No. 14-1492

In The
Supreme Court of the United States

BRANDON PICKENS,
JAMES ATNIP, and STEVE BEEBE,

Petitioners,

vs.

ERMA ALDABA, personal representative and next of kin of JOHNNY MANUEL LEIJA, deceased,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) Whether the court of appeals erred in affirming the denial summary judgment on qualified immunity grounds to the Petitioners, three armed law enforcement officers who, for the ostensible purpose of forcing an unarmed, severely ill hospital patient to receive medical treatment, tasered, tackled and handcuffed him where the district court found that questions of fact existed as to: i) the level of the patient's aggression; ii) the degree of resistance by the patient; iii) the degree of threat, if any, the patient posed to the officers or the public; and iv) the knowledge the officers possessed about the patient's physical condition in the hospital before such force was used.

2) Whether it is a constitutional violation made clear by existing law for three law enforcement officers in a medical hospital to taser, tackle and handcuff an unarmed hospital patient who has committed no crime for the ostensible purpose of protecting him so that he could be forced to receive medical treatment when the patient is severely ill and physically compromised with a dangerous lung condition, is delusional but has committed no crimes, poses no threat to the officers or the public, and is offering minimal or passive resistance by merely walking away from the officers and where the officers have taken few steps to learn anything about the nature, immediacy or severity of the hospital patient's medical condition.

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Respondent Erma Aldaba, personal representative and next of kin of Johnny Manuel Leija respectfully submits that this Court should deny the petition for a writ of certiorari sought by Petitioners.

INTRODUCTION

This case involves a claim of excessive use of force against police officers who used a taser on Johnny Leija, a hospital patient suffering from severe pneumonia and mental disturbance, then tackled and handcuffed him, contributing to his death. Both lower courts found that there were material issues of fact that precluded summary judgment in favor of the police officers on their claim of qualified immunity, including disputes over whether Mr. Leija was engaged in any active resistance to the officers and whether he presented any kind of threat to their safety.

The officers' petition for a writ of certiorari challenging the fact-bound decision in this case presents no issue meriting review by this Court. The Petitioners do not raise any important legal issue. They do not challenge the legal standard applied by the Tenth Circuit in evaluating qualified immunity in excessive force cases, nor do they identify any decisions of other circuits with which the Tenth Circuit's ruling conflicts. Indeed, they do not contest that the use of a taser and the other force applied in this case

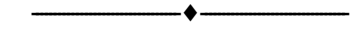
on a non-violent, non-resisting person not suspected of any crime would violate clearly established law. Instead, they argue only that there is no case authority clearly establishing that the use of force is unconstitutional on what they contend are the specific facts of this case.

That argument does not justify review here for multiple reasons. First, such a fact-specific challenge to the application of settled legal principles would not meet the standards for a grant of certiorari even if the petitioners' account of the facts were accurate. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *see also City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1779 (2015) (Scalia, J., concurring in part and dissenting in part) (observing that there was "little chance" the Court would grant certiorari to address the "fact-bound" question "whether the individual petitioners are entitled to qualified immunity on respondent's Fourth Amendment claim").

Second, accepting Petitioners' argument would amount to holding that the law can be clearly established only if there are other excessive force cases that adjudicate identical or nearly identical facts. But this Court and the lower courts have unanimously rejected that proposition. *See*, *e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Casey v. City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007).

Third, both lower courts found that there was a material dispute of fact as to whether Petitioners' account of the facts was correct. While Petitioners frame this case as being about whether they should be immune from liability for use of force where the victim posed a serious threat to police officers and other members of the public, it was precisely whether Mr. Leija posed such a threat that the lower courts found to be a disputed fact question. Where there are such disputed fact issues, the Petitioners' claim for summary judgment must be decided on the assumption that the issues will be resolved in favor of the non-moving party – an assumption that is fatal to Petitioners' claim to summary judgment on immunity.

The petition therefore ultimately rests on a disagreement with the courts below that there are genuine disputes of fact. This Court, however, generally defers to concurrent findings of two lower courts on fact-related issues. *Estelle v. Williams*, 425 U.S. 501, 530, n. 10 (1976). Moreover, district court findings that there are genuine disputes of material fact barring summary judgment do not even fall within the scope of interlocutory appeals of qualified immunity summary judgment rulings. *Johnson v. Jones*, 515 U.S. 304, 313-18 (1995). Second-guessing the lower courts' finding that there are genuine disputes of material fact would thus not only embroil this Court in a fact-bound issue that does not merit review, but also contravenes fundamental limits on the appealability of qualified immunity rulings.



