No. 17-1078

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In The

Supreme Court of the United States

DANIEL T. PAULY, et al.,

Petitioners,

v.

RAY WHITE, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

LEE R. HUNT, ESQ.
HUNT & MARSHALL, LLC
518 Old Santa Fe Trail, #501
Santa Fe, NM 87505
(505) 954-4868 – Telephone
(505) 819-0022 – Facsimile
lee@huntandmarshall.com

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

QUESTIONS PRESENTED

1. Under 42 U.S.C. § 1983, is a public official, whose reckless conduct proximately causes another official to violate a plaintiff's federally protected right, liable for the plaintiff's injuries, even though the latter official is entitled to qualified immunity?

2. When a public official violates clearly established law through his pre-seizure conduct, and the conduct causes the need to use deadly force, is the official protected by qualified immunity?

PARTIES TO THE PROCEEDING

Daniel T. Pauly, as personal representative of the Estate of Samuel Pauly, and Daniel B. Pauly, individually, petitioners on review, were the plaintiffs-appellees below.

Ray White, Michael Mariscal and Kevin Truesdale, respondents on review, were among the defendants-appellants below.

State of New Mexico, Department of Public Safety, is not a party to the appeal.

RULE 29.6 DISCLOSURE STATEMENT

No corporations are involved in this proceeding.

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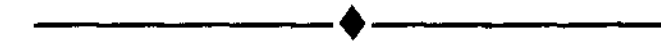
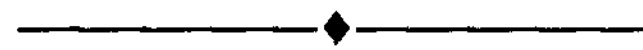
PETITION FOR A WRIT OF CERTIORARI

Petitioners, Daniel T. Pauly, as personal representative of the Estate of Samuel Pauly, deceased, and Daniel B. Pauly, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.



OPINIONS BELOW

The opinion of the court of appeals on remand (App. 1-59) is reported at *Pauly v. White* (*Pauly III*), 874 F.3d 1197 (10th Cir. 2017). This Court's opinion (App. 60-70) vacating and remanding the original court of appeals' opinion is reported at *White v. Pauly* (*Pauly II*), 137 S. Ct. 548 (2017). The original opinion of the court of appeals is reported at *Pauly v. White* (*Pauly I*), 814 F.3d 1060 (10th Cir. 2016). The memorandum opinions of the district court (App. 71-119) are not reported, but are available at *Pauly v. N.M. Dep't of Pub. Safety*, Civ. No. 12-1311, 2014 WL 12696630 (D.N.M. Feb. 10, 2014) and *Pauly v. N.M. Dep't of Pub. Safety*, Civ. No. 12-1311, 2014 WL 12694140 (D.N.M. Feb. 5, 2014).



JURISDICTION

The district court's jurisdiction was invoked under 28 U.S.C. § 1331. The judgment of the Court of Appeals was entered on October 31, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

Section 1983 provides in pertinent part as follows:

> 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 * * * .

42 U.S.C. § 1983.

INTRODUCTION

This case presents two issues (1) whether, under 42 U.S.C. § 1983, a public official who engages in unconstitutional conduct, and through that conduct proximately causes the deprivation of a federally protected right is protected because another public official, who fired the fatal shot, is entitled to qualified immunity; and (2) when an officer, through reckless, pre-seizure conduct, causes the need to use deadly force, must the

court consider the pre-seizure conduct in determining whether qualified immunity protects the officer?

Three New Mexico State Police Officers – Michael Mariscal, Kevin Truesdale, and Ray White – caused the death of Samuel Pauly. White shot Pauly, killing him, and both Mariscal and Truesdale, through their reckless conduct, proximately caused Pauly's death. Pauly's survivors brought a § 1983 claim; the district court denied the officers' motions for qualified immunity; and the court of appeals affirmed.

Last term, this Court granted the officers' petition for certiorari, vacated the court of appeals' opinion, and remanded. This Court held that, on the record described by the court of appeals' panel, Officer White did not violate a clearly established right. This Court, however, did not reach any holding as to Officers Mariscal and Truesdale. Accordingly, Justice Ginsburg emphasized, in a concurring opinion, that "the Court's opinion * * * does not foreclose the denial of summary judgment to Officers Truesdale and Mariscal." *Pauly II*, 137 S. Ct. at 553.

On remand, the court of appeals applied this Court's opinion to entail exactly what Justice Ginsburg said it did not. After finding that Officer White participated in the reckless, pre-seizure conduct and violated Pauly's Fourth Amendment right against excessive force, and after acknowledging "plaintiffs' theory of liability for Officers Mariscal and Truesdale, that their reckless conduct leading up to the shooting caused Officer White to use constitutionally excessive force", the

panel majority granted summary judgment to Officers White, Mariscal and Truesdale. *Pauly III*, 874 F.3d at 1223 (citing *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1549 (2017)). The panel majority held that, "Officer White is entitled to qualified immunity because his alleged use of excessive force was not clearly established," and therefore "there is no basis for holding either [Officer Mariscal or Truesdale] liable under § 1983." *Ibid.* That holding contravenes not only Justice Ginsburg's understanding of this Court's opinion but also well-settled interpretations of § 1983.

To reach its holding as to Officers Mariscal and Truesdale, the panel majority applied a new theory of qualified immunity: where one officer's conduct proximately causes another officer to violate a person's federally protected right, if the latter officer enjoys qualified immunity from suit, then the former officers' conduct will not be considered. *See Pauly III*, 874 F.3d at 1223. Instead of applying qualified immunity to individual conduct, the panel majority held that Officers Mariscal and Truesdale enjoyed qualified immunity because Officer White enjoyed qualified immunity. The panel majority's newfound qualified immunity rule is in error, and deeply misunderstands this Court's interpretation of § 1983.

