns." The concurrence in the en banc denial corrected the record, stating that Officer White had been on the scene for several minutes prior to the brothers saying "We have guns." App. at 121. The Tenth Circuit's factual error complicates any review of the legal issues in this case.

to mislead the Court about the facts and circumstances of this case. The officers' failure to state essential facts accurately and clearly is sufficient reason for the Court to deny the petition. *See* Sup. Ct. Rule 14.4 (failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition). At a minimum, the fact that the officers' arguments rely on mischaracterized facts and disputed facts improperly construed in the officers' favor highlights that this case is a poor vehicle for certiorari because the ongoing factual disputes hamper a clear resolution of any legal issues.

The officers state that "the Paulys noticed the flashlights outside, and called out 'Who are you?' and 'What do you want?' The officers responded, 'open the door, State Police, open the door.'" Pet. at 5. In contrast, what the district court actually found was that when the Pauly brothers saw the flashlights outside their home, "[b]oth brothers then yelled out several times, 'Who are you?' and, 'What do you want?' In response to those inquiries, the brothers heard a laugh and, 'Hey, (expletive), we got you surrounded. Come out or we're coming in.'" App. at 75-76 (citations omitted). The officers' misleading recitation of the facts presents an entirely different picture of the encounter than found by the district court.

The officers state that "as [Officer White] arrived on scene, someone inside the house shouted 'We have guns.'" Pet. at i. The facts as found by the district court,

however, are that Officer White arrived on the scene several minutes prior to this statement. The district court found that "[w]hile Officers Truesdale and Mariscal were trying to get the brothers to come out of the house and before one of the brothers yelled out, 'We have guns,'" Officer White arrived at the main residence. App. at 77. The district court did not elaborate on the timing of these events. The police recordings in the record, however, show that Officers Truesdale and Mariscal arrived at the main residence at 11:14 p.m.; Officer White was at the main residence by 11:16 p.m.; and Daniel's shots occurred at 11:19:42. App. at 121; Aplt. App. at 118. Thus, Officer White was on the scene for nearly four of the five minutes the incident lasted. By misrepresenting the facts, the officers attempt to shroud Officer White in ignorance of the events that caused the Pauly brothers to believe that they needed to defend themselves against intruders.

The officers assert that they made a "clear and unmistakable identification of themselves as 'State Police.'" Pet. at 14. The district court, however, found that despite the fact that the officers claimed they made numerous announcements, the audio of the incident contained only one announcement during the entire encounter. App. at 76. The district court did not find that this one announcement, which occurred after the officers had been lurking outside the house for several minutes, yelling profanities, threatening to invade the home and refusing to identify themselves in response to the Pauly brothers' requests to know who was outside their home, was "clear" or "unmistakable." To the

contrary, the district court found that a reasonable jury could find that the officers provided inadequate identification. App. at 84.

The officers argue that their "failure to provide *another* warning to the Pauly brothers prior to defending themselves is insufficient to deny qualified immunity." Pet. at 26 (emphasis added). The district court, however, found that it was undisputed that *no* warning was given. App. at 39. The officers' assertion that the Tenth Circuit required them to provide another warning implies that at least one warning was provided, which is false.

The officers wholly omit from the petition essential findings by the district court. For example, the officers never state that the district court found that prior to deciding to approach the Pauly home late at night, the officers all agreed that there was not enough evidence or probable cause to arrest Daniel and that no exigent circumstances existed. App. at 73-74. The officers never acknowledge that the district court found that the officers made threatening and profane statements in a hostile tone that they were going to invade the Pauly home. App. at 84. The officers never state that the Pauly brothers yelled "We have guns" in response to the officers' threats that an invasion of the Pauly home was imminent. App. at 76.

In addition to materially misstating and omitting key facts found by the district court, the officers improperly construe disputed facts in their favor rather than accepting the facts as found by the district court.

On review of a district court's denial of a claim of qualified immunity, the appellate court must accept the district court's conclusions that a reasonable jury could find certain specified facts in favor of the plaintiff. *Johnson v. Jones*, 515 U.S. 304, 319 (1995) (requiring the courts of appeals to "simply take, as given, the facts that the district court assumed when it denied summary judgment" when a defendant challenges the "purely legal" clearly-established-law prong).

