No. _____

IN THE

Supreme Court of the United States

VICKI JO LEWIS AND TROY LEVET LEWIS, INDIVIDUALLY AND AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF ISAIAH MARK LEWIS, DECEASED,

Petitioners,

v.

CITY OF EDMOND, AN OKLAHOMA MUNICIPAL CORPORATION; POLICE SERGEANT MILO BOX; AND POLICE OFFICER DENTON SCHERMAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 17, 2023

QUESTIONS PRESENTED

1. Whether this Court should reconsider the judge-made doctrine of qualified immunity.

2. Whether qualified immunity insulates a law enforcement officer from liability from excessive force claims under 42 U.S.C. § 1983 if there is no factually indistinguishable precedent establishing the unconstitutionality of that officer's conduct, or whether the law can be "clearly established" by precedent with some factual variation so long as the officer has fair notice that his conduct is unconstitutional.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Vicki Jo Lewis and Troy Levet Lewis, individually and as co-personal representatives of the estate of Isaiah Mark Lewis, were Plaintiffs in the District Court and Appellees in the Court of Appeals.

Respondents Police Officer Denton Scherman, Police Sergeant Milo Box, and the City of Edmond, Oklahoma were Defendants in the District Court. Respondent Scherman was Appellant in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioners are individuals and therefore have no parent corporation and no stock.

STATEMENT OF RELATED PROCEEDINGS

Lewis v. City of Edmond, No. 5:19-cv-489 (W.D. Okla.) (judgment entered in relevant part on October 14, 2022)

Lewis v. City of Edmond, No. 21-6081 (10th Cir.) (judgment entered on September 16, 2022)

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INTRODUCTION

Officer Denton Scherman, an inexperienced field trainee assigned to traffic duty, shot and killed Isaiah Lewis—a completely naked, visibly unarmed teenager who was experiencing a mental health crisis. Other officers who responded to the scene (including a sergeant trained in responding to mental health crises) managed to follow Isaiah peacefully for nearly an hour as he roamed harmlessly through the neighborhood. But not Officer Scherman. Without giving Isaiah a warning or attempting to de-escalate the situation, Officer Scherman rushed onto the scene and immediately resorted to deadly violence, shooting Isaiah not once, but four times over.

As the District Court correctly concluded, a reasonable jury could find that Officer Scherman's reckless conduct violated the Fourth Amendment's prohibition on excessive force. But the Tenth Circuit held that, even if his actions were unconstitutional, Officer Scherman was shielded from liability under the doctrine of qualified immunity. In the Tenth Circuit's view, Officer Scherman did not violate "clearly established" law because there was no binding authority with precisely the same facts as this case.

This Court should review that mistaken decision for three independent reasons.

First, the Tenth Circuit's decision exemplifies the broader flaws of this Court's qualified immunity jurisprudence. As a growing chorus of critics have recognized, qualified immunity is a broken doctrine in need of fixing. It is a judge-made invention found nowhere in the text of Section 1983 or in the common law. It fails to achieve its policy objectives. And it

thwarts efforts to hold public officials accountable for their unlawful conduct. The Court should seize on this case as an opportunity to narrow or abolish the doctrine once and for all.

Second, even if this Court decides to cling to its qualified immunity jurisprudence, it should at least ensure that the doctrine is applied in a consistent, predictable, and uniform manner. In this case, the Tenth Circuit applied a far too onerous "clearly established" standard by requiring Petitioners to identify indistinguishable precedent matching the facts of this case. This Court's cases do not require such rigid precision. Rather, Petitioners simply had to show that existing precedent put Officer Scherman on "fair notice" that his conduct was unconstitutional. By imposing a heightened standard, the decision below entrenches an acknowledged Circuit split over how similar a prior case must be to the case at hand to satisfy the clearly established requirement in excessive force cases. This Court should grant review to resolve that confusion and bring needed clarity to the clearly established inquiry.

Third, the Tenth Circuit's decision is a prime candidate for summary reversal. As the District Court correctly found, Officer Scherman violated clearly established law when (1) he immediately used lethal force against Isaiah (a naked, unarmed teenager in the throes of a mental health episode) as a first resort without giving a warning, using de-escalation techniques, or trying to use non-deadly force, and (2) he continued to shoot Isaiah after the first gunshot eliminated any potential threat to officer safety. In reaching a contrary conclusion, the Tenth Circuit erroneously disturbed the District Court's factual findings,

drew inferences in favor of Officer Scherman, and misapplied governing precedent. This Court should grant review to correct those grave errors.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 48 F.4th 1193 and is reproduced at Pet.App.1-18. The District Court's order denying summary judgment to Officer Scherman is not officially reported but may be found at 2021 WL 2815851 and is reproduced at Pet.App.21-57.

JURISDICTION

The Tenth Circuit entered its judgment on September 16, 2022. Pet.App.19-20. On December 8, 2022, Justice Gorsuch extended the time for filing a petition for certiorari to January 14, 2023.[1] This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

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

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[1] Because January 14 fell on a Saturday, and January 16 was Martin Luther King Jr. Day, the deadline for the petition is January 17, 2023. *See* Sup. Ct. R. 30(1).

U.S. Const. amend. IV.

Section 1983 provides in relevant part:

> 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.

STATEMENT OF THE CASE

A. Factual Background

Viewing the evidence in the light most favorable to Petitioners, a jury could find that the following facts occurred on the day Isaiah was slain by Officer Scherman. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam).

On April 29, 2019, Isaiah Lewis—a 17-year-old student described by his classmates as "quiet" and "funny"—inadvertently smoked marijuana laced with PCP. AA90.[2] Later that morning, he visited his girlfriend Kamri's house. Pet.App.4; AA397. Kamri noticed that he was behaving abnormally, and the two began arguing after Isaiah asked to see Kamri's cellphone. *See id.*

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[2] Citations to "AA__" are references to Respondents' Appendix in the Tenth Circuit.

A food delivery driver overheard the disagreement, ran to a nearby house, and asked the neighbor to call the police. Pet.App.22. The neighbor called 911 (around 1:00 p.m.) and mistakenly reported that Isaiah was "beating up" a girl. Pet.App.4. Kamri corrected that misunderstanding, informing the police that, in fact, she and Isaiah "were fine" and that neither of them "needed medical treatment." Pet.App.22; AA183.