As to Officers Mariscal's and Truesdale's conduct, the panel majority's holding is in clear derogation of the clearly established law that an officer is liable under § 1983 for *causing* a constitutional deprivation. First, the panel majority overlooked that, like liability under § 1983, qualified immunity is personal – i.e., it

applies based on the *conduct* of each officer. The panel majority applied *per se* one officer's qualified immunity to a different officer, for different conduct. Second, the holding violates the common law rule, which has its roots in the time of the statute's enactment, that, "[i]f two persons would otherwise be liable for a harm, one of them is not relieved from liability by the fact that the other has * * * an immunity from liability to the person harmed." Restatement (Second) of Torts § 880 (1979); accord Restatement (First) of Torts § 880 (1939). Third, the panel majority misperceived this Court's doctrine in *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, supportive of the panel majority's new-found theory. Finally, the panel majority's decision is a lonely outlier among federal appellate precedents addressing § 1983 liability in excessive force cases.

As to Officer White's conduct, the panel majority corrected the error in *Pauly I*, finding "Officer White's reckless or deliberate conduct unreasonably created a need for him to shoot Samuel Pauly." *See Pauly III*, 874 F.3d at 1213, 1222. Because Officer White's conduct set in motion a series of events that led to an unconstitutional use of excessive force and his pre-seizure conduct was clearly established as unconstitutional, qualified immunity should not protect against the excessive force claim. Any other result ignores the pre-seizure conduct as part of the "totality of the circumstances" analysis under *Graham v. Connor*, 490 U.S. 386 (1989), and shields clearly unconstitutional conduct by impermissibly dissecting out portions of an officer's conduct.

This Court should exercise its certiorari jurisdiction in this case. The panel majority clearly found that Samuel Pauly's death was unconstitutional and that all officers were responsible; but, because it misinterpreted § 1983, qualified immunity, the panel majority closed the door on a valid claim. The panel majority's decision should not be allowed to take root.

STATEMENT OF THE CASE

A. Factual Background

On the night of October 4, 2011, New Mexico State Police Officers White, Mariscal, and Truesdale were investigating a road rage incident involving Daniel Pauly when they approached the home he shared with his brother, Samuel. *Pauly III*, 874 F.3d at 1204. Their home did not have direct access to the roadway, but was instead located in the back of a property behind another home located on the same property. *Ibid.* Recognizing that there was no probable cause or exigent circumstances justifying a search of the home or the arrest of Daniel, the officers decided instead to attempt to talk with Daniel. *Id.* at 1203. The officers did not activate their security lights, used their flashlights only intermittently, and approached the home in a manner in which neither brother knew that the officers were on the property. *Id.* at 1204. Officers Truesdale and Mariscal only activated their flashlights as they approached the front door of the house. *Ibid.* Officer White was an active participant in the police

action of surrounding the home and shouting commands to the occupants of the home. *Id.* at 1222.

The Pauly brothers saw people moving outside of their home, and the beams of the two flashlights, but did not know that those persons were police officers. *Pauly III*, 874 F.3d at 1204. The brothers yelled several times, asking the people outside to identify themselves. *Ibid.* Rather than doing so, however, the officers laughed and stated: "[W]e got you surrounded. Come out or we're coming in." Officer Truesdale later shouted, "Open the door, State Police, open the door", while Officer Mariscal later shouted, "Open the door, open the door." *Ibid.* Because of the commotion, the Pauly brothers did not hear anyone announce "State Police." *Ibid.*

Fearful for their lives, the Pauly brothers decided to call 911. *Pauly III*, 874 F.3d at 1204. Before they could do so, however, they heard one of the officers yell, "We're coming in. We're coming in." *Id.* at 1205. Believing that entry to their home was imminent, Samuel retrieved a loaded handgun for himself and a shotgun and ammunition for Daniel. *Ibid.* One of the brothers shouted, "We have guns," and Daniel ran towards the back of the house. *Ibid.* Officer Truesdale then positioned himself towards the rear of the house, while Officer White barricaded himself between a stone wall located fifty feet from the front door, and Officer Mariscal hid behind one of the brother's trucks. *Ibid.*

Daniel then opened the back door of the house, fired two warning shots, and screamed loudly in an

attempt to scare the unidentified individuals away from his home. *Pauly III*, 874 F.3d at 1205. Shortly after the warning shots were fired, Samuel pointed a handgun out of the front window, unknowingly pointing the weapon in the direction of Officer White. *Ibid.* Officer Mariscal then shot at Samuel, but missed. *Ibid.* Four to five seconds after Officer Mariscal shot at Samuel, Officer White shot Samuel from his covered position fifty feet away. *Ibid.* Samuel died.