The district court found that after hearing "'We have guns,' Officer White took cover behind a stone wall located 50 feet from the front house." App. at 77. The officers urge the Court to reconstrue this disputed fact in their favor, arguing that Officer White was not really under cover because his head and arms were necessarily exposed in order to shoot Samuel. Pet. at 6. The district court, however, found that Officer White was under cover and this fact must be accepted on an interlocutory appeal of qualified immunity.

The officers contend that it would not have been apparent to Officer White that the Pauly brothers might believe the officers were intruders because the officers were in uniform. Pet. at 22. The district court, however, found that it should be apparent to a reasonable officer that the rain, darkness, and ambient lighting conditions would make it difficult for the persons inside the home to see who was outside. App. at 84. The officers must accept the facts as found by the district court.

The officers' inaccurate, incomplete, and misleading statements of material facts throughout their petition make it impossible to evaluate the arguments as presented. Neither the Court nor respondents should be required to correct the factual assertions in a petition and then attempt to address the arguments as if properly based on the facts as found by the district court. Under these circumstances, the Court should deny the petition pursuant to Rule 14.4. Furthermore, the officers' invitation to this Court to ignore facts found by the district court and to resolve disputed facts in their favor is especially inappropriate in an interlocutory appeal of a non-final order regarding qualified immunity. Such an interlocutory appeal is permissible only when it raises purely legal questions, not when it is bound up with factual determinations. *Johnson*, 515 U.S. at 319.

II. THIS CASE DOES NOT RAISE THE FIRST QUESTION PRESENTED BECAUSE THE TENTH CIRCUIT ASSESSED THE USE OF FORCE FROM THE PERSPECTIVE OF A REASONABLE OFFICER

In their first question presented, the officers assert that the Tenth Circuit erred 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." Pet. at i. The Tenth Circuit, however, correctly assessed the use of force from the perspective of a reasonable officer on the scene. In fact, the Tenth Circuit began its analysis by

stating that Fourth Amendment excessive force claims are reviewed "under a standard of objective reasonableness, judged from the perspective of a reasonable officer on the scene." App. at 15 (citations omitted). Numerous times in its analysis, the court reiterated that it was considering the excessive force claim from the perspective of a reasonable officer on the scene. App. at 15 (court must determine "whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them") (quotations and citations omitted); App. at 29 ("Officer White's use of deadly force must be judged from the perspective of a reasonable officer on the scene") (quotations and citations omitted); App. at 30 (our analysis focuses "on the reasonableness of [Officer White's] own conduct"); App. at 31 (ultimate determination is "whether from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force") (citations omitted); App. at 39 (reasonableness of use of force "must be judged from the perspective of a reasonable officer on the scene") (citation omitted). Ultimately, the Tenth Circuit concluded that a jury could find that "a reasonable officer in Officer White's position would *not* have probable cause to believe there was an *immediate* threat of serious harm to himself or to Officer Mariscal, who was also behind cover, such that he could shoot Samuel Pauly through the window of his home without giving him a warning." App. at 45 (emphasis in original).

The officers assert that the Tenth Circuit refers to Daniel's shotgun blasts as "warning shots" when this

fact would not have been apparent to Officer White.[3] Pet. at 5. The district court found that Daniel "fired two warning shots up into a tree." App. at 78. The Tenth Circuit acknowledged this factual finding in the background section of its decision, stating that Daniel "fired two warning shots." App. at 8. Contrary to the officers' assertion, however, the Tenth Circuit did not find that a reasonable officer in Officer White's position would have known that these were warning shots. In discussing the warning shots in its analysis of the reasonableness of Officer White's conduct, the Tenth Circuit referred to them simply as shots.[4] App. at 33-34.

The officers assert that the Tenth Circuit improperly focused on whether the Pauly brothers could hear

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[3] The Tenth Circuit held that it was "a fact question for the jury as to whether it was objectively reasonable for Officer White to immediately assume that one of his fellow officers was shot after hearing two shots from the back of the house but nothing more to indicate that anyone had been hit." App. at 34. The officers assert, based on this finding, that the Tenth Circuit "appears to read into this Court's existing case law the requirement that police officers must witness or perceive that someone . . . was actually hit by the suspect's shot, not just that they were shot at." Pet. at 15. This argument is wholly unrelated to the question presented. Further, the officers incorrectly state the facts of this case. Officer White knew only that shots had been fired. He did not know if the shots had been directed at anyone. Finally, the Tenth Circuit's holding that whether Officer White's assumption was objectively reasonable is a fact question does not suggest that it imposed any requirement that an officer witness someone being shot.