Several Edmond City police officers, including Sergeant Michael King, Detective Gregory Hunt, and Officer Timothy Radcliff, responded to the 911 dispatch. Pet.App.4; AA243. On their way to Kamri's house, the responding officers learned that Isaiah had stripped off his clothing (except for his socks) and was wandering around the neighborhood. Pet.App.22, A373. The officers also learned that Isaiah was unarmed and was likely experiencing a mental health crisis or under the influence of a mind-altering substance. AA238, 251. For nearly an hour, Sergeant King (who was trained to respond to mental health crises), Detective Hunt, and Officer Radcliff followed Isaiah, as he made his way through the surrounding area. Pet.App.4-5, AA235-37.

Isaiah did not threaten the officers or others as he roamed harmlessly through the neighborhood. AA371-98. So, the officers did not try to arrest Isaiah, nor did they use their sirens or lights as they pursued him. AA221, 257, 262. Instead, the officers followed Isaiah from a safe distance to "check his welfare" and "make sure he[] [was] okay and render aid" if necessary. AA238, 244.

Sergeant Box (a traffic cop) and Officer Scherman (a new field trainee with limited experience) were not part of the initial response team. Pet.App.5; AA271-76, 299-300, 409. But after hearing reports of Isaiah's behavior, Sergeant Box decided that Isaiah's mental health crisis presented a "teaching moment," and the pair joined the search. AA277-80; Pet.App.5. Sergeant Box and Officer Scherman knew Isaiah was unarmed, naked, and wandering around harmlessly; they knew Kamri was uninjured and did not want to press charges; and they knew that other officers were already safely following Isaiah without incident. AA279-83, 373-74, 400-01.

Eventually, Sergeant Box and Officer Scherman spotted Isaiah in a yard. Pet.App.5. The officers drove past Isaiah, but Sergeant Box made no effort to de-escalate the situation; rather, he immediately jumped out of a moving police car, pointed his taser at Isaiah, and shouted at Isaiah to get on the ground. *See* Pet.App.5, 31-32; AA285-91, 309-10.[3] In response to this aggression, Isaiah ran toward the nearest house, used his shoulder to dislodge the front door's glass window, and went inside to hide. Pet.App.5; AA309-11, 398-401. Sergeant Box chased Isaiah into the house, saw him try to exit through the back door, and ordered him to stop and get on the ground. Pet.App.5. Isaiah moved toward Sergeant Box, who deployed his taser. *Id.* Sergeant Box fought with Isaiah in the living room and re-deployed his taser. *Id.*

[3] Neither Sergeant Box nor Officer Scherman turned on the squad car video, audio recording equipment, or a body mic when they pursued Isaiah. AA274, 295-96, 304-05.

Meanwhile, Officer Scherman parked the car, made his way into the house, and could see that Isaiah was naked and unarmed. AA309, 322. Officer Scherman observed Isaiah striking Sergeant Box, who deployed his taser a third time (to no avail). Pet.App.5-6. After Sergeant Box disappeared from Officer Scherman's view, Isaiah turned his body toward Officer Scherman and moved in the officer's direction while waving his arms in a "windmill" motion. Pet.App.25. In response, Officer Scherman did not employ any de-escalation techniques or issue a warning. Pet.App.24-25; AA293-94, 313-16, 322, 411-12. Instead, he backed down the entry hallway of the house, drew his gun, and repeatedly fired at Isaiah, hitting him four times (in his face, groin, and both thighs). Pet.App.24-25; AA364-65. Isaiah—who was not even close enough to injure Officer Scherman when he was first shot, Pet.App.6, 24-25; AA367-68—stopped advancing toward Officer Scherman and posed no conceivable threat to officer safety after the first gunshot hit him, *see* Pet.App.38; App.364-68. But Officer Scherman kept firing anyway. Pet.App.38.

Seconds later, Sergeant King, Detective Hunt, and Officer Radcliff arrived on the scene. AA317, 329. In their presence, Isaiah, who was already bleeding to death on the floor, muttered "help me" and attempted to crawl toward the front door. AA92-93, 378. Isaiah ultimately died from his gunshot wounds. AA363.

B. Procedural History

1. Petitioners Vicki and Troy Lewis—the mother and father of Isaiah—filed this civil rights action under 42 U.S.C. § 1983 against Officer Scherman, Sergeant Box, and the City of Edmond, Oklahoma in

the United States District Court for the Western District of Oklahoma. Petitioners alleged (among other claims) that Officer Scherman used excessive force against Isaiah in violation of the Fourth Amendment. Pet.App.25.[4] Officer Scherman moved for summary judgment on the ground that he was entitled to qualified immunity.

2. The District Court denied that motion, concluding that Officer Scherman did not deserve qualified immunity. Pet.App.33-42.[5]

First, the District Court held that, based on the factual record before it, a jury could find that Officer Scherman's use of deadly force ran afoul of the Fourth Amendment. Pet.App.38-39. In particular, the District Court explained that the summary judgment record supported two factual conclusions: (1) a reasonable jury could find that "*deadly force* was not justified against the naked, unarmed [Isaiah] 'at the precise moment[s]' Scherman discharged his firearm," and (2) a reasonable jury could also find that "after Scherman discharged his firearm once, [Isaiah] no longer presented a 'threat of serious physical harm.'" Pet.App.38.

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[4] Petitioners also brought an excessive force claim against Sergeant Box, as well as failure-to-train, federal equal protection, and state-law negligence claims against the City. Pet.App.25.

[5] The District Court granted summary judgment to Sergeant Box based on qualified immunity. Pet.App.29-32. It also granted summary judgment to the City on the failure-to-train and equal protection claims. Pet.App.42-56. But, having denied summary judgment to Officer Scherman, the court declined to grant summary judgment on the related state-law negligence claim against the City. Pet.App.57. Only the Fourth Amendment claim against Officer Scherman is at issue in this petition.

Second, the District Court held that the law was clearly established because a "reasonable jury could conclude that no reasonable officer could have believed that the use of lethal force was lawful when Scherman encountered" Isaiah. Pet.App.41. After carefully surveying Tenth Circuit case law, the District Court determined that existing precedent—including *Estate of Ceballos v. Husk*, 919 F.3d 1204 (10th Cir. 2019) and *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997)—provided Officer Scherman with fair notice that his behavior was objectively unreasonable under the circumstances. Pet.App.39-42. In reaching that conclusion, the District Court adhered to the well-settled principle that "prior cases need not be factually identical to the scenario facing the officer" to satisfy the clearly established requirement. Pet.App.39.