STATEMENT OF THE CASE

On the evening of March 24, 2011 the Petitioners were on duty as law enforcement officers with the City of Madill, Oklahoma and the Marshall County Sheriff's Department when they were called to Integris hospital to deal with a hospital patient, Johnny Leija, who had been admitted for severe double pneumonia. Mr. Leija was refusing treatment and trying to leave the hospital. When the Petitioners arrived at the hospital officer Pickens was told that Mr. Leija was extremely ill and could die. The Petitioners saw Mr. Leija exit his hospital room. He waved them off and walked past them slowly. Officer Pickens called to him and told him to go back to his room. Mr. Leija responded that people were trying to poison him and kill him. He was visibly agitated and upset. Mr. Leija was unarmed and had committed no crimes, nor had he threatened anyone.

Officer Pickens and the other Petitioners continued to instruct Mr. Leija to go back to his hospital room. Mr. Leija continued to slowly walk down the hall away from the officers. Eventually Mr. Leija raised his arms, clenched his fists which were bleeding from his IV ports and stated "this is my blood." In response, the Petitioners contend that they ordered Mr. Leija to get on his knees or he would be tased. Mr. Leija did not get on his knees. Officer Pickens shot Mr. Leija in the chest with his taser weapon. Instead of attacking the officers Mr. Leija turned away from them. The officers lunged at Mr. Leija and forced him against a wall where two of them held him while the

third used the taser, or stinger, in Mr. Leija's back. The three of them drove this very ill man to the ground after a struggle where they placed him face down and handcuffed him while using their weight to hold him. Mr. Leija was quickly discovered to be unconscious. CPR was performed and he was pronounced dead shortly thereafter. The medical examiner determined the cause of death to be "respiratory insufficiency" secondary to pneumonia. He explained that the physical struggle with the Petitioners exacerbated the pneumonia.

The District Court correctly found and the Tenth Circuit affirmed that multiple facts were in dispute and that each of them must be weighed in favor of the non-moving party, Respondent. Those disputed facts, when viewed in the light most favorable to the Respondent, preclude qualified immunity on the claims of excessive force. The actions of the Petitioners in tasering, tackling and handcuffing a gravely ill hospital patient were unreasonable and unnecessary.

The District Court specifically found that the following facts were in dispute:

1) The degree of resistance exhibited by Mr. Leija. (Petitioners' Appendix (Pet. App.) 64)

2) The nature of the aggressive behavior of Mr. Leija during his encounter with the Petitioners. (Pet. App. 64)

3) The degree of threat that Mr. Leija posed to the public or the officers. (Pet. App. 64-65)

4) The Petitioners' knowledge of Mr. Leija's medical condition and their efforts to ascertain information about it. (Pet. App. 65)

The Tenth Circuit accepted these conclusions by the district court and viewed each disputed fact in favor of the non-moving party, Respondent, in the court's qualified immunity analysis. The Tenth Circuit applied the criteria for determining the reasonableness of force as identified in *Graham v. Connor*, 490 U.S. 386, 395 (1989) to the disputed facts and correctly concluded that they weighed against the type of force used by the Petitioners. The circuit court then identified three additional factors that were relevant to a qualified immunity analysis where the subject was mentally unstable and was being taking into protective custody only. The dissenting opinion disagreed with the characterization and interpretation of the undisputed facts found by the district court and embarked on its own fact finding mission.

REASONS FOR DENYING THE WRIT

This case presents the application of settled principles of law to a disputed factual scenario. The Tenth Circuit's application of law to the disputed issues of material fact was correct and does not contradict rulings of this Court or other federal appellate decisions. The Tenth Circuit properly accepted the district court's conclusion that there are genuine disputes of material facts that relate directly to the

factors that must be considered in determining the reasonableness of a particular use of force. The Tenth Circuit and the district court correctly assumed that each of these disputed facts would be resolved in favor of the non-moving party and in doing so correctly found that each of them weighed against the uses of force by the Petitioners on the question of qualified immunity. The petition for certiorari is nothing more than a request for this Court to question the pretrial findings of fact of two lower courts that there are disputed issues of material fact – a request that relevant decisions of this Court foreclose.

I. The Petition Presents No Important Question Of Law Meriting Review

This Court's Rules emphasize that a writ of certiorari is granted only for "compelling reasons," most notably when a lower court's decision conflicts with a ruling of another federal court of appeals, a state court of last resort, or a decision of this Court on an important issue of federal law. *See* S. Ct. R. 10. By contrast, cases involving issues of fact, or the application of settled principles of law to particular facts, do not merit review. *See id*.