[4] In its analysis of clearly established law, the Tenth Circuit refers to these shots as "protective shots." App. at 48. This characterization does not appear to have been of any significance to the analysis.

the officers identify themselves as State Police officers; whether the Pauly brothers could see the officers, considering the ambient light and other light sources; and the Pauly brothers' fear that the officers were assailants. Pet. at 14. The Tenth Circuit, however, did not mention any of these facts in its analysis of Officer White's conduct.

To the extent the Tenth Circuit discussed what the Pauly brothers may have perceived, it was in service of determining what a reasonable officer would have known and done under the circumstances. The Tenth Circuit determined that a reasonable officer on the scene would take into account the known circumstances surrounding the encounter, including that the Pauly brothers may not have known it was officers outside their home when the officers approached the home after 11:00 p.m. on a dark and rainy night while intentionally concealing their identities, did not adequately identify themselves, and yelled hostile and profane threats that an invasion of the Pauly home was imminent. This is not viewing the facts from the perspective of the victim; rather it is part of the existing requirement that the court consider excessive force claims from the perspective of a reasonable officer on the scene, including the facts and circumstances known to the officer. *See, e.g.*, *Graham*, 490 U.S. at 396; *Scott v. United States*, 436 U.S. 128, 137 (1978) (court must assess reasonableness of officer's actions "in light of the facts and circumstances then known to him").

The Tenth Circuit correctly assessed Officer White's use of force from the perspective of a reasonable officer on the scene, including the facts and circumstances known to the officer. The officers' first question presented is not presented at all.

III. THE TENTH CIRCUIT'S DECISION IS CORRECT, WELL-REASONED, AND DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS

A. THE TENTH CIRCUIT CORRECTLY FOLLOWED THIS COURT'S PRECEDENTS IN DETERMINING THAT OFFICER WHITE USED EXCESSIVE FORCE

The officers do not dispute that the Tenth Circuit correctly identified the Supreme Court and Tenth Circuit law that applied to its analysis of the reasonableness of Officer White's conduct. The Tenth Circuit cited to *Graham* for the principle that excessive force claims are evaluated "under a standard of objective reasonableness, judged from the perspective of a reasonable officer on the scene." App. at 15. The court set forth the *Graham* factors, stating that the proper application of the objective reasonableness test requires "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." App. at 16 (citing *Graham*, 490 U.S. at 396).

The Tenth Circuit correctly stated that the Fourth Amendment permits an officer to use deadly force only if there is "probable cause to believe that there is a threat of serious physical harm to the officer or to others." App. at 30 (punctuation and citations omitted). The court then set forth the test applied by the Tenth Circuit to assess the degree of threat the officer faces by considering a number of non-exclusive factors that include "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect." App. at 30 (citing *Estate of Larsen*, 511 F.3d at 1260). The court emphasized that these factors are "only aids in making the ultimate determination" of "whether from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force" and the primary focus of the court's inquiry "remains on whether the officer was in danger at the exact moment of the threat of force." App. at 31 (citations omitted).

Having correctly set forth the applicable law, the court then analyzed Officer White's conduct, from the perspective of a reasonable officer on the scene, using the three factors articulated in *Graham* to balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion, and the four factors listed in *Estate of Larsen* to assess the degree of threat the officer faced and

whether it was feasible to provide a warning. App. at 31-32. The court found that the first *Graham* factor, the severity of the crime at issue, weighed in favor of plaintiffs because Officer White knew prior to arriving at the Pauly home that it was unclear what, if any, crime had been committed during the road incident, that no exigent circumstances existed, and that there was insufficient evidence or probable cause to make an arrest. App. at 32.

The Tenth Circuit found that the second *Graham* factor, whether the suspect posed an immediate threat to the safety of the officers or others, also weighed in favor of plaintiffs. The court held that "because Officers White and Mariscal were behind cover some distance away in the dark before Samuel even opened the window and there is a fact issue as to whether Samuel fired his weapon, for purpose of analysis on summary judgment Samuel Pauly did not pose an *immediate* threat to the safety of the officers or others." App. at 33 (emphasis in original).