3. Officer Scherman filed an interlocutory appeal, and the Tenth Circuit reversed the District Court's decision denying him qualified immunity. Pet.App.1-18.

At the outset, the Tenth Circuit acknowledged the "limited" scope of its appellate jurisdiction. Pet.App.3. Because Officer Scherman's appeal arose in an interlocutory posture, the court could review issues of law, but lacked authority to disturb or otherwise second-guess the District Court's factual findings. *Id.*[6]

Turning to the merits, the Court of Appeals first noted that Officer Scherman did not dispute "that

[6] Notwithstanding the panel's recognition that its jurisdiction was limited, it repeatedly diverged from the District Court's findings and construed the facts in favor of Officer Scherman (at one point gratuitously referring to Isaiah's mental health troubles as a "rampage"). Pet.App15.

when he shot [Isaiah] multiple times, his use of force was objectively unreasonable and violated the Fourth Amendment." Pet.App.7-8. Given that concession, the Court of Appeals assumed that Officer Scherman violated the Fourth Amendment's prohibition on excessive force. Pet.App.4. "The only question" at issue on appeal, the court explained, was "whether the law at the time of the incident was 'clearly established.'" Pet.App.8.

In the Tenth Circuit's view, the answer to that question was no. It concluded that Officer Scherman should be afforded qualified immunity because no factually indistinguishable precedent clearly established that his conduct—repeatedly shooting a slowly approaching unarmed, naked teenager in the throes of a mental health crisis—was unconstitutional. *See* Pet.App.12-18. In service of that conclusion, the Court of Appeals distinguished analogous cases based on minor factual variations and concluded that Officer Scherman's behavior was justified simply because *Sergeant Box* acted reasonably during the encounter with Isaiah. *See id.*[7]

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for three independent reasons. *First*, and foremost, this case presents an ideal vehicle to reconsider the scope and validity of qualified immunity. *Second*, at minimum, the Court should grant review to resolve an acknowledged split among the Circuits regarding the proper application of the "clearly established" standard in Fourth

[7] On October 14, 2022, in accordance with the Tenth Circuit's decision, the District Court entered judgment in favor of Officer Scherman. Pet.App.58-59.

Amendment excessive force cases. *Third*, and in the alternative, this Court should summarily reverse the decision below because it is patently incorrect and flatly inconsistent with this Court's precedents.

I. THE COURT SHOULD GRANT CERTIORARI TO ABOLISH OR NARROW THE DOCTRINE OF QUALIFIED IMMUNITY

The doctrine of qualified immunity shields public officials from damages liability when their conduct "'does not violate clearly established statutory or constitutional rights.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). As Judge Calabresi recently observed, qualified immunity "cannot withstand scrutiny." *McKinney v. City of Middletown*, 49 F.4th 730, 756-58 (2d Cir. 2022) (Calabresi, J., dissenting) (appendix collecting cases and scholarship critiquing qualified immunity). Jurists and scholars from across the ideological spectrum have offered varied criticisms of this Court's modern qualified immunity jurisprudence. *Id.* Below, we discuss three of the most powerful critiques.

First, modern qualified immunity doctrine is a creature of judicial innovation that finds no support in Section 1983's text or the common law. *Second*, the doctrine fails to achieve its putative policy goals. And *third*, the doctrine empowers government officials to trample on the Constitutional rights of civilians with impunity. This case is a clean and unencumbered vehicle to address those serious concerns and reconsider the scope and ongoing viability of qualified immunity.

A. Modern Qualified Immunity Doctrine Is Divorced from the Statutory Text and the Common Law

Enacted in 1871, Section 1983 authorizes "any citizen of the United States or other person within [its] jurisdiction" to sue a government official who, while acting "under color of" state law, violates their "rights, privileges, or immunities" under federal law. 42 U.S.C. § 1983.

As Justice Thomas and other judges have explained, the statutory text "'ma[kes] no mention of defenses or immunities,'" and instead "applies categorically to the deprivation of constitutional rights under color of state law"—whether or not those rights are "clearly established" by existing precedent. *Baxter v. Bracey*, 140 S. Ct. 1862, 1862-63 (2020) (Thomas, J., dissenting from denial of certiorari) (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J.) (concurring in part and concurring in the judgment)); *accord Sampson v. Cnty. of Los Angeles by & through Los Angeles Cnty. Dep't of Child. & Fam. Servs.*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part) (noting that "the judge-made doctrine of qualified immunity … is found nowhere in the text of § 1983").

Unable to anchor qualified immunity in the text of Section 1983, the Court has sometimes tried to ground the doctrine in the common law. *See, e.g.*, *Malley v. Briggs*, 475 U.S. 335, 339 (1986) (noting that, "[a]lthough the statute on its face admits of no immunities, we have read it 'in harmony with general principles of tort immunities and defenses rather than in derogation of them'"). But, as many federal judges

have recognized, the common law of 1871 provides scant support for the modern doctrine of qualified immunity. *See Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting) (noting that qualified immunity doctrine "is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act"); *City of Middletown*, 49 F.4th at 757 (Calabresi, J., dissenting) (noting that "scholars have demonstrated that there was no common law background that provided a generalized immunity that was anything like qualified immunity"). This Court has openly acknowledged that, when it decided *Harlow v. Fitzgerald*, it "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). So, even assuming qualified immunity had common law roots at some point in the distant past, this Court has since tossed them aside.

B. Modern Qualified Immunity Doctrine Does Not Achieve Its Policy Goals

Because neither the statutory text nor the common law provides a solid foundation for qualified immunity, proponents of the doctrine often fall back on pure policy arguments. This Court, for its part, has offered two primary policy justifications supporting qualified immunity: (1) protecting officers from financial liability, *Pierson v. Ray*, 386 U.S. 547, 555 (1967), and (2) decreasing the costs of burdensome litigation against government officials, *Harlow*, 457 U.S. at 816-17. But those justifications rest on shaky footing and have been empirically disproven. *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1803-14 (2018) (debunking policy justifications for qualified

immunity); Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 673-77 (2021) (showing "that foundational assumptions underlying the Supreme Court's qualified immunity jurisprudence are false").