The petition here makes little pretense of meeting these standards. The Petitioners do not identify an important issue of law presented by the case, nor do they even attempt to claim that the Tenth Circuit's ruling conflicts with rulings of other courts on any broadly applicable issue of law.

Indeed, Petitioners do not even challenge the legal principles that underlie the Tenth Circuit's ruling. They do not contest that it is clearly established that unreasonable use of force by the police violates the Fourth Amendment and that the application of this standard requires a fact-specific analysis of whether the use of force was reasonably justified by the degree of threat and resistance posed by the person subjected to force, and the need to subdue him in light of the severity of the conduct justifying a seizure. *Graham v. Connor*, 490 U.S. 386 (1989). They likewise acknowledge that it may be clearly established that a use of force is unconstitutional in the absence of a case directly on point, if precedent would put a reasonable officer on notice that the circumstances do not justify the degree of force used. (Petition for Certiorari 13). And they do not take issue with the Tenth Circuit's approach in addressing such questions, under which "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." (Pet. 14) (citing *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004); *Morris v. Noe*, 672 F.3d 1185, 1196-97 (10th Cir. 2012)).

Petitioners do not even contest the Tenth Circuit's legal conclusions about the circumstances under which tasers and similar force can be used against offenders. They *endorse* Tenth Circuit decisions in prior cases confirming that tasers may be used against offenders who pose a risk of violence but not against

those who pose no threat. *See* Pet. 16-18 (discussing *Hinton v. City of Elwood, Kansas*, 997 F.2d 774 (10th Cir. 1993), and *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007)).[1] And they approvingly cite similar cases from other circuits and district courts that draw the same line. *See* Pet. 16-19. In short, Petitioners' own case citations would refute any suggestion that there is a conflict among the lower courts that would require resolution here even as to the very fact-specific issue of the application of Fourth Amendment standards to particular uses of tasers. Petitioners assert no more than that some of the decisions that the Tenth Circuit cited in support of its ruling are distinguishable on their facts (Pet. 19) but that assertion, even if true, falls far short of establishing a conflict requiring resolution by this Court.

Petitioners likewise do not contest the Tenth Circuit's legal conclusion that precedent clearly establishes that it violates the Fourth Amendment to use a taser and other violent force against a non-criminal, physically and mentally ill offender who has not threatened the officers or other members of the public and who is engaging only in passive resistance to police officers' efforts to restrain him for his own safety.

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[1] Petitioners' claim that the decision below is inconsistent with the Tenth Circuit's own ruling in *Hinton* is not only unpersuasive in light of the factual differences between the cases, but at best would establish an intra-circuit conflict, which is not generally a ground for review by this Court as it can be resolved within the circuit itself through en banc proceedings, if necessary.

Rather, they argue only that the case law establishes that "one may be able to use a Taser on a person who is acting in an aggressive fashion and posing a threat." (Pet. 19) In other words, rather than claiming that the legal principles applied by the Tenth Circuit are erroneous or in conflict with rulings of other courts, Petitioners assert only "that the Tenth Circuit erred" (Pet. 18) in applying those principles to the facts here, which they contend established that Mr. Leija posed a threat. Such a claim of mere error in the application of settled legal principles to facts is the antithesis of a question meriting the grant of certiorari. Thus, Petitioner's arguments would not justify review even if they had factual support in the record.

II. The Lower Courts' Determination That There Are Genuine Disputes Of Material Fact Should Not Be Disturbed, And All Disputed Facts Must Be Viewed In Favor Of Non-Moving Party Respondent

Petitioners' fact-bound challenge to the Tenth Circuit's decision not only fails to present any legal issue meriting review, but its factual premise – that Mr. Leija was "acting in an aggressive fashion and posing a threat" (Pet. 19) flies in the face of the determinations of both lower courts that there were disputed issues of material fact on both these points, as well as others that are relevant to the question of qualified immunity.