B. Proceedings in the District Court

Daniel T. Pauly (Samuel's and Daniel's father), as the personal representative of the estate of Samuel Pauly, and Daniel B. Pauly, on behalf of himself, filed suit for damages against Officers White, Mariscal, and Truesdale, alleging that the officers used unconstitutionally excessive force during their encounter with Samuel and Daniel. *Pauly v. New Mexico Dep't of Pub. Safety*, 2014 WL 12694140, at *1 (D.N.M. Feb. 5, 2014). The three officers moved for summary judgment, asserting that they were entitled to qualified immunity for their actions. *Id.* at *1 (White); *Pauly v. New Mexico Dep't of Pub. Safety*, 2014 WL 1269663, at *1 (D.N.M. Feb. 10, 2014) (Mariscal and Truesdale). Before the district court, the defendants analyzed the claims separately, asserting that they were each entitled to qualified immunity on different grounds. *Ibid.* The district court issued two orders. The first denied qualified immunity for Officer White, determining that there were genuine disputes of material facts regarding whether Officer White unconstitutionally used

excessive force when he shot and killed Samuel Pauly. *Pauly*, 2014 WL 12694140, at *8. In the second order, the district court rejected qualified immunity for Officers Mariscal and Truesdale because there were genuine disputes of material facts regarding whether "the Officers' conduct before the shooting was reckless and unreasonably precipitated Officer White's need to shoot Pauly." *Pauly*, 2014 WL 1269663, at *6-7. The district court held that, on the record facts, "a reasonable jury could find that Officers Truesdale's and Mariscal's conduct caused Samuel Pauly to be deprived of his Fourth Amendment right to be free from excessive force." 2014 WL 12696630, at *7. Accordingly, the district court denied granting summary judgment to Officers Mariscal and Truesdale on Pauly's § 1983 claim. *Ibid.*

C. The Court of Appeals' Original Decision

The officers appealed the district court's orders denying qualified immunity. The panel majority of the court of appeals analyzed Officer White's actions separately from Officers Mariscal and Truesdale. As to Officer White, the panel majority determined that, given the record facts, a jury could reasonably conclude that his "conduct was objectively unreasonable and violated the Fourth Amendment," *Pauly III*, 874 F.3d at 1027 (citing *Pauly I*, 814 F.3d at 1082), and that Officer White's conduct violated a clearly established constitutional right when he fired his weapon at Samuel without first giving a warning, *id.* at 1207-1208.

The panel majority of the court of appeals then determined that Officers Mariscal and Truesdale would be liable if "their conduct immediately preceding the shooting was the 'but-for' cause of Samuel Pauly's death, and if Samuel Pauly's act of pointing a gun at the officers was not an intervening act that superseded the officer's liability." *Pauly I*, 814 F.3d at 1072 (citing *Trask v. Franco*, 446 F.3d 1036 (10th Cir. 2006)). The panel majority concluded that Mariscal and Truesdale were not entitled to qualified immunity, because there were "disputed facts * * * concerning whether the officers properly identified themselves and whether the brothers knew Officers Mariscal and Truesdale were intruders or state police." *Id.* at 1074. The panel majority also determined that the law was clearly established, because *Trask* held in 2006 that "an officer would be held liable for any conduct that [was] the proximate cause of a constitutional deprivation." *Pauly III*, 874 F.3d at 1207.[1]

D. This Court's Vacatur and Remand

The three officers petitioned this Court for certiorari. This Court granted the petition, vacated the court of appeals' opinion, and remanded the case for reconsideration. This Court held that Officer White was entitled to qualified immunity, because:

> Clearly established law does not prohibit a reasonable officer who arrives late to an

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[1] The officers petitioned for rehearing en banc, which was denied on a split vote. *Pauly v. White*, 817 F.3d 715 (10th Cir. 2016).

> ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here.

Pauly II, 137 S. Ct. at 552.

This Court's opinion regarding Officer White's role was based on the court of appeals' misrepresentation of the "portrayal of the events" regarding Officer White's role in the pre-seizure conduct. On remand, in *Pauly III*, the panel majority dramatically changed its findings regarding the extent of Officer White's conduct.

This Court did not address the court of appeals' opinion regarding Mariscal and Truesdale. In fact, Justice Ginsburg stated in a concurring opinion that she "join[s] the Court's opinion on the understanding that it does not foreclose the denial of summary judgment to Officers Truesdale and Mariscal," and that the "Court of Appeals emphasized, repeatedly, that fact disputes exist on the question whether Truesdale and Mariscal 'adequately identified themselves' as police officers before shouting 'Come out or we're coming in.'" *Id.* at 553. Accordingly, this Court's opinion did not foreclose Officer Mariscal's and Officer Truesdale's liability for proximately causing the death of Samuel Pauly.

E. The Court of Appeals' Decision on Remand

On remand, upon close observation of the record, the panel majority of the court of appeals concluded that Officer White violated Samuel Pauly's Fourth Amendment right against excessive force. Then, in addressing Officer White's claim for qualified immunity, the panel majority determined that White was entitled to immunity, because, even though his use of deadly force was not objectively reasonable, *Pauly III*, 874 F.3d at 1222, "there is no case close enough on point to make the unlawfulness of [Officer White's] actions apparent." *Id.* at 1223 (quotation marks and citation omitted). Accordingly, the panel majority concluded that, even though Officer White violated Samuel's Fourth Amendment right against excessive force by shooting and killing him, and even though Officer White's actions recklessly created the need for him to use deadly force, Officer White was entitled to qualified immunity because it was not clearly established that Officer White's conduct, *at the time of the shooting*, was unconstitutional. *Ibid.* Petitioners seek review of this holding.

