No. 16-805

In the Supreme Court of the United States

DAX K. LEWIS and RICHARD JIMERSON,
Petitioners,

v.

PETER L. VASQUEZ,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. McALLISTER
Solicitor General of Kansas
(*Counsel of Record*)
DWIGHT R. CARSWELL
Assistant Solicitor General
BRYAN C. CLARK
Assistant Solicitor General
M.J. WILLOUGHBY
Assistant Attorney General
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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I. This Court has frequently reversed Circuit decisions that wrongly deny qualified immunity to law enforcement officers, including several decisions of the Tenth Circuit in recent years, and it should do so again here.

Contrary to the overall suggestion of Vasquez's Brief in Opposition ("Opp."), this Court regularly has engaged in the correction of erroneous lower court decisions that improperly denied claims of qualified immunity asserted by law enforcement officers. *See City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) ("Because of the importance of qualified immunity to society as a whole, the Court often corrects lower courts when they wrongly subject individual officers to liability." (internal citation and quotation marks omitted)).

In fact, this Court emphasized its corrective role in this context just weeks ago when it summarily reversed another erroneous Tenth Circuit decision:

> In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. The Court has found this necessary both because qualified immunity is important to society as a whole and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial.

White v. Pauly, 137 S. Ct. 548, 551 (2017) (internal citations and quotation marks omitted).[1]

The Court has not used—indeed, would not use—such summary reversals to "clarify general principles of law," as Vasquez erroneously claims. Opp. at 12. Plenary review, not summary reversal, is the method this Court uses to clarify or change the law. Instead, summary reversals of lower court decisions denying qualified immunity have held that the law is *unclear*, and rarely (if ever) has the Court in a summary reversal attempted or purported to resolve the underlying constitutional question on the merits. Nor have these cases altered or expanded the qualified immunity analysis; to the contrary, they reaffirm longstanding and well-established qualified immunity principles that lower courts simply failed to apply, or applied incorrectly. *Pauly*, 137 S. Ct. at 552 ("Today, it is again necessary to *reiterate the longstanding principle* that 'clearly established law' should not be defined 'at a high level of generality.'" (emphasis added)).

For example, contrary to Vasquez's claim, *White v. Pauly*, 137 S. Ct. 548 (2017), did not announce any new legal rule, nor did it "clarif[y] the framework for evaluating 'clearly established law.'" Opp. at 13. *Pauly* did not even address the underlying Fourth

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[1] *See also Mullenix v. Luna*, 136 S. Ct. 305 (2015); *Taylor v. Barkes*, 135 S. Ct. 2042 (2015); *Carroll v. Carman*, 135 S. Ct. 348 (2014); *Stanton v. Sims*, 134 S. Ct. 3 (2013); *Ryburn v. Huff*, 565 U.S. 469 (2012); *Los Angeles County v. Rettele*, 550 U.S. 609 (2007); *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Hanlon v. Berger*, 526 U.S. 808 (1999).

Amendment issues, nor did it say anything new about the qualified immunity analysis. *Pauly* only reiterated what this Court has said many times before.[2]

The same is true of *Carroll v. Carman*, 135 S. Ct. 348 (2014), and *Stanton v. Sims*, 134 S. Ct. 3 (2013), two other summary reversals Vasquez cites. Even though both cases involved splits of authority on the merits of the underlying constitutional issue, this Court did not resolve the constitutional question in either case. Instead, this Court only held that the lower courts were wrong to deny qualified immunity because the law was not clearly established, just as the Court should do here. *See Stanton*, 134 S. Ct. at 7 ("[W]hether or not the constitutional rule applied by the court below was correct, it was not 'beyond debate.'"); *Carroll*, 135 S. Ct. at 352 (same).