A denial of qualified immunity by a lower court is reviewed based on "the facts that the district court assumed when it denied summary judgment." *Johnson v. Jones*, 515 U.S. 304, 319 (1995) (quoted by *Morris v. Noe*, 672 F.3d 1185, 1189 (10th Cir. 2012). Disputed facts are to be judged in the light most favorable to the non-moving party. *Hope*, 536 U.S. at 748, n. 1 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Scott v. Harris*, 550 U.S. 372, 378 (2007). Consistent with this procedure the Tenth Circuit explicitly stated in its opinion, "We accordingly rely on the district court's description of the facts, taken in the light most favorable to the Plaintiff, and do not reevaluate the district court's conclusion that the summary judgment record is sufficient to prove these facts." (Pet. App. 3) That approach is in agreement with the views of other federal appellate courts that have recognized that, "we may review whether the set of facts identified by the district court is sufficient to establish a violation of a clearly established constitutional right, but we may not consider whether the district court correctly identified the set of facts that the summary judgment record is sufficient to prove." *Forbes v. Twp. of Lower Merion*, 313 F.3d 144, 147 (3d Cir. 2002) (Alito, J.).

Petitioners' challenge to the concurrent findings of the district court and court of appeals that the case presents a genuine dispute of material fact falls well outside the scope of issues appropriate for review by this Court. This Court's "two-court" rule is the "long established practice not to reverse findings of fact

concurred in by two lower courts unless shown to be clearly erroneous." *Estelle v. Williams*, 425 U.S. 501, 530, n. 10 (1976). Petitioners join the lower court's dissenting opinion in complaining about perceived mischaracterizations of the facts by the majority opinion and the district court. But Petitioners identify no clear error in the determination that there are material disputes. Instead, Petitioners' brief wrongly "takes issue with the district court's characterization of the facts based upon the evidence – which is really an attack concerning evidentiary sufficiency." *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 664 (10th Cir. 2010). The certiorari petition is nothing more than an improper request for this Court to go beyond an appeal of the lower court's legal conclusions. *Id.*

Indeed, review of the lower courts' determination that there are genuine issues of disputed fact would contravene fundamental limits on the appropriate exercise of appellate jurisdiction over interlocutory appeals of qualified immunity orders. In *Johnson*, this Court held that although legal questions concerning whether official conduct violated clearly established law may be the subject of interlocutory appeals from denials of qualified immunity at the summary judgment stage, a district court's "determination that the summary judgment record . . . raised a genuine issue of fact" is not similarly appealable. 515 U.S. at 313. Moreover, the Court cautioned that even when an interlocutory appeal is available on the legal question whether the plaintiff's allegations (if true) would establish a violation of clearly established law,

the appellate court should not allow that appeal to be used as a vehicle "to review the underlying factual matter." *Id*. at 318.

Here, Petitioners were entitled to appeal whether, viewing the disputed material facts in the light most favorable to the plaintiff, their conduct (tasing, tackling, and handcuffing a non-violent, passively resisting person who had engaged in no criminal conduct and was experiencing severe physical and mental illness) violated clearly established law. What they were not entitled to do was appeal the district court's determination that there were disputed issues of fact as to whether he posed a threat of violence, the nature of his resistance, and other material issues. Yet the only issue they now press before this Court is that the Tenth Circuit supposedly erred "inexplicably" in accepting the district court's ruling that those issues were in dispute. (Pet. 8). This Court should reject that effort to expand the permitted scope of review on an interlocutory appeal of a qualified immunity ruling.

III. The Qualified Immunity Holding Does Not Warrant Review

A. The decision below was correct

1. The Petitioners violated Mr. Leija's constitutional rights

"*The situation the police officers faced in this case called for conflict resolution and*

de-escalation, not confrontation and tasers."
(10th Cir. Majority Opinion, Pet. App. 16-17)

"The threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. at 736 (citing *Saucier v. Katz*, 533 U.S. at 201). "All claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigative stop or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989). A determination as to the 'reasonableness' of a particular use of force requires "a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396. The question is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id*. at 397. The weapon of choice by the Petitioners in this case was a taser, or stinger – "a weapon that sends up to 50,000 volts of electricity through a person's body, causing temporary paralysis and excruciating pain," *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 665 (10th Cir. 2010) (citing *Casey v. City of Federal Heights*, 509 F.3d at 1285) followed by tackling and handcuffing of a critically ill and delusional hospital patient with a dangerous lung condition.

Graham identified three non-exclusive factors in determining the reasonableness of the force used: i) the severity of the crime at issue; ii) whether the suspect poses an immediate threat to the safety of the officers or others; and iii) whether he is actively resisting arrest or attempting to escape arrest. *Graham*, 490 U.S. at 396. The district court found that there were genuine issues of fact directly related to each of these factors and the Tenth Circuit agreed. The Tenth Circuit then identified additional factors that it considered relevant to a "reasonableness" inquiry into the force used on a mentally impaired person for the sole purpose of placing him in protective custody for his own benefit. The Petitioners do not contest the Tenth Circuit's reliance on the factors as identified in *Graham* nor does the certiorari petition claim that the circuit court was in error when it identified at least three non-*Graham* factors in its reasonableness analysis of the force employed. The Petitioners have waived any criticism of the Tenth Circuit's identification of these relevant factors.