Unlike its opinion relied on by this Court, in *Pauly III*, the panel majority found that Officer White's own reckless conduct "unreasonably created a need for him to shoot Samuel Pauly." The panel majority made clear that its misrepresentation of facts occurred because it "was misled by the erroneous assertions about the record by the defendants." The panel majority corrected this error in *Pauly III*, finding that:

> Thus, contrary to our determination in *Pauly I*, we are now persuaded a reasonable jury could find that Officer White participated in the events leading up to the armed confrontation and heard the other officers threaten the brothers by saying, "Come out or we're coming in." A reasonable jury could thus conclude that Officer White acted recklessly by precipitating the need to use deadly force.

Pauly III, 874 F.3d at 1211-1213 (citations omitted). The panel majority's correction of the record undermines the analysis made by this Court. Instead of arriving late, Officer White was an active participant in the reckless conduct that led to the unconstitutional shooting. Because his pre-seizure conduct caused the need to use deadly force, the proper qualified immunity analysis must consider Officer White's conduct in totality.

The panel majority then considered the claims against Officers Mariscal and Truesdale in summary fashion. Despite pronouncing that Officers Mariscal's and Truesdale's assertions of qualified immunity should be analyzed separately from Officer White, the panel majority held that, because "Officer White is entitled to qualified immunity because his alleged use of excessive force was not clearly established in the circumstances of this case," "[i]t therefore cannot serve as the basis of liability for Officers Mariscal and Truesdale." *Pauly III*, 874 F.3d at 1223 (citing *Mendez*, 137 S. Ct. at 1549). On that basis alone, the panel majority held that Officers Mariscal and Truesdale were

entitled to qualified immunity. *See ibid.* Petitioners also seek review of this holding.

REASONS FOR GRANTING THE PETITION

I. The Decision of the Tenth Circuit as to Officers Mariscal and Truesdale Contravenes This Court's § 1983 Rulings.

Samuel Pauly was deprived of his Fourth Amendment right to be free from excessive force. "The first inquiry in any § 1983 suit * * * is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" *Baker v. McCollan*, 443 U.S. 137, 140 (1979) (quoting § 1983). The panel majority resolved that inquiry, holding "Officer White's use of deadly force was not objectively reasonable and violated Samuel Pauly's constitutional right to be free from excessive force." *Pauly III*, 874 F.3d at 1222.

Officers Mariscal and Truesdale are liable under § 1983 for proximately causing the violation of Samuel Pauly's Fourth Amendment right. By its terms, § 1983 authorizes the imposition of liability upon a public official who, acting under the color of state law, "subjects, or *causes to be subjected*, any citizen * * * to the deprivation of any rights" protected by federal law. § 1983 (emphasis added); *see also Baker*, 443 U.S. at 142 ("[A] public official is liable under § 1983 only if he *causes* the plaintiff to be subjected to deprivation of his constitutional rights.") (quotation marks and citation omitted). Because § 1983 is "read against the

background of tort liability that makes a man responsible for the natural consequences of his actions," *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled on other grounds by Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658 (1978), this Court imposes a proximate cause requirement to establish § 1983 liability, *see Brower v. County of Inyo*, 489 U.S. 593, 599 (1989) (citing *Martinez v. California*, 444 U.S. 277, 285 (1980)); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305-306 (1986) (noting that common-law principles control the issuance of damages under § 1983); *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (stating that § 1983 "creates a species of tort liability").

While the panel majority acknowledged "plaintiffs' theory of liability for Officers Mariscal and Truesdale, that their reckless conduct leading up to the shooting caused Officer White to use constitutionally excessive force," the panel majority granted summary judgment to Officers Mariscal and Truesdale. *Pauly III*, 874 F.3d at 1223. The panel majority held that, "Officer White is entitled to qualified immunity because his alleged use of excessive force was not clearly established," therefore "there is no basis for holding either [Officer Mariscal or Truesdale] liable under § 1983." *Ibid.* Instead, under § 1983 because Officer White's conduct was unconstitutional, it can serve a basis to hold either Officer Mariscal or Truesdale liable under § 1983, if they set in motion the events proximately causing the constitutional violation.

A. The panel majority's decision ignores this Court's doctrine that, under § 1983, both liability and immunity are personal, meaning that the actions of each public official are subject to independent assessment

Despite finding a constitutional violation, the panel majority held that "Officer White's . . . alleged use of excessive force was not clearly established in the circumstances of this case . . . [and] therefore cannot serve as the basis of liability for Officers Mariscal and Truesdale." *Pauly III*, 874 F.3d at 1223. The panel majority's opinion completely absolves Officers Truesdale and Marsical based on Officer White's qualified immunity. Giving the officers the benefit of a different officer's immunity, in the face of a constitutional violation, is at odds with established principles of law. This panel majority's holding conflicts with this Court's instruction to analyze each officer's conduct independently.

A governmental actor may be liable for the constitutional violations that another committed where the actor "set in motion a series of events that the defendant[s] knew or reasonably should have known would cause others to deprive the plaintiff of [his] constitutional rights." *Trask*, 446 F.3d at 1046 (alterations original) (quotation marks and citation omitted); *see also Monroe v. Pape*, 365 U.S. at 187 (holding that § 1983 liability should be "read against the background of tort liability that makes a man responsible for the natural consequences of his actions").

A fundamental principle of qualified immunity analysis is that clearly established law must put beyond all doubt that an officer's respective *conduct* is unlawful. *See Saucier v. Katz*, 533 U.S. 194, 202 (2001). Each public official is entitled to an independent analysis of the qualified immunity doctrine to his specific actions. *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987) ("[W]hether an official protected by qualified immunity may be held personally liable for allegedly unlawful official action turns on the 'objective legal reasonableness' of *the action*, assessed in light of the legal rules that were 'clearly established' at the time it was taken.") (emphasis added) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982)). The analysis of Officers Mariscal's and Truesdale's *conduct*, under principles of qualified immunity, was not undertaken by the panel majority in *Pauly III*. And because Officer White's conduct was unconstitutional, it can serve as the basis for Officer Mariscal's and Truesdale's liability – without regard to whether Officer White is protected by immunity.