First, qualified immunity is unnecessary to protect individual officers from financial liability. *See City of Middletown*, 49 F.4th at 757-58 (Calabresi, J., dissenting) (noting that "qualified immunity is largely irrelevant to officers' individual financial liability"). In most jurisdictions, government officials are indemnified by their employers, "even when they were disciplined, terminated, or prosecuted for their misconduct." Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 902-37 (2014). So, as a practical matter, "officers virtually never pay" for their own legal defense or for the monetary damages awarded against them. Schwartz, *The Case Against Qualified Immunity*, *supra* at 1806. Given these pervasive indemnification policies, abolishing qualified immunity would not have a financial impact on law enforcement officers and other public officials.

Second, qualified immunity does not effectively protect litigants or courts from the burdens of Section 1983 litigation, nor does it materially reduce the costs of defending against "insubstantial lawsuits." *Harlow*, 457 U.S. at 814-15. In fact, the opposite is true. According to a recent study conducted by Professor Joanna Schwartz, "qualified immunity actually increases the time, cost, and complexity of civil rights cases in which the defense is raised." Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 338 (2020). In any event, as Professor Schwartz has elsewhere explained, "there are many

other barriers to relief for insubstantial cases—and substantial ones as well—including the challenges of getting a lawyer, pleading plausible claims, proving constitutional violations, and convincing sometimes skeptical juries of the merits of the plaintiff's allegations." Schwartz, *Qualified Immunity's Boldest Lie*, *supra* at 674. Ultimately, eliminating qualified immunity would not open the floodgates to burdensome litigation; rather, doing so "would likely decrease the average cost and time spent litigating and adjudicating civil rights cases." Schwartz, *After Qualified Immunity*, *supra* at 338.

C. Modern Qualified Immunity Doctrine Prevents Courts from Remedying Constitutional Violations

As explained above, qualified immunity is an atextual doctrine that finds no support in the common law and fails to advance its putative policy goals. That is reason enough to doubt its continued viability or narrow its scope. But the doctrine is also dangerous: it undermines the rule of law, encourages police officers like Officer Scherman to "shoot first [and] think later," and renders the protections of the Constitution "hollow." *Mullenix v. Luna*, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting).

Congress passed Section 1983 during Reconstruction "to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). But nowadays, qualified immunity often forces courts to forsake that critical responsibility and protect government officials instead of the public. *See Sampson*, 974 F.3d at 1025 (op. of

Hurwitz, J.) (noting that qualified immunity "doctrine requires—in this case and many others—the dismissal of facially plausible claims of constitutional violations because the right at stake was not 'clearly established'").

That dynamic is especially harmful in the Fourth Amendment excessive force context. As Justice Sotomayor and other jurists have cogently observed, this Court has "transform[ed] the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment"; it "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); *Jamison v. McClendon*, 476 F. Supp. 3d 386, 392 (S.D. Miss. 2020) ("Immunity is not exoneration. And the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine.").

This case proves the point. Officer Scherman "does not challenge the district court's finding that when he shot [Isaiah] multiple times, his use of force was objectively unreasonable and violated the Fourth Amendment." Pet.App.7-8. Rather than remedy that clear and undisputed constitutional violation (or even permit a jury to consider Petitioners' claim), the Tenth Circuit gave Officer Scherman a free pass simply because minor factual variations exist between this case and others. *See infra* Part II. That should not be (and is not) the law.

* * *

More than five years ago, Justice Thomas invited the Court to "reconsider [its] qualified immunity

jurisprudence" in "an appropriate case." *Ziglar*, 137 S. Ct. at 1872 (op. of Thomas, J.). This case presents an ideal vehicle to accept Justice Thomas's invitation.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE AN ACKNOWLEDGED CIRCUIT SPLIT ON THE PROPER APPLICATION OF THE QUALIFIED IMMUNITY DOCTRINE IN EXCESSIVE FORCE CASES

Even if this Court declines the opportunity to reconsider the doctrine of qualified immunity, it should at least grant review to provide much-needed guidance to the Courts of Appeals on the proper application of the "clearly established" standard in excessive force cases.

A. The Tenth Circuit's Decision Exacerbates Confusion among the Courts of Appeals over How to Conduct the Clearly Established Inquiry

As the Tenth Circuit recognized, Pet.App.8, this case hinges on an important question that lies at the heart of the Court's modern qualified immunity jurisprudence: what must Section 1983 plaintiffs do to show that a law enforcement officer has violated their "clearly established" rights?

In answering that question, this Court has sent mixed messages. On one hand, the Court has repeatedly emphasized that the clearly established requirement does "not require a case directly on point." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Instead, the principal focus of the clearly established inquiry is "whether the officer had fair notice that [their] conduct was unlawful." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). Consistent with

that principle, the Court has clarified that "general statements of the law are not inherently incapable of giving fair and clear warning to officers" that their behavior is unconstitutional. *Kisela*, 138 S. Ct. at 1153 (per curiam). On the other hand, the Court has instructed courts "not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742.

These somewhat conflicting directives have sown significant uncertainty and confusion among (and within) the Courts of Appeals. In practice, "determining whether an officer violated 'clearly established' law has proved to be a mare's nest of complexity and confusion" for federal courts. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010). Indeed, as one Fifth Circuit Judge has observed, "courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" to satisfy the clearly established requirement. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part).

The disarray among the Courts of Appeals is especially stark in cases involving Fourth Amendment excessive force claims against law enforcement officers. At least four Circuits—including the Third, Fourth, Seventh, and Eleventh Circuits—have consistently held that the law can be "clearly established" by prior case law even if those cases have some factual differences from the case at hand, as long as the officer has fair notice that his use of force is objectively unreasonable. By contrast, the Fifth and Eighth Circuits have regularly demanded an impossibly high showing of factual similarity to satisfy the clearly established requirement in excessive force

cases. Muddying the waters even further, a few Circuits (including the Sixth, Ninth, and Tenth Circuits) have cases going both ways. This Court should grant plenary review to untangle this dizzying conflict among (and within) the Courts of Appeals.

1. The Third, Fourth, Seventh, and Eleventh Circuits Do Not Require Plaintiffs to Identify a Prior Case Involving the Same Factual Scenario to Satisfy the Clearly Established Prong

Four Circuits have correctly held that the law can be clearly established even if prior case law is not an apples-to-apples match, so long as prior decisions put the officer on fair notice that his use of force is unconstitutional.

The Seventh Circuit's decision in *Strand v. Minchuk* is emblematic of this approach. 910 F.3d 909 (7th Cir. 2018). In *Strand*, the Seventh Circuit explained that, although courts must define the constitutional right at issue with some "specificity," the "demand for specificity is not unyielding or bereft of balance." *Id.* at 915. As the Seventh Circuit put it, "assessing whether the law is clearly established does not require locating 'a case directly on point'" since police officers "'can still be on notice that their conduct violates established law even in novel factual circumstances.'" *Id.*; *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 528-30 (7th Cir. 2012) (denying qualified immunity even though no prior case held that the use of device resembling bean-bag shotgun constituted excessive force).