The Tenth Circuit found that the third *Graham* factor, whether the officer reasonably believed the suspect was actively resisting arrest or attempting to evade arrest by flight, weighed in favor of plaintiffs because Officer White knew that no exigent circumstances existed and that the officers did not have enough evidence or probable cause to make an arrest. App. at 35. Since the officers had not gone to the Pauly home to make an arrest, the brothers could not have been attempting to evade arrest by flight. *Id.*

The officers do not directly contest the Tenth Circuit's findings on any of the *Graham* factors.

The Tenth Circuit then turned to the four factors set out in *Estate of Larsen* to assess the degree of threat Officer White faced. The court found that the first and third factors supported plaintiffs, the second factor weighed in favor of Officer White, and the fourth factor was "somewhat neutral." App. at 35-36. The officers challenge the Tenth Circuit's analysis of the third and fourth factors.

The Tenth Circuit found that the third factor, the distance separating the officers and the suspect, supported plaintiffs because Officer White was at least fifty feet away in the dark and behind cover of a stone wall when he fired the fatal shot. App. at 36. The officers challenge the relevance of the distance of fifty feet when a suspect has a gun. Pet. at 25. This argument is not related to the question presented – whether the court analyzed Officer White's use of force from the perspective of a reasonable officer on the scene. Nonetheless, the Tenth Circuit did not just consider the distance between Samuel and Officer White; rather, it considered the fact that Officer White was behind cover of a stone wall, obscured by the rain and the dark, at least fifty feet away before Samuel even appeared with a weapon. The Tenth Circuit appropriately determined that an officer fifty feet away behind cover of a stone wall and obscured by rain and the dark is not facing the same degree of threat as an unprotected officer fifty feet away.

The officers argue that, when viewed from the perspective of an objectively reasonable officer, the fourth factor, the manifest intentions of Samuel, were "plainly hostile" and not "somewhat neutral." Pet. at 23. At first glance, a suspect sticking a gun out of a window in the general direction of an officer would appear to manifest hostile intentions. The entirety of the circumstances known to Officer White, however, caused the court to find that from Officer White's perspective, the manifest intentions of Samuel were unclear.

At the time Officer White approached the Pauly home, he knew 1) there had been a prior road incident; 2) there were no exigent circumstances requiring officers to go to the Pauly home at 11:00 p.m. and no probable cause for arrest; 3) the police cars were not visible from the Pauly home; 4) the Pauly home was in a rural, wooded location; 5) he had approached the home in the dark, using his flashlight intermittently, and the other officers were standing in the dark outside the home; 6) the rain, darkness and ambient lighting conditions made it difficult for the persons inside the home to see who was outside; and 7) he had not identified himself.[5] Based on the facts known to Officer White, the Tenth Circuit found that a reasonable officer would conclude that Daniel could believe that persons coming up to his house at 11:00 p.m. were connected to the road rage incident that had occurred a couple of hours previously

[5] Other facts found by the district court, including that Officer White was on the scene when coercive threats to invade the home were made, provide additional support for the Tenth Circuit's determination.

and that under these circumstances, the occupants of the house would feel a need to defend themselves and their property with the possible use of firearms as permitted under clearly established Supreme Court and New Mexico law. *See D.C. v. Heller*, 554 U.S. 570, 635 (2008) (the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home"); *State v. Boyett*, 185 P.3d 355, 358-59 (N.M. 2008) (defense of habitation has long been recognized in New Mexico and applies when an intruder is outside the home but endeavoring to enter it).

Given Officer White's knowledge of the circumstances that preceded Samuel pointing a gun out a window, the finding that "from Officer White's perspective, the manifest intention of Samuel Pauly was unclear" and, therefore, the fourth *Larsen* factor was "somewhat neutral" is correctly made from the perspective of a reasonable officer on the scene and supported by the facts as found by the district court.