The focus of the qualified immunity analysis is whether Officers Mariscal's and Truesdale's reckless conduct set in motion the events leading to a constitutional violation. This inquiry was undertaken by both the district court and the Court of Appeals in *Pauly I*. In both instances, the courts found Mariscal's and Truesdale's conduct to have been reckless or deliberate and to have set in motion the events leading to Samuel

Pauly's death, anchoring § 1983 liability.[2] This Court's opinion in *Pauly II* specifically did not overturn those decisions.

By simply applying Officer White's qualified immunity to Officers Mariscal's and Truesdale's individual conduct, the panel majority's opinion improperly applied one officer's qualified immunity to the independent, unlawful conduct of other officers. But qualified immunity is a personal defense, such that each officer's respective conduct must be individually analyzed in determining whether qualified immunity applies. One officer's immunity does not *per se* apply to all other officers involved.[3] Unless this Court

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[2] Moreover, Tenth Circuit precedent establishes clear circumstances where the officers who precipitated a constitutional violation are liable, despite no liability for the seizing officer. In *Trask v. Franco*, two probation officers called a NMSP officer to arrest Mr. Trask. The arrest was made by the NMSP officer, despite the fact that the warrant was not valid. Suit was filed against the probation officers, and not the NMSP officer who carried out the arrest. The probation officers argued they could not be held liable because they did not "personally participate in Mr. Trask's detention or arrest," which was carried out by the NMSP officer. *Trask*, 446 F.3d at 1045. The court held otherwise, finding that if the probation officers "set in motion a series of events" that caused the constitutional violation, then they were liable – without regard to the fact that the NMSP officer was not liable. *Id.* at 1046.

[3] It is well established that, under § 1983, liability is personal; each government official is only liable for his or her own misconduct, and each defendant's conduct must be independently assessed. See *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) ("[E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct.") Mirroring liability under the statute, qualified immunity – just like the common law tort

intervenes, other courts will be compelled to analyze qualified immunity by lumping several officers together, which will result in unconstitutional conduct going without remedy, resulting in findings of no qualified immunity when the individual conduct dictates otherwise.

B. The panel majority's decision conflicts with this Court's instruction to read § 1983 in harmony with the common law

The panel majority's holding conflicts with this Court's instruction to read § 1983 "'in harmony with general principles of tort immunities and defenses.'" *Filarsky v. Delia*, 566 U.S. 377, 389 (2012) (quoting *Imbler*, 424 U.S. at 418); *see also Filarsky*, 566 U.S. at 389 (instructing courts to "proceed[] on the assumption that common-law principles of * * * immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so") (omission original) (quoting *Pulliam v. Allen*, 466 U.S. 522, 529 (1984)). At least since *Pierson v. Ray*, this Court has read § 1983 as reflecting common law tort defense and immunity principles. 386 U.S. 547 (1967). The *Pierson* Court held that the defense of good faith was available to officers in a § 1983 action, because that defense was available at common law. *Id.* at 555-557 (citing Restatement (Second) of Torts § 121 (1965)). The common law of torts provides both a source of and a limit to the defenses and immunities

immunities that are its doctrinal parents – is also personal. As such, each defendant's assertion of qualified immunity merits a separate analysis, based on that defendant's respective conduct.

available to public officials under § 1983. Compare *Filarsky*, 566 U.S. at 383-384 ("Our decisions have recognized similar immunities under § 1983, reasoning that common law protections 'well grounded in history and reason had not been abrogated by covert inclusion in the general language' of § 1983.") (quoting *Imbler*, 424 U.S. at 418), with *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) ("'[O]ur role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice.'") (citation omitted), and *Tower v. Glover*, 467 U.S. 914, 922-923 (1984) ("We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy.").

The panel majority's holding – that Officers Mariscal or Truesdale are not liable because Officer White is immune from suit – does not sound in the common law; to the contrary, it is clear derogation thereof. According to both the First and Second Restatement of Torts, "[i]f two persons would otherwise be liable for a harm, one of them is not relieved from liability by the fact that the other has * * * an immunity from liability to the person harmed." Restatement (Second) of Torts § 880 (1979); accord Restatement (First) of Torts § 880 (1939). The Restatement rule "applies to situations in which one who, because * * * of a general immunity from tort liability, is not civilly responsible for an act that except for the immunity would have created liability, and in which there is another whose conduct is also a legal cause of the harm."

Restatement (Second) of Torts § 880 cmt. a; *see also* Restatement (First) of Torts § 880 cmt. a. The separate actions of Officers White, Mariscal and Truesdale are each legal causes of the deprivation of Pauly's right. Under the Restatement rule, Officer White's immunity from suit does not relieve Officers Mariscal and Truesdale from liability. *See* Restatement (Second) of Torts § 880; Restatement (First) of Torts § 880.