Like the Seventh Circuit, the Fourth Circuit, too, has held that a prior case need not be factually indistinguishable to provide sufficient notice to an officer that his use of force is unreasonable. *See Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019). For example, in *Williams*, the Fourth Circuit explained that police officers "can be expected to know that if X is illegal, then Y is also illegal, despite factual differences between the two." *Id.*

The Third and Eleventh Circuits apply the same sensible rule in determining whether an officer has violated clearly established law. *See Peroza-Benitez v. Smith*, 994 F.3d 157, 166 (3d Cir. 2021) (noting that excessive force violation may be clearly established "even without a precise factual correspondence between the case at issue and a previous case" (internal quotation marks omitted)); *Young v. Brady*, 793 F. App'x 905, 908 (11th Cir. 2019) (per curiam) (holding that "'[e]xact factual identity with a previously decided case is not required'" and affirming denial of qualified immunity (quoting *Coffin v. Brandau*, 642 F.3d 999, 1013 (11th Cir. 2011)).

2. The Fifth and Eighth Circuits Routinely Require Plaintiffs to Identify a Prior Case Involving the Same Factual Scenario

In contrast, the Fifth and Eighth Circuits regularly apply a heightened "clearly established" test that demands prior case law with indistinguishable (or close-to indistinguishable) facts.

For instance, in *Morrow v. Meachum*, the Fifth Circuit held that a plaintiff "must make an extraordinary showing" to satisfy the clearly

established requirement. 917 F.3d 870, 876 (5th Cir. 2019). That "extraordinary showing" requires the plaintiff to identify clearly established law with a heightened degree of "specificity and granularity." *Id.* at 874-75. Thus, in the Fifth Circuit, a plaintiff "loses [if] no previous panel has ever held th[e] exact sort of [conduct at issue] unconstitutional" under the Fourth Amendment. *Zadeh*, 928 F.3d at 479 (op. of Willett, J.).

Likewise, in *Goffin v. Ashcraft*, the Eighth Circuit granted qualified immunity to an officer who shot a fleeing arrestee because the plaintiff could point to no prior case arising from the same factual circumstances. *See* 977 F.3d 687, 691-92 (8th Cir. 2020). As Judge Kelly noted in dissent, the majority "relie[d] on the precise scenario of a suspect fleeing after a pat down that revealed no weapons to conclude that Ashcraft violated no clearly established law"—even though the "novel fact" of a pat down "d[id] not render inapplicable the clearly established law that officers 'may not use deadly force unless the suspect poses a significant threat of death or serious physical injury to the officers or others.'" *Id.* at 696 (Kelly, J., dissenting); *see N.S. v. Kansas City Bd. of Police Comm'rs*, 35 F.4th 1111, 1114-16 (8th Cir. 2022) (petition for cert. filed) (holding that police officer did not violate clearly established law when he shot unarmed, surrendering man in back because prior analogous excessive force cases arose in slightly different factual scenarios).

3. A Handful of Circuits Have Precedent on Both Sides of the Split

Confusing matters even further, the Sixth, Ninth, and Tenth Circuits have applied both versions of the

"clearly established" test outlined above in excessive force cases. Sometimes those courts follow the correct rule adopted by the Third, Fourth, Seventh, and Eleventh Circuits, and other times, they follow the incorrect heightened standard applied by the Fifth and Eighth Circuits.

The Sixth Circuit's muddled case law is illustrative. In *Baynes v. Cleland*, 799 F.3d 600 (6th Cir. 2015), the Sixth Circuit reversed the grant of qualified immunity because existing precedent held that "excessively forceful or unduly tight handcuffing is a constitutional violation." *Id.* At 614. "Requiring any more particularity than th[at]," the court declared, "would contravene the Supreme Court's explicit rulings that neither a 'materially similar,' 'fundamentally similar,' or 'case directly on point'—let alone a factually identical case—is required." *Id.* But in *Gordon v. Bierenga*, the Sixth Circuit took a stricter approach, holding that the law is not clearly established unless the plaintiff can point to prior case law meeting a heightened "level of 'specificity.'" 20 F.4th 1077, 1085 (6th Cir. 2021). The court acknowledged that "several cases" established the rule "'that deadly force was objectively unreasonable when the officer was to the side of [a] moving car or the car had already passed by him—taking him out of harm's way—when the officer shot the driver.'" *Id.* at 1083. Although the court recognized that this existing precedent was "similar in some ways," it found that the case law was not "similar enough to the facts of this case to pass muster under the controlling standards for defining 'clearly established' law." *Id.* at 1079; *see Latits v. Philips*, 878 F.3d 541, 552-53 (6th Cir. 2017) (holding that law was not clearly

established because of minor factual distinctions in prior case law).

The Ninth Circuit's precedent is equally murky. In *Gravelet-Blondin v. Shelton*, 728 F.3d 1086 (9th Cir. 2013), the court held that "[i]t does not matter that no case of this court directly addresses the use of [a particular weapon]," since "we have held that '[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury.'" *Id.* at 1093; *Torres v. City of Madera*, 648 F.3d 1119, 1128-29 (9th Cir. 2011) (declining to require "granular specificity" to satisfy clearly established requirement). By contrast, two years before *Shelton*, the Ninth Circuit (sitting *en banc*) granted qualified immunity to an officer who used a taser on a non-threatening individual because "there was no Supreme Court decision or [Ninth Circuit] decision … addressing the use of a taser in dart mode." *Mattos v. Agarano*, 661 F.3d 433, 452 (9th Cir. 2011) (en banc) (cleaned up).