The Tenth Circuit opinion here is likely to impact future cases in the Circuit, and possibly in other jurisdictions. The majority's conclusion that *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997), constitutes clearly established law for this case—in light of numerous post-*Wood* Tenth Circuit decisions distinguishing and even questioning *Wood* as discussed in the Officers' cert petition—does more to unsettle the

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[2] If *Pauly* had offered a novel clarification of the qualified immunity framework, this Court would not have summarily reversed but instead would have set *Pauly* for full briefing and oral argument. Further, if *Pauly* in fact created new law, the proper course here would be for this Court to grant, vacate, and remand for reconsideration in light of the *new* qualified immunity principles that Vasquez alleges *Pauly* purportedly adopted. But because *Pauly* only reiterated what this Court repeatedly has said about qualified immunity, summary reversal is the proper course.

law than to clarify it. *See Stanton*, 134 S. Ct. at 7 (summary reversal of denial of qualified immunity was bolstered by two district courts that had distinguished the two cases the Ninth Circuit relied on as clearly establishing the law). In fact, the panel majority's decision here creates significant uncertainty for law enforcement officers in the Tenth Circuit, while making the prospect of liability in other arguably distinguishable cases much higher.

II. *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997), was not clearly established law and may not even be valid law.

Vasquez relies solely on *Wood* in his attempt to demonstrate clearly established law, but he ignores that *Wood* (contrary to this Court's subsequent decision in *United States v. Arvizu*, 534 U.S. 266 (2002)) completely "disregarded" and "strip[ped] away" all but two of the factors that supported reasonable suspicion: (1) the driver's nervousness; and (2) his prior narcotics history. 106 F.3d at 948. For *Wood* to be on point, it must clearly establish that the numerous other factors the Officers relied upon here should be completely disregarded as well. But those numerous additional factors are ones that the Tenth Circuit and other circuits previously have determined *do* contribute to reasonable suspicion. Petition at 12-16 (citing cases). In any event, the conclusion is inescapable that *Wood* is plausibly distinguishable and did not place "beyond debate" the Officers' reliance on numerous additional factors here to decide that they had reasonable suspicion to detain Vasquez.

It also is questionable whether *Wood* even remains good law in the Tenth Circuit, especially after this Court's decision in *Arvizu*. *See* Petition at 11, 17-19. At a minimum, the existence of reasonable suspicion here was debatable, and thus the Officers are entitled to qualified immunity.

III. Contrary to the analysis this Court directed in *United States v. Arvizu* (2002), the Tenth Circuit here did not consider the totality of the circumstances.

Although the Tenth Circuit panel majority gave lip service to the totality of the circumstances test, it did not actually follow that test, as Chief Judge Tymkovich's dissent demonstrated. In reality, the panel majority first isolated the numerous factors the Officers relied on in deciding to detain Vasquez, and then discounted the factors as innocuous to come up with the notion that 0+0+0+0+0+0+0+0+0+0 = 0 (the Officers here relied on at least 10 considerations, *see* Petition at 11-16). But this Court has made clear that it is error in this context to look "at each separate event in isolation and conclude[] that each, in itself, did not give cause for concern," because "it is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture." *Ryburn v. Huff*, 565 U.S. 469, 476-77 (2012).

For instance, the panel majority completely disregarded the fact that Vasquez was traveling from a known drug source area. Vasquez does the same, suggesting that the Officers stopped him for being a Colorado resident and arguing that the Officers could not detain him "simply" for traveling from Colorado.

Opp. at 9-10. But the Officers did not stop Vasquez on the basis of his residency.[3] Nor did they rely solely on the origin of his travel in deciding to briefly detain him after the initial stop. Instead, they relied on the fact that he was traveling from a significant drug source area, *along with many other factors*, as part of the totality of the circumstances.[4]

Contrary to Vasquez's claim, *Reid v. Georgia*, 448 U.S. 438 (1980), does not hold that traveling from a drug source area can *never* contribute to reasonable suspicion. Instead, in *United States v. Sokolow*, 490 U.S. 1 (1989), the Court subsequently and explicitly recognized that travel to or from a major drug source area, while not suspicious "standing alone," may

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[3] In fact, when the Officers stopped Vasquez, they couldn't even see his temporary tag—that was the basis for the stop. Furthermore, selectively stopping cars with Colorado tags wouldn't make sense as a matter of law enforcement practice—vehicles transporting marijuana from Colorado are often registered in other States (for example, if someone is selling Colorado marijuana in Kansas, they likely have a Kansas registered vehicle that they drive to Colorado and back). In any event, the Officers' subjective intent is irrelevant. *Whren v. United States*, 517 U.S. 806 (1996).