The roots of the Restatement rule extend to the time of § 1983's enactment. *See* Civil Rights Act of 1871, 17 Stat. 13, 13, § 1 (Apr. 20, 1871). Late-nineteenth century jurists and tort scholars would recognize the panel majority's holding as error. In *Burns v. Kirkpatrick*, 51 N.W. 893 (Mich. 1892), for example, the Supreme Court of Michigan held that, in a tort action for "trespass *de bonis asportatis*," the defendant was not immune from suit because he was acting under the direction of the plaintiff's spouse, who enjoyed common-law immunity from suit. *Id.* at 893. In *Burns*, the plaintiff, Mr. Burns, lived with Mrs. Burns, his spouse, their three children, and his mother-in-law. The defendant, Burns's brother-in-law, went to Burns's house; a fight ensued; Burns ran away; and the defendant removed Mrs. Burns and sundry household goods to the defendant's house. Burns sued for the value of the goods taken, and the defendant argued that Burns could not recover, because the defendant acted under the supervision and instruction of Mrs. Burns, who enjoyed spousal immunity from suit. The court rejected the defendant's "principal defense," reasoning that "[t]he act of removal was a tort, and the defendant is

liable, notwithstanding he acted under the direction of Mrs. Burns." *Ibid.*; accord Restatement (Second) of Torts § 880 (citing *Burns*, 51 N.W. 89).[4]

In the era of § 1983's enactment, the common law of torts recognized that, when a tort was committed by at least two tortfeasors, one tortfeasor's immunity from suit or defense from liability does not preclude the plaintiff from seeking recovery from the other tortfeasors. *See* T. Cooley, *Law of Torts* 133-134 (1880); 2 C.G. Addison & H.G. Wood, *Treatise on the Law of Torts* 233-234 (1876); 2 F. Hillard, *The Law of Torts or Private Wrongs* 441 (1859). Restatement § 880 as a direct corollary of the principle, which late-nineteenth century commentators discussed, that one tortfeasor is not protected from liability because the plaintiff does not (or cannot) file suit against another tortfeasor. Accordingly, that rule provides the light in which § 1983 is interpreted. *See Kalina v. Fletcher*, 522 U.S. 118, 123 (1997) ("Congress intended the statute to be construed in the light of common-law principles that were well

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[4] In *Owen v. City of Independence*, this Court reviewed another late-nineteenth century example of the Restatement rule that one tortfeasor's immunity does not necessarily protect another tortfeasor – *viz.*, that "the good-faith immunities enjoyed by legislators, judges, governors, sheriffs, and other public officials" did not extend to protect a municipal corporation from tort liability. 445 U.S. 622, 643 (1980) (citations omitted); see *id.* ("Nowhere in the debates * * * is there a suggestion that the common law excused a city from liability on account of the good faith of its authorized agents, much less an indication of a congressional intent to incorporate such an immunity into the Civil Rights Act.").

settled at the time of its enactment.") (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951)).

Indeed, this Court has interpreted § 1983 consistently with the Restatement rule providing that "[i]f two persons would otherwise be liable for a harm, one of them is not relieved from liability by the fact that the other has * * * an immunity from liability to the person harmed." Restatement (Second) § 880. Over the course of several cases, this Court's decisions reflect that the immunity of a person who directly causes the deprivation of a federally protected right does not protect from liability the public official or entity that proximately caused the deprivation. *See, e.g.*, *Owen*, 445 U.S. at 651; *Martinez v. California*, 444 U.S. 277, 285 (1980).

Martinez shows that this Court interprets § 1983 consistently with the Restatement rule. The case arose out of the murder of a 15-year-old girl by a parolee. 444 U.S. at 279. Her survivors brought a § 1983 claim against the state parole officers who decided to release the parolee. *Id.* at 283-284. The *Martinez* Court held "that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law." *Id.* at 285. As one prominent commentator explains, "*Martinez* does not hold that an official sued under § 1983 may never be held responsible for injuries directly inflicted by a private individual; § 1983 liability may be imposed when the private individual's conduct was a reasonably foreseeable consequence of the defendant's conduct." 1A Martin A. Schwartz, *Section*

1983 Litigation: Claims and Defenses § 6.03[A], at 6-13 (4th ed. 2017). And the *Martinez* Court certainly did not hold that the parole officers were not liable because the parolee, who directly caused the plaintiffs' injury, was not liable under § 1983 (as a private person not acting under color of law). By leaving open the question of a public official's liability under § 1983 for causing a private person to cause the deprivation of a federally protected right, the *Martinez* Court charted a course consistent with the common-law rule that one tortfeasor's immunity or defense does not extend to shield another tortfeasor from liability.

In sum, under the common law, where two tortfeasors each legally cause the plaintiff's injury, the immunity of one tortfeasor does not protect the other from liability. *See, e.g.*, Restatement (Second) of Torts § 880; Restatement (First) of Torts § 880; accord *Burns*, 51 N.W. at 893. This Court reads § 1983 "in harmony" with that common-law rule. *Filarsky*, 566 U.S. at 389; *see, e.g.*, *Martinez*, 444 U.S. at 285; *Owen*, 445 U.S. at 651. In direct conflict with both the common-law rule and this Court's instruction regarding the correct interpretation of § 1983, the panel majority's holding allows one tortfeasor's qualified immunity to protect all tortfeasors from § 1983 liability. That holding will spread like crown fire through future multiple-defendant § 1983 cases. This Court should grant certiorari to extinguish the error before it consumes other victims' remedies.

C. The Decision of the Tenth Circuit Misperceives This Court's Doctrine in *County of Los Angeles v. Mendez*

Tellingly, the panel majority cited only one case, *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017), to ground its award of summary judgment to Officers Mariscal and Truesdale. But the panel majority misperceived *Mendez*. This Court's opinion does not support the holding that Officer White's qualified immunity from Pauly's excessive force claim necessarily immunizes Officers Mariscal and Truesdale from § 1983 liability.