The Tenth Circuit's decisions follow the same jumbled pattern. In some cases, the Tenth Circuit has correctly applied the rule that "'a prior case need not be exactly parallel to the conduct here for the officials to have been on notice'" that their use of force was unconstitutional. *E.g.*, *Est. of Smart v. City of Wichita*, 951 F.3d 1161, 1168 (10th Cir. 2020). As the panel in *Smart* smartly explained, the clearly established inquiry "is not a 'scavenger hunt for prior cases with precisely the same facts.'" *Id.* But on other occasions, the Tenth Circuit has disregarded this rule and applied a supercharged clearly established rule, requiring near-perfect "factual symmetry" with prior case law. For example, in *Arnold v. City of Olathe*, 35

F.4th 778 (10th Cir. 2022), the Tenth Circuit held that officers did not violate clearly established law when they shot and killed a woman after an extended standoff. *Id.* at 793-95. In reaching that conclusion, the Court found "insufficient factual symmetry" between prior analogous case law and the officers' conduct because the earlier cases did not arise in the same exact factual circumstances. *Id.*

B. The Tenth Circuit Applied the Wrong "Clearly Established" Standard

In the decision below, the Tenth Circuit embraced the outlier approach adopted by the Fifth and Eighth Circuits. Pet.App.12-18. Although the court paid lip service to the principle that courts "do not require a case directly on point for the law to be clearly established," Pet.App.9, the Tenth Circuit applied a far more demanding standard; it held that the law was not clearly established by prior Circuit case law because those cases were not factually indistinguishable from this one, Pet.App.18. Specifically, the Tenth Circuit reasoned that on-point precedent like *Ceballos*, *Allen*, and *Fancher v. Barrientos*, 723 F.3d 1191 (10th Cir. 2013) did not match the "totality of the[] facts" in this case. Pet.App.14-18. Rather than focus on the salient, material facts driving the courts' reasoning in those and other analogous cases, the Tenth Circuit split hairs and faulted Petitioners for failing to do the impossible: locating a case where a field trainee repeatedly fired his gun from a "small" hallway at an unarmed, naked teenager in the throes of a mental health crisis who was moving his arms like a "windmill." Pet.App.18. According to the Tenth Circuit, Officer Scherman deserved qualified immunity because no case matched that fact pattern. *Id.*

That approach is mistaken. To be sure, this Court has instructed courts to frame the right "in light of the specific context of the case," *Brosseau*, 543 U.S. at 198, but that does not mean that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful," *Anderson*, 483 U.S. at 640. Indeed, as this Court has made clear time and again, a Section 1983 plaintiff need not find "a case directly on point" to satisfy the clearly established requirement. *E.g.*, *al-Kidd*, 563 U.S. at 741. Instead, the touchstone of the inquiry is "fair notice." *Brosseau*, 543 U.S. at 198. And there can be little doubt that police officers can be on notice that their behavior flouts the Fourth Amendment's prohibition on excessive force "even without a precise factual correspondence between the case at issue and a previous case." *Peroza-Benitez*, 994 F.3d at 166 (cleaned up). As the Fourth Circuit aptly explained, federal courts "need not—and should not—assume that government officials are incapable of drawing logical inferences" in evaluating whether their conduct comports with clearly established law. *Williams*, 917 F.3d at 770. Were the rule otherwise, the clearly established test would "be so narrow that the immunity" enjoyed by police officers would be "transformed from one 'qualified' in nature to one absolute." *Torres*, 648 F.3d at 1129.

Thus, contrary to the Tenth Circuit's approach, Petitioners had no obligation to find virtually identical case law to satisfy the clearly established requirement. Under this Court's precedents, Petitioners just had to show that existing precedent put Officer Scherman on fair notice that his deadly conduct—repeatedly shooting an unarmed, naked

teenager experiencing a mental health crisis—was beyond the constitutional pale. *See Brosseau*, 543 U.S. at 198.

* * *

As the foregoing discussion shows, the "clearly established" standard has proven so indecipherable that it has generated both inter- and intra-Circuit splits that befuddle litigants and judges alike in excessive force cases. The conflict among and within the Circuits shows that "the 'clearly established' standard is neither clear nor established among our Nation's lower courts." *Zadeh*, 928 F.3d at 479 (op. of Willett, J.). Left to their own devices, the Circuits will remain "hopelessly conflicted both within and among themselves." Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 (2015) (footnotes omitted). The Court should intervene now to bring order to this chaos.

III. THE COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW

The Tenth Circuit's flawed application of the clearly established test led it astray on the merits. Had it applied the proper standard, the Court of Appeals would have reached the only result supported by the facts and law: Officer Scherman violated clearly established law when he repeatedly shot a naked, visibly unarmed teenager experiencing a mental health crisis.

As the District Court correctly found, Officer Scherman violated clearly established law in two distinct ways. *First*, he used deadly force as a first resort against a naked, unarmed Isaiah without first giving a warning or trying less deadly tactics. *Second*, even assuming Officer Scherman's first shot were

constitutional, he continued to deploy lethal force and shot at Isaiah four more times (hitting him three of those times) after Isaiah no longer posed a danger.

Accordingly, even if the Court determines that plenary review is not warranted on the questions presented, it should summarily reverse the decision below to correct the Tenth Circuit's grievous errors. *See Brosseau,* 543 U.S. at 197-98 n.3.

A. Officer Scherman Had Fair Notice That His First Shot Was Unconstitutional

No reasonable officer would have believed that it was objectively reasonable to shoot a naked, unarmed teenager in the middle of a mental health crisis without first giving a warning, using de-escalation techniques, or trying to use non-deadly force. Existing Tenth Circuit precedent clearly established that Officer Scherman's immediate resort to lethal force in these circumstances ran afoul of the Fourth Amendment's prohibition against excessive force.

In particular, a trio of Tenth Circuit decisions—*Allen*, *Ceballos*, and *Carr v. Castle*—supplied Officer Scherman with more than enough notice that his conduct was unconstitutional. *Allen*, 119 F.3d at 839-41; *Ceballos*, 919 F.3d at 1208-17; *Carr v. Castle*, 337 F.3d 1221, 1224-28 (10th Cir. 2003).[8]

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[8] Both this Court and the Tenth Circuit have routinely looked to governing Circuit precedent in evaluating whether the law is clearly established. *See Kisela*, 138 S. Ct. at 1153; *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018) (noting that law must be clearly established by "controlling authority" or "a robust 'consensus of cases of persuasive authority'"); Pet.App.10 (noting that "controlling authority" means "a Supreme Court or Tenth Circuit published decision").