Since it was undisputed that neither Officer White nor Officer Mariscal ordered Samuel to drop his weapon, the Tenth Circuit next considered whether such a warning was feasible. *See Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) ("if the suspect threatens the officer with a weapon . . . deadly force may be used if necessary to prevent escape, and if where feasible, some warning has been given"). The court started its analysis by considering the testimony of plaintiffs' expert witness, Glenn A. Walp, who found that five seconds was "an extensive amount of time" to provide a

warning. App. at 39-40. The court noted that Mr. Walp's testimony highlighted why a reasonable jury might conclude a warning was reasonable. App. at 39-40 & n.8. The court then cited to *Tenorio v. Pitzer*, 802 F.3d 1160 (10th Cir. 2015), where an officer, in the space of two or three seconds, provided three warnings to the suspect before shooting. App. at 40. The court contrasted the immediacy of the danger to the officer in *Tenorio*, who was unprotected in a "moderate sized room" with a man walking toward him with a knife despite repeated orders to drop it, with Officer White, who was "sequestered behind a rock wall some distance away in the dark and Samuel was aiming his gun through the open window of a lighted house toward a target obscured by the dark and rain." App. at 40-41. The court also found it significant that Officer White was in a protected position behind the rock wall before Samuel appeared with the gun. App. at 42-43.

Despite the fact that he was in a protected, concealed position, once Officer White saw Samuel in the window with a weapon, he focused solely on taking a single kill shot. He did not provide a warning. He did not observe what Samuel was doing. He did not consider the evolving circumstances (including the fact that Samuel had not fired his weapon even after Officer Mariscal fired at him) and did not even know whether Samuel had lowered the gun before he took the fatal shot. *See, e.g.*, *Thomas v. Durastanti*, 607 F.3d 655, 666 (10th Cir. 2010) ("circumstances may change within seconds eliminating the justification for deadly force").

The Tenth Circuit concluded that "a reasonable officer in Officer White's position would *not* have probable cause to believe there was an *immediate* threat of serious harm to himself or to Officer Mariscal, who was also behind cover, such that he could shoot Samuel Pauly through the window of his home without giving him a warning." App. at 45 (emphasis in original). As a result, the Tenth Circuit determined that a jury could conclude that Officer White's use of deadly force against Samuel was not objectively reasonable and violated the Fourth Amendment. *Id.*

The Tenth Circuit's analysis of the reasonableness of Officer White's conduct correctly applies controlling law from the Supreme Court and the Tenth Circuit to the unique circumstances and facts of this case as found by the district court. This decision is well-reasoned and correct and does not require this Court's review.

B. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS FROM THE TENTH CIRCUIT OR OTHER CIRCUITS

The analysis of excessive force claims to determine whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force is highly fact specific. *Scott v. Harris*, 550 U.S. 372, 383 (2007) (there is no easy-to-apply legal test for whether an officer's use of deadly force is excessive and the court must "slosh our way through the

fact-bound morass of reasonableness"). The officers cite a number of cases in which they assert courts, including the Tenth Circuit, found qualified immunity when an officer used deadly force against an armed suspect. None of these cases, however, has facts similar to the facts here. None of these cases involves officers surreptitiously approaching a home late at night when no exigent circumstances existed and there was no probable cause to make an arrest, inadequately identifying themselves, and yelling hostile and profane threats that they were going to invade the home. Police encounters with citizens in their homes late at night are qualitatively different than the types of encounters between identified officers and armed suspects in the cases cited by the officers.

The Tenth Circuit has noted that courts must be particularly stringent when late night encounters at a residence occur, stating "our Fourth Amendment jurisprudence counsels that, when a knock at the door comes in the dead of the night, the nature and effect of the intrusion into the privacy of the dwelling place must be examined with the greatest of caution." *United States v. Reeves*, 524 F.3d 1161, 1167, n.7 (10th Cir. 2008) (citing *United States v. Jerez*, 108 F.3d 684, 690 (7th Cir. 1997)). Courts have also noted the obvious risks of violent confrontations if residents of a home mistake police officers for intruders. *United States v. Combs*, 394 F.3d 739, 744 (9th Cir. 2005) (when officers fail to knock and announce, they risk the "violent confrontations that may occur if occupants of the home

mistake law enforcement for intruders"); *United States v. Spikes*, 158 F.3d 913, 925 (6th Cir. 1998) (same).

When citizens have the right to use force in defense of hearth and home, reasonable officers who have surreptitiously approached a home late on a dark and rainy night, who have failed to provide adequate identification, and who have yelled threatening and hostile statements that they are invading the home, would know that the residents of the home may believe they are under attack from intruders and may use force to defend their lives and their home. Under these circumstances, a reasonable officer on the scene, who is under cover of darkness and a stone wall fifty feet away, would know that he cannot use deadly force on a resident who points a handgun out the window of his home toward the unknown persons in his yard without providing a warning.