In *Mendez*, two sheriffs deputies, while conducting a search for a parolee-at-large, entered a shack in which Mr. Mendez and Ms. Garcia were napping. 137 U.S. at 1544. The deputies entered the abode without a warrant and failing to announce their presence before entry. *Ibid.* Upon the deputies' warrantless and unannounced entry, Mr. Mendez rose from the bed, holding a BB gun. *Id.* at 1544-1545. The deputies opened fire, shooting Mr. Mendez and Ms. Garcia multiple times. *Id.* at 1545.

Mr. Mendez and Ms. Garcia sued the deputies under § 1983, pressing three Fourth Amendment claims: excessive force, warrantless entry, and a knock-and-announce claim. 137 U.S. at 1545. The Ninth Circuit concluded that the deputies were entitled to qualified immunity on the knock-and-announce claim, but held that "basic notions of proximate cause" support liability, because it was reasonably foreseeable that the

deputies "would meet an armed homeowner when they 'barged into the shack unannounced.'" *Id.* at 1546 (citation omitted). This Court granted certiorari, vacated the Ninth Circuit's opinion, and remanded. *Id.* at 1549.

After concluding that the plaintiffs could not recover on their excessive force and knock-and-announce claims, this Court focused on the plaintiffs' warrantless-entry claim, observing, "if the plaintiffs in this case cannot recover on their excessive force claim, that will not foreclose recovery for injuries proximately caused *by the warrantless entry*." 137 U.S. at 1548. Reviewing the Ninth Circuit's holding that "the deputies are liable for the shooting under basic notions of proximate cause," this Court determined that the appellate court did not connect its proximate-causation analysis to the deputies' warrantless entry. *Ibid.* (citation omitted). The Ninth Circuit's proximate-causation analysis instead "appear[ed] to focus on the risks foreseeably associated with the failure to knock and announce, which could not serve as a basis for liability since the * * * officers had qualified immunity on that claim." *Id.* at 1549. "On remand," this Court instructed, "the court should revisit the question whether proximate cause permits respondents to recover damages for their shooting injuries based on the deputies' failure to secure a warrant at the outset." *Ibid.*

In this case, the panel majority relied on the *Mendez* Court's premise that, because the defendant officers enjoyed qualified immunity from plaintiffs' knock-and-announce claim, the same officers were not liable for the injuries that their knock-and-announce

violation proximately caused. *See Pauly III*, 874 F.3d at 1223 (citing *Mendez*, 137 S. Ct. at 1549). That premise is uncontroversial, but it does not control whether Officers Mariscal and Truesdale may piggyback on Officer White's qualified immunity.

In *Mendez*, this Court intimated that officers who enjoy qualified immunity from a plaintiff's knock-and-announce claim are not liable for the plaintiff's injuries that their failure to announce proximately caused. *Mendez* did not hold that the officers were, therefore, entitled to qualified immunity on all claims. *Mendez* does not speak to whether, when one officer (*e.g.*, White), who directly causes the violation of a plaintiff's federal right, enjoys qualified immunity from an excessive-force claim, other officers (*e.g.*, Mariscal and Truesdale) are necessarily not liable for proximately causing the deprivation of the plaintiff's constitutional right. Accordingly, *Mendez* – the only authority the panel majority cited to justify its erroneous holding – does not support an award of summary judgment as to Officers Mariscal and Truesdale.

II. The Panel Majority's Holding is an Outlier Among the Decisions of the Federal Courts of Appeal and Should not be Allowed to Take Root.

The panel majority's holding is an erroneous outlier among federal appellate opinions addressing the § 1983 liability of non-shooting officers in multi-defendant, police shooting actions. Following this

Court's interpretation of § 1983, the federal courts of appeal have uniformly held – particularly in police shooting cases – that an officer is liable for proximately causing the excessive use of force in violation of the Fourth Amendment. *See, e.g.*, *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) ("Police officers that unreasonably create a physically threatening situation in the midst of a Fourth Amendment seizure cannot be immunized for the use of deadly force."); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 560-561 (1st Cir. 1989) ("The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.") (citation omitted); *Grandstaff v. Borger*, 767 F.2d 161, 168 (5th Cir. 1985) ("Each participant was as much at fault as the others, all are liable for the foreseeable consequences."). The panel majority's holding as to Officers Mariscal and Truesdale conflicts in principle with those opinions. And while § 1983 liability cannot be imposed on any public officer or municipal entity "[i]n the absence of any underlying use of excessive force," *Hinkle v. City of Clarksburg*, 81 F.3d 416, 420 (4th Cir. 1996) (citation omitted), that doctrine cannot support the panel majority's grant of summary judgment to Officers Mariscal and Truesdale, because the panel majority expressly held that "Officer White's use of deadly force was not objectively reasonable and violated Samuel Pauly's constitutional right to be free from excessive force." *Pauly III*, 874 F.3d at 1222. The panel majority's

decision, therefore, has no place in the garden of federal appellate precedent. This Court should uproot it before it spreads.