Take *Allen*, for starters. In that case, Terry Allen "left his home after an altercation with his wife and children" and drove to his sister's driveway, taking "ammunition and several guns with him." 119 F.3d at 839. Officers learned that Allen was armed and suicidal, had threatened his family members, and was subject to an outstanding arrest warrant. *Id.* Once the police arrived on scene, they saw Allen sitting in the driver's seat with one foot out of his car and a gun in his right hand. *Id.* One of the responding officers ordered Allen to drop his gun and then reached into the car to take it from him. *Id.* Allen resisted and aimed the gun at three different officers in rapid succession. *Id.* In response, two of the officers fired twelve rounds into the car, striking Allen four times. *Id.* Allen died on the scene. *Id.* All of this happened in about 90 seconds. *Id.* The Tenth Circuit denied qualified immunity, holding that, on these facts, a jury could find that the police acted recklessly when they aggressively responded to a mentally ill suspect by immediately resorting to deadly force. *Id.* at 840-41.

Ceballos is similarly instructive. There, "Ceballos's wife called 911" and reported that he was "acting crazy" in their driveway with "two [baseball] bats." 919 F.3d at 1208-09. She also reported that Ceballos was "drunk and probably on drugs," that she felt "afraid," and that her 17-month-old daughter was with her. *Id.* at 1209. Officers sped to the scene and, en route, learned that Ceballos had previously "threatened his wife with a knife" and had stopped taking his anti-depression medication. *Id.* Upon their arrival, the officers found Ceballos pacing in the driveway, where he was swinging a baseball bat, yelling, and throwing his arms in the air. *Id.* at 1210. Officers repeatedly told

Ceballos to drop the bat, but Ceballos refused to comply. *Id.* Instead, he approached the officers with the bat in his hand. *Id.* The officers drew their weapons and continued to command Ceballos to drop the bat. *Id.* One of the officers then warned Ceballos that he would "be shot" if he did not obey their commands. *Id.* When Ceballos refused yet again and continued moving toward the officers (baseball bat in hand), an officer shot and killed him. *Id.* The Tenth Circuit held that the officer violated clearly established law when he "approached Ceballos quickly, screaming at Ceballos to drop the bat and refusing to give ground as Ceballos approached the officers." *Id.* at 1216. Relying on *Allen*, the Tenth Circuit found that the "right at issue" was "clear": it is objectively unreasonable for an officer to rely on deadly force "as a first resort" against "an irrational suspect who is armed only with a weapon of short-range lethality." *Id.* at 1219.

And in *Carr*, the Tenth Circuit applied the same principles and reached a similar result. *Carr* involved an "emotionally disturbed person" who had punched his landlord several times, struck one officer on the head, kicked another in the groin, instigated a high-speed foot chase, resisted several different types of less lethal force, and was running at officers with a four-inch piece of concrete, while raising his arm to throw it at them. 337 F.3d at 1224-28, 1230. In response to these violent and threatening actions, the police shot and killed the man. *Id.* Consistent with controlling authority, the Tenth Circuit concluded that the officers acted unreasonably and violated clearly established law governing the reasonableness of deadly force. *Id.*

These three cases provided Officer Scherman with ample notice that his use of deadly force against Isaiah was unreasonable. In each case (as in this one), the officers confronted a mentally troubled individual—a suicidal father in *Allen*, a person "acting crazy" in *Ceballos*, and an "emotionally disturbed person" in *Carr*. And in each case (as in this one), the officers aggravated the situation by recklessly rushing to deadly violence. If anything, this case presents a much easier call than those three cases. Unlike Allen, Isaiah was not armed to the teeth with guns and ammo. Unlike Ceballos, Isaiah was not pacing around with bats and had no history of making threats against others. And unlike the man in *Carr*, Isaiah was not attacking Officer Scherman with a piece of concrete. In fact, the record makes clear that Officer Scherman *knew* that Isaiah was unarmed. AA279-83, 322, 400-01. If the officers in *Allen*, *Ceballos*, and *Carr* acted unreasonably when they shot and killed mentally troubled individuals who were armed and dangerous, it follows *a fortiori* that Officer Scherman acted unreasonably when, without giving a warning, he repeatedly shot a naked, unarmed Isaiah who was not close enough to injure him. AA367-68 (noting that county autopsy report indicates that Officer Scherman was not at close or even intermediate range when he shot Isaiah).

If all that were not enough, many other Tenth Circuit cases reinforce the lessons of *Allen*, *Ceballos*, and *Carr*, and confirm beyond doubt that Officer Scherman's conduct was unconstitutional. *See, e.g.*, *Zia Trust Co. ex rel. Causey v. Montoya*, 597 F.3d 1150, 1153-55 (10th Cir. 2010) (no qualified immunity for officer who shot and killed mentally ill person who had

access to firearms and was driving van toward officer); *King v. Hill*, 615 F. App'x 470, 471-79 (10th Cir. 2015) (no qualified immunity for police who shot mentally unstable man who threatened to blow up house with explosives and was suspected of hiding gun); *Zuchel v. Spinharney*, 890 F.2d 273, 274-76 (10th Cir. 1989) (no qualified immunity for officer who repeatedly shot mentally "disturbed" man who ignored officer commands, threatened to kill teenager, and was suspected of wielding knife).

Despite this raft of on-point authority, the Court of Appeals held that prior Tenth Circuit cases provided insufficient notice to Officer Scherman. Pet.App.18. That was so, the Court of Appeals claimed, because unlike in those earlier cases, (1) Officer Scherman did not "escalate the situation," (2) Isaiah had "battered Sergeant Box into submission," and (3) Officer Scherman was in a "confined area making it difficult if not impossible for Scherman to retreat." Pet.App.15-18. That analysis is flawed, multiple times over.

For one thing, the Tenth Circuit's reasoning impermissibly second-guesses the District Court's factual determination that a jury could find that Officer Scherman's use of "*deadly force* was not justified against the naked, unarmed [Isaiah] 'at the precise moment[s]' Scherman discharged his firearm." Pet.App.38; Pet.App.37 (finding that "a reasonable jury could arguably conclude that" Isaiah "did not pose a level of danger requiring deadly force"). As the Tenth Circuit acknowledged, appellate courts have no authority to disturb a district court's factual findings on interlocutory review of a denial of qualified immunity. *Henderson v. Glanz*, 813 F.3d 938, 948 (10th Cir. 2015).

For another, the Tenth Circuit's purported distinctions rest on factual inferences drawn in favor of Officer Scherman. Properly viewed in the light most favorable to Petitioners, the record shows that:

(1) Officer Scherman *did* escalate the situation when he rushed onto the scene (after other officers had been peacefully following Isaiah for nearly an hour) and, instead of attempting to de-escalate the situation, repeatedly shot Isaiah from a distance, *see* Pet.App.4-5, AA411-12;[9]

(2) Sergeant Box disappeared from Officer Scherman's view and may have tripped over something (not that Isaiah "battered [him] into submission"), Pet.App.23; AA435 (Sergeant Box's statement that "he hit his head on something as he fell back over something in the house");

(3) Officer Scherman was backing down the entry hallway of the house when he shot Isaiah (and thus could have retreated instead of opening fire), Pet.App.25; and

(4) Isaiah was not within striking distance of Officer Scherman when he was shot, Pet.App.24-25; AA367-68.