The specific factors identified and analyzed by the Tenth Circuit are as follows:

i) Severity of the crime

In addressing the severity of the crime at issue the district court found that "while it is alleged that he [Leija] was using his blood as a weapon, there is no evidence that any blood was spattered on any of the officers." (Pet. App. 65) The Tenth Circuit

concluded that "[t]aking the facts in the light most favorable to Plaintiff, Mr. Leija did not commit any crime, much less a severe crime . . . " (Pet. App. 17) The circuit court was correct to make this determination after the district court failed to identify any crime Mr. Leija committed given an appellate court's duty to view disputed facts in the light most favorable to the non-moving party. *Saucier*, 533 U.S. at 201.

Force should be commensurate with the severity of the crime. *Graham*, 490 U.S. at 396; *Cavanaugh*, 625 F.3d at 665 (10th Cir. 2010) (holding that taser use on a subject suspected of a non-injurious and mild misdemeanor crime where the subject was unarmed and not fleeing is unconstitutional). Neither court below articulated a crime that Mr. Leija committed taking the facts in the light most favorable to the non-moving party. This factor clearly weighs against the use of force employed by the Petitioners given the lower court's agreement that Mr. Leija had committed no crime. *Id.*

ii) Immediate threat posed to the officers

The district court and the Tenth Circuit reviewed video footage of part of the altercation between the Petitioners and Mr. Leija. The initial encounter and the second taser use, tackling and handcuffing of Mr. Leija are viewable. However, the first taser use and what circumstances led to it cannot be objectively seen on the video. The district court found that "[t]he

testimony of the officers is not consistent as to the nature of the aggressive behavior of Leija during this critical gap in the video. Additionally, the record is in dispute as to the degree of threat Leija posed to the officers and the public. Leija was a hospital patient. He was not armed in any fashion." (Pet. App. 64-65) The Tenth Circuit recognized that these facts were in dispute and stated, "[h]ere, taking the facts in the light most favorable to the Plaintiff, Mr. Leija . . . he posed no threat to the police officers or anyone else." (Pet. App. 17)

Despite these clear determinations by both the district court and the court of appeals the Petitioners, without citing to any source other than the findings of *disputed* facts as stated in the lower court opinions, argue that " . . . Leija . . . posed a threat to the officers and even to the medical staff in the hospital who were afraid of him." (Pet. 14) The district court and the circuit court both found that the issue of whether Mr. Leija was a threat to anyone was in dispute and should be viewed in the light most favorable to the non-moving party, the Respondent. That reviewing courts should view disputed facts favorably to the non-moving party is based on settled law beyond dispute. *Hope*, 536 U.S. at 748, n. 1 (citing *Saucier*, 533 U.S. at 201). Again, this factor weighs clearly against the type of force used by the Petitioners. *Graham*, 490 U.S. at 396; *Cavanaugh*, 625 F.3d at 665.

iii) Active resistance or escape

As the district court found, "[p]rimarily the record is in dispute as to the *degree* of resistance exhibited by Leija after being confronted by the officers. The video shows Leija merely walking away from the officers." (Pet. App. 64) The Tenth Circuit recognized that there was evidence that Mr. Leija was clenching and shaking his fists and did not comply with officer's demands to get on his knees. The Court found that the evidence shows some level of resistance but drew a distinction between merely passively resisting and actively resisting an arrest. (Pet. App. 19) The Court emphasized that the video only showed Mr. Leija slowly walking away. (Pet. App. 19) The Court recognized that this indicated some level of resistance but stated, "[h]owever, viewing the facts in Plaintiff's favor nothing suggests Mr. Leija's resistance was anything more than passive." (Pet. App. 19) In such circumstances courts typically allow excessive force cases to proceed when a subject who is not actively resisting is tased. *See*, *e.g.*, *Roosevelt-Hennix v. Prickett*, 717 F.3d 751, 759-60 (10th Cir. 2013) (cited at Pet. App. 18) The Court found that Mr. Leija's level of resistance was not commensurate with the use of force that was applied in response. (Pet. App. 19-20)

The Petitioners incorrectly rely on *Hinton*, 997 F.2d at 774. (Pet. 16) While it is true that the plaintiff in *Hinton* was only arrested for a mild misdemeanor crime and the Tenth Circuit found that he was not an immediate threat to the police or the public when the initial force was used the Tenth Circuit also found

that he was biting and actively fighting the officers when the taser use occurred. *Id*. at 781. This fact alone was justification for the taser use in *Hinton*. *Id.* The Petitioners fail to mention this aspect of *Hinton* which clearly distinguishes it from the instant case where Mr. Leija was not actively resisting arrest, fleeing, biting or even touching the Petitioners when the first taser strike occurred.