Courts in other circuits have found similar conduct to be objectively unreasonable. In a seminal case, *Yates v. City of Cleveland*, 941 F.2d 444 (6th Cir. 1991), an officer entered a dark hallway at a private residence at approximately 2:45 a.m., without identifying himself. The plaintiff and his brothers discovered the officer in the dark hallway and, believing the officer to be an intruder, knocked the officer back through the door. The officer fired his weapon in response, killing plaintiff. *Id.* at 445, 447. The Sixth Circuit concluded that it was objectively unreasonable for the officer to enter the area in that manner, and thus he was not entitled to qualified immunity. *Id.* The court drew this conclusion notwithstanding the officer's argument

that, at the time he shot the plaintiff, he reasonably believed that his life was in danger. *Id.* According to the Sixth Circuit, the act of entering a private residence late at night with no indication of identity was enough to show that the officer had unreasonably created the encounter that led to the use of force. *Id.*

In *Sledd v. Lindsay*, 102 F.3d 282 (7th Cir. 1996), seven police officers began executing a search warrant at the plaintiff's residence around 10:30 p.m. The plaintiff heard banging on the door and started to go downstairs. When the plaintiff was halfway down the stairs, the officers broke through the door. Fearing that they were intruders, the plaintiff raced back up the stairs and retrieved his .22 caliber sport rifle. When he turned back to the doorway of the room, he saw a man wearing blue jeans and a blue jacket standing there with a gun. After a split second, the man turned and ran. The plaintiff followed. As soon as the plaintiff exited the front door, still holding his rifle across his chest, the man turned and shot multiple rounds at the plaintiff. At no time during the encounter did the man identify himself as an officer.

The court denied qualified immunity for the officers because there were jury issues as to whether the officers announced their presence and whether a reasonable officer would have thought the plaintiff posed such a risk under all the circumstances that the immediate use of deadly force was justified. *Id.* at 288. The court found that the officers had unreasonably created a situation in which the plaintiff felt the need to arm

himself and resist people he believed to be intruders. *Id.*

Similarly, in *Estate of O'Bryan v. Town of Sellersburg*, No. 4:02-CV-238, 2004 WL 1234215, 2004 U.S. Dist. LEXIS 10160 (S.D. Ind. May 20, 2004), officers investigating a battery approached O'Bryan's home after midnight, concealing their presence. O'Bryan's mother encountered some of the officers in the garage and screamed. Upon hearing his mother scream, O'Bryan grabbed a gun and exited his apartment. On the steps, O'Bryan encountered an armed man in civilian clothing. The man did not identify himself as an officer but shouted at O'Bryan to drop his gun. When O'Bryan refused, the officer shot him three times. The court denied qualified immunity finding that if the officer shot O'Bryan on the steps of his home without warning and without identifying himself, a jury could find the use of deadly force objectively unreasonable. *Id.* at 12-13. The court also found that the law was clearly established that officers who failed to identify themselves in situations where they could be easily mistaken as intruders would not be entitled to the same deference in their use of force against those who reasonably feared them. *Id.*

The facts in this case are even more compelling than those in *Yates*, *Sledd*, and *O'Bryan* because the officers in this case had no probable cause or exigent circumstances to even be at the Pauly home late at night.

The cases cited by the officers provide no guidance in analyzing an encounter between officers and citizens in the sanctity of their home late at night when the officers approached the home under circumstances that could lead the occupants to believe that their home was being criminally invaded.

IV. THE TENTH CIRCUIT PROPERLY DEFINED CLEARLY ESTABLISHED LAW

After determining that the evidence was sufficient to establish an excessive force claim against Officer White, the Tenth Circuit considered whether the law was clearly established at the time of the violation. A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012) (quotation marks, alteration and citation omitted). "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001) (citation omitted). A right can be clearly established, however, without a controlling decision declaring the "very action in question . . . unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

This Court has held 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." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (internal punctuation omitted). Consequently, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.*; *see also Casey v. Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) ("The *Hope* decision shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional.") (internal quotations and citations omitted).

Following *Hope*, the Tenth Circuit adopted a sliding scale to determine when law is clearly established. *Casey*, 509 F.3d at 1284. "The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation. Thus, when an officer's violation of the Fourth Amendment is particularly clear from *Graham* itself, we do not require a second decision with greater specificity to clearly establish the law." *Id.* (citation omitted).