Here is why: Section 1983 is the central remedy to recover from police shootings that violate the Fourth Amendment. Police shootings are on the rise. *See, e.g.*, Kimberly Kindy et al., "*Fatal shootings by police are up in the first six months of 2016*," WASHINGTON POST (Jul. 7, 2016). As a result, plaintiffs will continue to assert § 1983 actions against multiple officers. In light of the Court's qualified immunity rulings, in excessive-force actions brought against several officers, lower courts must analyze the conduct of all officers involved, not just the shooting officer. *See, e.g.*, Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219, 1245 (2015). This case proves the point.

Unless this Court grants certiorari to uproot the Tenth Circuit's newfound doctrine by which all participating officers, who proximately caused the deprivation, may share in the shooting officer's qualified immunity, many victims of excessive force will be left without a remedy. Cf. *Owen*, 445 U.S. at 651 ("[O]wing to the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense."). This Court should not allow police officers to recklessly cause situations in which they

foreseeably use excessive force, but face no liability under § 1983. The result betrays § 1983's common-law roots, departs from this Court's instructions regarding the statute's interpretation, and misperceives that qualified immunity, like § 1983 liability, attaches personally. The court of appeals erred, and this Court should grant certiorari to ensure its careful calibration of federal rights and remedies under § 1983.

III. This Court Should Grant Certiorari to Resolve Whether "Totality of the Circumstances" Under *Graham v. Connor* Requires an Analysis of Unreasonable Police Conduct Prior to the Use of Force that Foreseeably Created the Need to Use It.

This Court should also grant certiorari to resolve the second question presented – i.e., whether "totality of the circumstances" under *Graham* includes unreasonable police conduct prior to the excessive use of force that foreseeably creates the need to use such force. Officer White violated Samuel Pauly's Fourth Amendment right to be free from excessive force.

The panel majority acknowledged that the reasonableness of an officer's actions includes whether his "own reckless or deliberate conduct" unreasonably created the need to use force. *Id.* at 1220. "This," the panel majority stated, "has been the law in our circuit since 1995." *Pauly III*, 874 F.3d at 1219 n.7 (citing *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995)); *see*

also Allen v. Muskogee, 119 F.3d 837, 840 (10th Cir. 1997).

The federal courts of appeal are split on whether "totality of the circumstances" under *Graham* requires an analysis of reckless and unlawful police conduct that foreseeably created the necessity to use excessive force. Compare *Pauly III*, 874 F.3d at 1219 ("Our precedent recognizes that [t]he reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own 'reckless or deliberate conduct during the seizure unreasonably created the need to use such force.'") (citations omitted), with *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995) (holding that evidence of pre-seizure conduct was irrelevant to reasonableness); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (same); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (same); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (same).

This Court refused to resolve this issue in *Mendez*. *See* 137 S. Ct. at 1547 n.* But this Court should now grant certiorari as to Officer White's conduct and clarify the law. Section 1983 should not permit a grant of qualified immunity to an officer when that officer's own unconstitutional conduct causes the need to use deadly force. Accordingly, courts should be permitted to analyze an officer's pre-seizure conduct in creating the need to use deadly force, along with the actual use of deadly force.

In the opinion below, the panel majority held "Officer White's use of deadly force was not objectively reasonable and violated Samuel Pauly's constitutional right to be free from excessive force." *Pauly III*, 874 F.3d at 1222. After stating that it was "*misled by the erroneous assertions about the record that defendants made to us on appeal*", the panel majority further determined that "a reasonable jury could thus conclude that Officer White acted recklessly by precipitating the need to use deadly force." *Ibid.* (emphasis added). As the panel majority opinion made clear:

> Officer White participated in the events leading up to the armed confrontation and heard the other officers threaten the brothers by saying "Come out or we're coming in." A reasonable jury could thus conclude that Officer White acted recklessly by precipitating the need to use deadly force.

Pauly III, 874 F.3d at 1212. The panel majority even proceeded one step further, holding: "Officer White's use of deadly force was not objectively reasonable and violated Samuel Pauly's constitutional right to be free from excessive force." *Id.* at 1222. Yet, on remand from this Court, the panel majority granted Officer White qualified immunity.

But this Court, in its first consideration of this case, did not have the whole picture. Now that the panel majority has painstakingly corrected "the erroneous assertions about the record that defendants made to us on appeal", this Court should grant certiorari to clarify that a correct qualified immunity

analysis includes, within a survey of the totality of the circumstances, an analysis of an officer's unreasonable pre-seizure conduct. Because Officer White's reckless conduct precipitated the need to use deadly force, and because the use of deadly force "violated Samuel Pauly's constitutional right to be free from excessive force", Officer White is not entitled to qualified immunity. The totality of the circumstances – which this Court did not have a full opportunity to review in *Pauly II*, shows that his conduct was manifestly unreasonable.

Accordingly, this Court should grant certiorari to resolve the circuit split and again clarify that "totality of the circumstances" in fact means totality of the circumstances. *See, e.g.*, *District of Columbia v. Wesby*, 583 U.S. ___ (2018), slip op. at 11 ("The 'totality of the circumstances' requires courts to consider the whole picture. Our precedents recognize that the whole is often greater than the sum of its parts – especially when the parts are viewed in isolation.") (citation omitted). In this case, that includes unreasonable, pre-seizure conduct that foreseeably created the need to use fatal force. Now that this Court has the whole picture, it should look upon it: Officer White is not entitled to qualified immunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEE R. HUNT, ESQ.
HUNT & MARSHALL, LLC
518 Old Santa Fe Trail, #501
Santa Fe, NM 87505
(505) 954-4868 – Telephone
(505) 819-0022 – Facsimile
lee@huntandmarshall.com