Petitioners and the dissenting opinion complain about the majority opinion's adoption of the district court's finding that the degree of Mr. Leija's resistance was in dispute. Again, however, it is proper in an interlocutory qualified immunity appeal for the appellate court to accept the lower court's identification of issues of fact, *see Johnson*, 515 U.S. at 319, and in its own analysis to view all factual disputes favorably to the non-moving party. *Hope*, 536 U.S. at 748, n. 1 (citing *Saucier*, 533 U.S. at 201); *Scott*, 550 U.S. at 378.

iv) Government interest in preventing Mr. Leija from harming himself

The Tenth Circuit properly recognized that "[t]he state has a legitimate interest . . . in protecting a mentally ill person from self-harm." *Pino v. Higgs*, 75 F.3d 1461, 1468 (10th Cir. 1996) (cited by majority opinion, Pet. App. 11). It is undisputed that Mr. Leija was suffering from a mental break with reality as a result of his lung condition which had steadily

deprived him of oxygen. Courts have repeatedly held that the government has an interest in protecting persons in Mr. Leija's position from harm to themselves, and thus both lower courts have agreed that *some* type of seizure accompanied by *some* use of force was legitimate. *Id*. But the reasonableness analysis must be different in protective custody cases as opposed to criminal ones. As the Ninth Circuit has stated when discussing the use of force in protective custody cases:

> The government has an important interest in providing assistance to a person in need of psychiatric care; thus the type of force that may be justified by that interest necessarily differs in both degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community.

Bryan v. MacPherson, 630 F.3d 805, 829 (9th Cir. 2010). Officers must make a "greater effort to take control of the situation through less intrusive means." *Id.*

Where the only reason for detaining a person is protective custody the "severity and immediacy of the threat the individual poses to himself" must be considered in determining the reasonableness of a particular use of force. (Pet. App. 11) Certainly the more severe and immediate a person's medical condition the more likely it is that a use of force will *undermine* the state's interest in seizing him. The greater the force the greater the likelihood that it will

cause more harm than good. Mr. Leija was extremely ill. He was hospitalized for double pneumonia and at least one officer was told by hospital staff that if Mr. Leija left the hospital he might very well die. These factors all point to using force that will not exacerbate an already potentially lethal condition. Tasering, tackling and handcuffing is not that type of force.

Thus, Petitioners do not contest the Tenth Circuit's invocation of the proposition that "[w]here it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed." *Deorle v. Rutherford*, 272 F.3d 1272, 1282-83 (9th Cir. 2001) (quoted at Pet. App. 13). Where an individual has committed no crimes and is unarmed, as Mr. Leija was, directly causing him injury while trying to protect him from injuries to himself does not serve any state interest. *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003).

Here the state had an interest in protecting Mr. Leija. That interest was not served by harming him when he had committed no crime, was unarmed and was not a danger to anyone but himself. These factors weigh heavily against the type of force that was used on Mr. Leija.

v) Officer's knowledge of Mr. Leija's mental and physical condition

The district court specifically found that there were genuine issues of fact in dispute concerning the Petitioners' knowledge of Mr. Leija's medical condition and their efforts to learn about his condition. (Pet. App. 65) In adopting that finding the Tenth Circuit also found that any analysis of the reasonableness of a particular use of force "depends in part on whether the law enforcement officers knew or should have known that the individual had special characteristics making him more susceptible to harm from this particular use of force." (Pet. App. 13) Again, Petitioners do not contest this legal principle. The court cited *Cruz v. Laramie*, 239 F.3d 1183 (10th Cir. 2001) which applied this factor when determining the reasonableness of a certain type of restraint of an arrestee. *Id*. This factor is even more important when the *only* governmental interest at play is the health of the detainee and an increased use of force elevates the likelihood that the force "may do more harm than good." (Pet. App. 14) Specifically the Ninth Circuit has noted that officers have been warned by electronic weapon manufacturer Taser International that officers using these devices should "pay special attention to 'physiologically or metabolically compromised' suspects, including those with cardiac disease and the effects of drugs." *Rosa v. Taser Int'l, Inc.*, 684 F.3d 941, 948, n. 6 (9th Cir. 2012). (Pet. App. 14-15)