The Tenth Circuit found that *Graham*, *Garner* and their Tenth Circuit progeny, particularly *Allen v. Muskogee, Okla.*, 119 F.3d 837 (10th Cir. 1997), clearly established that the reasonableness of an officer's use of

force depends, in part, on whether the officer is in danger at the precise moment that he used force and that if a suspect threatens the officer with a weapon, a warning must be given before the use of deadly force where feasible. App. at 46.

In this case, an officer outside a home late on a dark, rainy night with no probable cause to arrest anyone and behind the cover of a stone wall fifty feet away, without warning, shot a person pointing a gun out of his well-lighted living room window toward unknown persons in his yard.[6] App. at 48. The Tenth Circuit found that "[a]ny objectively reasonable officer in this position would well know that a homeowner has the right to protect his home against intruders and that the officer has no right to immediately use deadly force in these circumstances." *Id.* The Tenth Circuit concluded that the conduct in this case was so obviously a violation of the Fourth Amendment from *Graham* and *Garner* and their Tenth Circuit progeny that, based on *Hope* and *Casey*, more specificity was not required to put an objectively reasonable officer on fair notice that he was not entitled to use deadly force unless he was in danger at the exact moment of the threat of force and that he was required, under the circumstances here, to warn Samuel to drop his weapon. App. at 49.

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[6] Again, other facts found by the district court, including that Officer White was on the scene when coercive threats to invade the home were made, provide additional support for the Tenth Circuit's findings.

The Tenth Circuit acknowledged that while this Court has cautioned lower courts not to define clearly established law too generally, it also held in *Hope* that in an obvious case, the *Garner* and *Graham* standards can clearly establish the answer, even without a body of relevant case law. App. at 46-47. This is such an obvious case. "[I]t is 'beyond debate' that an officer can't shoot and kill without good cause and while not endangered" and the court does not "define excessive force at 'a high level of generality' by including within excessive force such an egregious situation." App. at 123.

The officers cite to three Tenth Circuit cases as evidence that the law was not clearly established that Officer White could not use deadly force in the circumstances of this case. According to the officers, in these cases the Tenth Circuit held that officers were entitled to qualified immunity under similar circumstances as faced by the officers in this case. These cases were persuasively distinguished by the Tenth Circuit as involving officers who were not in protected positions and who had provided warnings prior to shooting. App. at 43-45. Further, none of these cases involved an unidentified officer outside a home late at night without probable cause under circumstances in which the occupants reasonably could mistake the officers for intruders.

Applying *Hope* and *Casey*, the Tenth Circuit correctly found that *Garner* and *Graham* applied with such obvious clarity to the conduct at issue that a case with further specificity was not necessary for the law to be clearly established. This determination is based

on valid Supreme Court and Tenth Circuit precedent carefully applied to the unique facts and circumstances of this case as determined by the district court.

The officers assert that over the past five years, the Court has been expanding the qualified immunity defense and routinely reversing circuit courts who deny qualified immunity. However, there must still be limits to the circumstances under which police officers can use deadly force against innocent citizens. It is a dangerous path the officers advocate, one that calls "reasonable" the use of deadly force against innocent citizens in the sanctity of their homes with no warning when the officers had no reason to be outside the home late at night, had not adequately identified themselves, and had shouted profane and hostile threats about an imminent invasion of the home. As stated by Judge Phillips "granting officers qualified immunity here – when there's a genuine issue of material fact whether the killing was unjustified – would create a new precedent with potentially deadly ramifications for *citizens* in this circuit." App. at 123 (emphasis in original).

CONCLUSION

Respondents Daniel T. Pauly, as Personal Representative of the Estate of Samuel Pauly, deceased, and Daniel B. Pauly, individually, respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

Attorneys for Respondents
O'FRIEL AND LEVY, P.C.

PIERRE LEVY
Counsel of Record
AIMEE BEVAN
644 Don Gaspar Avenue
Santa Fe, New Mexico 87505
Telephone: (505) 982-5929
Facsimile: (505) 988-5973
pierre@ofrielandlevy.com
aimee@ofrielandlevy.com

HUNT & MARSHALL
LEE R. HUNT
532 Old Santa Fe Trail
Santa Fe, New Mexico 87505
Telephone: (505) 954-4868
Facsimile: (505) 819-0022
lee@huntandmarshall.com

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