Moreover, Petitioners' expert credibly testified that if Scherman "had employed the verbal de-escalation

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[9] Even if Officer Scherman did not escalate the situation, *Allen* and *Ceballos* are not confined to cases in which officers provoke the need for deadly force. As both cases confirm, officers contravene the Fourth Amendment not only when they recklessly provoke the need for deadly force, but also when they "rely on lethal force unreasonably *as a first resort* in confronting an irrational suspect." *Ceballos*, 919 F.3d at 1219 (emphasis added) (relying on *Allen* as clearly established law).

[techniques] [he] had been trained to utilize […] no force whatsoever may have been necessary." AA411. At the very least, these material facts should be resolved by a jury—not the court. That procedural misstep alone warrants summary reversal of the Tenth Circuit's decision. *See Tolan*, 572 U.S. at 657-60 (vacating Fifth Circuit's judgment because it "improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party").

Accordingly, contrary to the Tenth Circuit's determination, it was clearly established that Officer Scherman's first shot was objectively unreasonable under the circumstances.

B. Officer Scherman Had Fair Notice That It Was Unconstitutional to Continue Shooting Isaiah after He No Longer Posed a Threat

Even assuming Officer Scherman's first shot did not clearly violate the Fourth Amendment, no reasonable officer would have believed that it was constitutional to keep shooting Isaiah after he no longer posed a threat to officer safety. Indeed, the Tenth Circuit has long held that an officer may not continue to use deadly force after the supposed threat to safety has subsided. *See Smart*, 951 F.3d at 1175-77; *Fancher*, 723 F.3d at 1200-01; *Perea v. Baca*, 817 F.3d 1198, 1202-05 (10th Cir. 2016).

In *Fancher*, for example, a suspect grabbed an officer's gun, which discharged into the ground. 723 F.3d at 1196. The suspect then stole the officer's patrol car, which contained "two loaded long guns." *See id.* The officer tried to regain control of the vehicle, to no avail. *Id.* So he opened fire on the suspect, shooting

seven shots in total. *Id.* After the first shot, the officer saw the suspect slump over. *Id.* at 1197-98. The Tenth Circuit held that the officer violated clearly established law when he fired shots "two through seven" because any threat had subsided after the officer noticed the suspect slump over from the first shot. *Id.* at 1200-01.

Similarly, in *Perea*, officers encountered a mentally ill man (Perea) who was reportedly on "very bad drugs." 817 F.3d at 1201. The officers pushed him off his bicycle and then tried to detain him. *Id.* "Perea struggled and thrashed while holding a crucifix." *Id.* In response, the officers repeatedly tased him (ten times in less than two minutes), "continuing after [he] had been effectively subdued." *Id.* at 1204. At some point during those two minutes, police officers were able to get Perea on the ground on his stomach. *Id.* at 1201. The Tenth Circuit, relying on *Fancher*, denied qualified immunity, finding that it was clearly established that the continued use of force against a person who no longer posed a threat violated the Fourth Amendment. *Id.* at 1204-05.

Fancher and *Perea* teach a simple lesson: the Fourth Amendment does not permit an officer to continue using deadly force once the danger justifying that force has dissipated. Officer Scherman flouted that settled rule. The record shows that, when Officer Scherman *started* shooting, Isaiah was not close enough to punch or otherwise injure him. Pet.App.24-25; AA367-68. And after the first gunshot, Isaiah stopped his advance toward Officer Scherman and otherwise presented no ongoing danger to officer safety. App.364-68. Thus, much like the suspect in *Fancher* (who was immobilized after the first of seven

gunshots) or the mentally ill man in *Perea* (who was put on the ground well before the officers stopped tasing him), Isaiah "no longer presented a 'threat of serious physical harm'" "after Scherman discharged his firearm once." Pet.App.38; *see Smart*, 951 F.3d at 1165-67, 1175-77 (no qualified immunity for officer who fired several additional shots at victim after victim fell to ground and thus "posed no threat" after first shot); *Reavis v. Frost*, 967 F.3d 978, 982-84, 989-95 (10th Cir. 2020) (no qualified immunity for officer who shot at approaching truck driver immediately after truck had already passed him).

The Tenth Circuit paid little heed to these precedents because (in its view) "all of these decisions" involved a "suspect [who] had *clearly* been subdued in an outdoors setting, making the continued use of deadly force plainly unjustifiable," whereas Isaiah was on an unstoppable "rampage." Pet.App.15. But that cursory reasoning does not pass muster.

To start, the District Court found that Officer Scherman's first shot neutralized any threat posed by Isaiah, Pet.App.38, and the Tenth Circuit lacked any jurisdiction to disturb that dispositive factual finding. But even if the Court of Appeals had authority to override that determination, the record (construed in Petitioners' favor) provides no basis for the Tenth Circuit's naked assertion that Isaiah was on a "rampage." Pet.App.15. It instead supports the conclusion that Isaiah no longer posed a threat, and likely stopped moving, after Officer Scherman's first gunshot. The evidence shows that the four bullets that hit Isaiah ripped through his face, right thigh, left groin, and left thigh. AA336-68. A reasonable jury could find that any of those injuries would have

rendered Isaiah immobile or otherwise eliminated any danger he may have initially posed to the officers. In these circumstances, Officer Scherman should have known, based on cases like *Fancher* and *Perea*, that he should have stopped shooting after Isaiah no longer posed a threat.

* * *

At bottom, the Tenth Circuit applied the wrong legal standard, drew the wrong factual inferences, and reached the wrong result. Instead of asking whether Officer Scherman had fair notice that his conduct was unreasonable (as this Court's cases instruct), the Court of Appeals disturbed the District Court's factual findings, construed the record in favor of Officer Scherman, and then granted him qualified immunity based on the absence of a factually identical Tenth Circuit decision. None of this was right. This Court should therefore grant the petition and correct these manifest errors.

CONCLUSION

The Court should grant certiorari on the questions presented or summarily reverse the decision below.

Respectfully submitted,

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