The court's application of this factor properly reasoned that Mr. Leija's mental health was obviously

compromised and that this factor weighed against "such a severe level of force against him." (Pet. App. 16) Officers confronted with mentally ill individuals should make a "greater effort to take control of the situation through less intrusive means." *Bryan v. MacPherson*, 630 F.3d at 829 (cited by majority opinion, Pet. App. 16) The Court also found that "Mr. Leija's compromised physical condition also weighs against the types of force employed in this case. A use of force that might be reasonable on an apparently healthy individual may be unreasonable when employed against an individual whose diminished capacity should be apparent to a reasonable officer." (Pet. App. 17) (citing *Cruz*, 239 F.3d at 1188). Again, precedent requires that these disputed facts must be viewed in favor of the non-moving party, Respondent. The court therefore assumed that "the officers were on notice that Mr. Leija was gravely ill and thus was very likely to have diminished capacity. This factor weighs against the reasonableness of the officers' decision to tase and wrestle a hospital patient. . . ." (Pet. App. 17)

The certiorari petition repeatedly and wrongly asserts that the lower court's ruling denies officers the ability to use a taser against "aggressive," "resisting" or "threatening" subjects. (Pet. 21, 23-25) The Petitioners overreach by ignoring the very specific findings of the lower court's opinion. The Tenth Circuit's ruling does not bar taser use against "aggressive," "resisting" or "threatening" persons as these terms are used by the Petitioners. Both lower courts

stated repeatedly that Mr. Leija's degree of aggression and resistance is a disputed fact that is not settled and therefore must be viewed at the summary judgment stage in the light most favorable to the Respondent. The court of appeals said the same thing about the level of "threat" posed by Mr. Leija to the officers and the public. The court's determination that summary judgment was properly denied rested on the view that Mr. Leija was only minimally aggressive, passively resisting and was not a threat to the officers or the public. The court was careful to point out that the factual disputes identified must be resolved at trial. "If these facts prove to be different than those we have considered on the summary judgment record, the excessive force analysis may yield a different result." (Pet. App. 25-26)

Viewing the facts in the light most favorable to the Respondent, it is fair and accurate to describe the lower court's ruling as holding that officers may not tase, tackle and handcuff an obviously mentally ill hospital patient with a severe and dangerous health condition who has committed no crimes, is unarmed, is only passively resisting if at all, is minimally aggressive and is not a threat to the officers or the public. That holding is correct and does not conflict with other decisions of this Court or courts of appeals.

2. The Petitioners were provided fair warning that their actions would violate Mr. Leija's constitutional rights

"Despite their participation in this constitutionally impermissible conduct, [Petitioners] may nevertheless be shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope*, 536 U.S. at 739 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This Court has held that an analysis of whether an officer has been given "fair warning" is another means of determining whether a right is "clearly established." *Hope*, 536 U.S. at 739-40 (citing *United States v. Lanier*, 520 U.S. 259 (1997). "To require something clearer than 'clearly established' would, then, call for something beyond 'fair warning.'" *Lanier* 520 U.S. at 270-71. Officers can be on notice that their conduct violates established law "even in novel factual circumstances." *Hope*, 536 U.S. at 741 (citing *Lanier*). This Court in *Hope* and in *Lanier* "expressly rejected a requirement that previous cases be 'fundamentally similar'" to provide fair warning to an officer that his conduct is unconstitutional. *Hope*, 536 U.S. at 741. As the Tenth Circuit stated in *Casey*, 509 F.3d at 1284, "[w]e cannot find qualified immunity wherever we have a new fact pattern."

The Tenth Circuit has stated that in excessive force cases which are always fact-specific, "there will

almost never be a previously published opinion involving exactly the same circumstances." *Morris v. Noe*, 672 F.3d 1185 (10th Cir. 2012) (quoting *Casey*, 509 F.3d at 1284 (10th Cir. 2007)). To ensure a fair application of the "clearly established" or "fair warning" requirements of qualified immunity the Tenth Circuit has established a "sliding scale": "The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish a violation." *Morris*, 672 F.3d at 1196 (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004) (*see also Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002)). As Petitioners do not contest, "[w]hen an officer's violation of the Fourth Amendment is particularly clear from *Graham* itself, we do not require a second decision with greater specificity to clearly establish the law." *Morris*, 672 F.3d at 1197 (quoting *Casey*, 509 F.3d at 1284).