[4] Vasquez's suggestion that because half the States now have legalized medical marijuana, it was somehow unlawful to consider his point of origin as a possible factor for reasonable suspicion is incorrect for at least two reasons. Opp. at 9-10. First, in 2011, only 16 States had legalized medical marijuana. Second, and more importantly, the Officers did not rely on the fact that Colorado had legalized medical marijuana. Rather, they knew—based on their training and experience—that Colorado, and the Denver area *in particular*, was a huge source of marijuana trafficking *in and through Kansas*, and especially on Interstate 70, more so than any other State that had legalized medical marijuana.

contribute to reasonable suspicion when combined with other factors. *Id.* at 9 ("Any one of these factors [including travel to a major drug source city] is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion.").

Similarly, Vasquez dismisses the fact that he was driving in the middle of the night because "[m]any people drive their car overnight." Opp. at 22. He separately argues that traveling alone on a cross-country trip is not suspicious. Opp. at 28. But the Officers did not consider these two factors separately; instead, they considered them together as part of the totality of the circumstances. This Court has rejected "the view that conduct cannot be regarded as a matter of concern so long as it is lawful." *Ryburn*, 565 U.S. at 476. Based on their training and experience, the Officers here found it suspicious for someone to be driving alone, at approximately 2:42 a.m., having apparently left at sunset for a roughly 25-hour cross-country trip. Again, this Court has recognized that acts which may not be suspicious in isolation may give rise to reasonable suspicion when considered in their totality. *See, e.g.*, *Arvizu*, 534 U.S. at 274-75, 277-78.

IV. The Tenth Circuit majority's opinion here conflicts with other Tenth Circuit decisions.

It is impossible to reconcile the decision in this case with the Tenth Circuit's unanimous decisions in *United States v. Moore*, 795 F.3d 1224 (10th Cir. 2015), and *United States v. Pettit*, 785 F.3d 1374 (10th Cir. 2015). In both of those cases, officers described the driver as *extremely nervous*. The same is true here. Jimerson Aff.

¶ 7, Exhibit 3 to *Memorandum in Support of Motion for Summary Judgment*, R. Vol. I, Doc. #70-3 ("His level of nervousness was more than what I normally encounter when I stop motorists. … Unlike most people I stop, who are initially nervous but tend to calm down as the stop progresses, I did not notice Mr. Vasquez's level of nervousness decline."). In fact, the dash cam recording here shows the Officers remarking that Vasquez was "quivering," was "shaking like a leaf," and "looks all scared to death."[5] R. Vol. III; Dash Cam Tr. 5:4-5, 22-23; 14:22.

Also, as in *Moore*, Vasquez was driving a recently registered car. Vasquez claims that *Moore* is distinguishable because there the driver had recently been added to someone else's registration. But *Moore* held that it was the *recent registration* of the car—which is present here—that contributed to reasonable suspicion. 795 F.3d at 1231 ("The recent registration of a vehicle can contribute to reasonable suspicion.") (citing *United States v. Berrelleza*, 90 F. App'x 361, 364 (10th Cir. 2004) (unpublished) (noting that "it is common for drug cartels to supply a courier with a high mileage vehicle that has only recently been registered and insured")).

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[5] Vasquez denies that he was actually nervous, but the question is not his subjective "feelings"; rather, it is whether objectively he appeared nervous to the Officers. Notably, earlier in the evening, Vasquez had called a Veterans Administration medical facility and complained of shaking and tremors. *See* R. Vol. II, Doc. #75; Plaintiff's Resp. to Def's First Request for Admissions #20-22, Exhibit 5 to *SJ Memo*, R. Vol. I, Doc. #70-5. An officer observing Vasquez's shaking and tremors reasonably could have perceived such symptoms as signs of extreme nervousness.