Petitioners overemphasize the degree of specificity required of prior cases to clearly establish the law. They would ask this Court to require a "scavenger hunt for prior cases with precisely the same facts" in place of the more fair and relevant inquiry of "whether the law put officials on fair notice that the described conduct was unconstitutional." *Pierce*, 359 F.3d at 1298 (discussing *Hope*, 536 U.S. at 741) The Petitioners' invitation to such a scavenger hunt does not warrant review by this Court.

Here, Petitioners had fair warning that a subject's mental health or diminished capacity should be

taken into account when determining the level or type of force that should be employed. *Cruz*, 239 F.3d at 1188; *Giannetti v. Stillwater*, 216 Fed. Appx. 756, 764 (10th Cir. 2007) (" . . . a detainee's mental health must be taken into account when considering the officer's use of force . . . "); *Champion v. Outlook National, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004) ("The diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted."); *Abudalli v. City of Madison*, 423 F.3d 763, 772 (7th Cir. 2005) (an officer's knowledge of mental disability "may also be deemed relevant to the reasonableness inquiry"); *Drummond*, 343 F.3d at 1058.

Petitioners were likewise on notice that use of significant force against a nonviolent, unarmed person who had committed no serious crimes and engaged in no active resistances is unconstitutional. In *Casey*, officers were found to have violated the plaintiff's rights by tackling and tasering him as he walked away from an officer who ordered him to return to his truck. The officer intended to seize him for what was at worst a slight misdemeanor crime (removing a court file from the courthouse). The plaintiff in *Casey* was unarmed and posed no threat to officers or the public. He was not "actively resisting" the officers but he did not comply with the order to return to his vehicle. The Court summarized the scenario:

> In sum we are faced with the use of force – an armlock, a tackling, a Tasering and a

> beating – against one suspected of innocuously committing a misdemeanor, who was neither violent nor attempting to flee.

Casey, 509 F.3d at 1282. The Tenth Circuit found that "*Graham* establishes that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest." *Id*. at 1285. The facts of Mr. Leija's case are strikingly similar to *Casey* in that both men were unarmed and offering only passive or no resistance after failing to comply with an officer's instruction. There are differences, but they do not deprive Petitioners of fair warning because they cut even more strongly against the use of force here. In *Casey* the Plaintiff was wanted for a mild misdemeanor, while Mr. Leija had committed no crimes but was being seized only for his own protection. At least one of the Petitioners, Pickens, knew Mr. Leija was very ill and all of them knew he was mentally disturbed by his actions and demeanor. The fact that Mr. Leija was physically ill and mentally disturbed as opposed to a presumably healthy plaintiff in *Casey* are factors that should weigh more strongly *against* such a strong use of force to any reasonable officer.

Following *Casey* the Tenth Circuit decided another case, *Cavanaugh*, 625 F.3d 661, where officers tased a woman from behind when she was not suspected of anything more than a non-injurious mild misdemeanor. The officers had been told that she had recently been in a domestic dispute and might be holding a kitchen knife. *Id.* at 663. The officer saw that both her hands were empty. *Id.* Although she

was walking quickly she was not fleeing and the officer was only six feet away from her when he fired a taser into her back without warning. *Id*. The Court found that none of the *Graham* factors called for this type of force and qualified immunity was denied. *Id.* at 665.

The Petitioners claim that these Tenth Circuit cases are not similar enough because the officers in both failed to give a warning before firing a taser. The lack of warnings were not a crucial element of the court's findings in *Casey* or *Cavanaugh*. The critical elements of *Casey* and *Cavanaugh* were that the plaintiffs were unarmed, non-escaping and non-resisting misdemeanant offenders who were tasered and tackled. As the majority opinion correctly pointed out, "[t]hus, *Casey* does not stand for the proposition that it is reasonable for an officer to simply give a warning then use a taser as the initial use of force against a non-violent, non-threatening misdemeanant." (Pet. App. 23). In other words a warning by the officers in *Casey* would not have cured the constitutional violations; the failure to warn only increased the officer's culpability.

The warnings by the Petitioners to a mentally ill and delusional Johnny Leija do not absolve them under *Casey* or *Cavanaugh* nor distinguish this case in such a way that renders *Casey* or *Cavanaugh* inapplicable. *Casey* and *Cavanaugh* provided ample warning to the Petitioners that Mr. Leija had a clearly established right to be free from tasering and tackling while he was a hospital patient who had

committed no crimes, was unarmed, was not a threat to the officers or the public, and was extremely physically compromised and delusional. The lower court's rulings were correct and do not warrant review by this Court.

CONCLUSION

For the above reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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