Likewise, as in *Pettit*, Vasquez's travel plans struck the Officers as unusual. Vasquez gave seemingly inconsistent explanations for his visit to Maryland (visiting a daughter versus moving there to be with his girlfriend), which suggested he may have been traveling there for another reason altogether, such as transporting drugs, especially once the Officers learned he was traveling from a significant drug source area. Furthermore, Vasquez's car was unusually empty for someone allegedly moving across the country, the Officers did not see items in the car typically part of the last stages of a move, and Vasquez had covered the items in his car even though the car's windows were tinted. Vasquez's claim that he was moving to Maryland was further undermined by his statement that he owned a store in Colorado *when asked where he worked*.

In addition, when asked why he was driving an almost 20-year-old BMW to Maryland instead of a much newer 2011 Chevy Malibu he owned, Vasquez replied that he bought "it" for his girlfriend. Vasquez now claims that he was referring to the Malibu when he said "it." But before the district court, Vasquez admitted that he was referring to the BMW. *See* Vasquez's *Response to Defendants' Motion for Summary Judgment*, R. Vol. I, Doc. #71 at 29 ("When Trooper Lewis [asked] why Mr. Vasquez was driving the BMW instead of the 2011 Malibu, Mr. Vasquez explained that he bought the BMW for his girlfriend and that the 2011 Malibu was in Elkton.").

In any event, the transcript of the conversation, which is included as an Appendix to the Petition, shows that Vasquez's statement would most naturally be

interpreted as referring to the BMW. Trooper Lewis asked Vasquez, "How come you're driving the older one [the BMW] across the country?" Vasquez responded, "Because I bought it for my girlfriend." App. 40. A reasonable officer would have understood "it" as referring to the object of the question, the BMW. That is precisely how Trooper Lewis interpreted Vasquez's statement, as demonstrated by Trooper Lewis's response: "*This*? Oh, okay." App. 40 (emphasis added). It struck Trooper Lewis as implausible that Vasquez would buy his girlfriend an almost 20-year-old car in Colorado and drive it to Maryland rather than just buying a car for her in Maryland.

Thus, Vasquez's travel plans here were just as suspicious as the travel plans in *Pettit*, and *far more* suspicious than the allegedly implausible travel plans in *Wood*.

In short, two of the three factors that contributed to reasonable suspicion in *Moore* and *Pettit* are present here, plus many more. Ideally, the Tenth Circuit itself would resolve this intra-circuit split en banc, but the Tenth Circuit declined to do so here, leaving this case out there with conflicting cases such as *Moore* and *Pettit* to create uncertainty for law enforcement officers in the Tenth Circuit.

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If the panel majority's decision finding no reasonable suspicion and denying qualified immunity is permitted to stand, law enforcement officers in the Tenth Circuit will face a very real and increased risk of liability for making traffic stops. The majority's decision below unsettles the law rather than clarifies it,

while holding the Officers liable despite this legal uncertainty. At a minimum, the extensive arguments about the scope and validity of the Tenth Circuit's *Wood* decision demonstrate that there was no clearly established law here because the question whether reasonable suspicion existed on these facts was not remotely "beyond debate." *See Stanton*, 134 S. Ct. at 7.

CONCLUSION

The Officers request that this Court summarily reverse the Tenth Circuit's decision erroneously denying the Officers qualified immunity, and vacate the panel majority's unnecessary and questionable Fourth Amendment analysis.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. McALLISTER
Solicitor General of Kansas
(*Counsel of Record*)
DWIGHT R. CARSWELL
Assistant Solicitor General
BRYAN C. CLARK
Assistant Solicitor General
M.J. WILLOUGHBY
Assistant Attorney General
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com
Counsel for Petitioners

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