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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHARLES D. NEAL, JR.
SEAN MCKELVEY
CLARK W. CRAPSTER
STEIDLEY & NEAL, P.L.L.C.
CityPlex Towers, 53rd Floor
2448 E. 81st Street
Tulsa, OK 74137
(918) 664-4612

JORDAN L. MILLER*
COLLINS, ZORN & WAGNER, P.C.
429 N.E. 50th Street, 2nd Floor
Oklahoma City, OK 73105
(405) 524-2070
jordan@czwglaw.com

**Counsel of Record*

Attorneys for Petitioners

October 26, 2015

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

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REPLY TO BRIEF IN OPPOSITION

In their Petition for Certiorari, Brandon Pickens, James Atnip, and Steve Beebe (altogether "Petitioners") made the case for review of the Tenth Circuit's opinion by this Court. Petitioners forcefully argued that the law was not clearly established such that the officers would know that their conduct under the circumstances was a violation of the Constitution. As discussed in great detail in the Petition for Certiorari, it is therefore apparent that the Tenth Circuit Court of Appeals, in denying the Petitioners qualified immunity, so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power. Moreover, the Tenth Circuit Court of Appeals, in denying Petitioners qualified immunity, also decided an important question of federal law in a way that conflicted with relevant decisions of this Court.

In her Brief in Opposition, Erma Aldaba, personal representative and next of kin of Johnny Manuel Leija ("Respondent"), attempts to discount the importance of the issues raised by the Petition for Certiorari, and ignores the key standard in qualified immunity analysis, namely that the law is not clearly established unless the officers would know that their conduct under the circumstances was a violation of the Constitution. Contrary to Petitioner's protestations, the Petition for Writ of Certiorari should be granted. Petitioners will address each of Respondent's three "Reasons for Denying the Writ" in turn.

I. RESPONSE TO RESPONDENT'S CLAIM THAT "THE PETITION PRESENTS NO IMPORTANT QUESTION OF LAW MERITING REVIEW"

Respondent first claims that the Petition for Writ of Certiorari should be denied because the "Petition presents no important question of law meriting review." (Resp. 7). In so arguing, Respondent misquotes this Court's Rule 10 governing review on writ of certiorari. Respondent conveniently omits the portion of this Court's own rule that certiorari should be granted when a "United States court of appeals. . . . has so far departed from the accepted and usual course of judicial proceedings. . . . as to call for an exercise of this Court's supervisory power." (S. Ct. R. 10). Respondent further minimizes the need to grant certiorari when a United States court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." (S. Ct. R. 10). Instead, Respondent attempts to divert this Court's attention away from this Court's own rules on the granting of certiorari, and toward non-issues in this case.

Again, the Tenth Circuit's ruling clearly conflicted with *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011); *Tolan v. Cotton*, 134 S. Ct. 1861, 1866, 188 L. Ed. 2d 895 (2014); *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056 (2014); *Taylor v. Barkes*, 135 S. Ct.

2042, 2044 (2015); and *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1779 (2015), among others, as it completely ignored this court's admonition that existing precedent must have placed the statutory or constitutional question beyond debate. Respondent continuously misstates Petitioners' position by ignoring Petitioners' argument that the Tenth Circuit has decided the important federal question of qualified immunity in a way that conflicted with the above decisions of this Court. Moreover, Respondent does not even address Petitioners' argument that the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power.

Respondent attempts to argue that the Petition for Certiorari should not be granted because this Court should not bother itself with whether general principles of qualified immunity apply in particular circumstances. In so arguing, Respondent cites to a recent opinion of this Court, *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015), which actually confirms Petitioners' argument that certiorari should be granted. In that case, this Court examined the Ninth Circuit's application of qualified immunity; this Court not only granted certiorari, but directly ruled that the Ninth Circuit examined qualified immunity at too high a level of generality, and criticized the Ninth Circuit's application of other Ninth Circuit cases that would not have put a reasonable officer on notice that their conduct was unreasonable.

This Court reviewed the Ninth Circuit's analysis of other Ninth Circuit cases, and stated:

> When *Graham, Deorle*, and *Alexander* are viewed together, the central error in the Ninth Circuit's reasoning is apparent. The panel majority concluded that these three cases "would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill suspect who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry." 743 F.3d, at 1229. But even assuming that is true, *no precedent clearly established that there was not "an objective need for immediate entry" here*. No matter how carefully a reasonable officer read *Graham, Deorle*, and *Alexander* beforehand, that officer could not know that reopening Sheehan's door to prevent her from escaping or gathering more weapons would violate the Ninth Circuit's test, even if all the disputed facts are viewed in respondent's favor. Without that "fair notice," an officer is entitled to qualified immunity.

Sheehan, *supra*, 135 S. Ct. at 1777.

Contrary to Respondent's claims, not only should certiorari be granted, but a denial of qualified immunity should be overruled, when a Circuit court inappropriately determines that a reasonable officer had fair notice that his actions were constitutionally invalid. Like in *Sheehan*, without such notice, a Court

of Appeals errs in denying qualified immunity. Here, as described in more detail in the Petition for Writ of Certiorari, the existing precedent on the relevant issues in this case actually made it clear that the Petitioners' actions in using a Taser on an aggressive individual after a warning was perfectly constitutionally valid; certainly the existing precedent would *not* make it clear to a reasonable official that such conduct was constitutionally *invalid*. As in *Sheehan*, it is the Tenth Circuit's erroneous application of qualified immunity (so as to essentially turn the key concept of "clearly established" law on its head) that both conflicted with key decisions of this Court, and also departed from the accepted and usual course of judicial proceedings. It is for these reasons that certiorari should be granted.

II. RESPONSE TO RESPONDENT'S CLAIM THAT "THE PETITION PRESENTS NO IMPORTANT QUESTION OF LAW MERITING REVIEW"

Contrary to Respondent's argument found at Resp. 10-13, Petitioners in no way seek to challenge the factual findings of the District Court or the Tenth Circuit. Again, even looking at the facts in the light most favorable to the Respondent, the following facts are undisputed by all parties and both lower Courts in this case: By the evening of March 24, 2011, Johnny Manuel Leija ("Leija") became delusional and aggressive, disconnected his oxygen, refused to take his medication, removed his IV tubing, and claimed

that hospital personnel were telling him lies and secrets, and were trying to poison him. (App. 52-53). Leija told a hospital nurse "I am Superman. I am God. You are telling me lies and trying to kill me." (App. 53). The treating physician and the medical personnel were concerned that Leija was harming himself by removing his oxygen and IV and refusing his medication, and concluded that they needed to resort to calling law enforcement to restrain Leija so that he could be given his medication. (App. 53-54). When Pickens, Atnip, and Beebe arrived on the scene, Leija was standing in the hallway, visibly agitated and upset, and yelling and screaming that people were trying to poison and kill him. (App. 55). Despite Pickens' attempts to talk Leija into returning to his room and letting the hospital staff help and treat him, Leija refused and said that the hospital staff were trying to kill him, and continued down the hallway toward the lobby area. (App. 55). "Leija continued with his aggressive behavior by pulling the remaining IV from his arms causing blood to come out. After speaking with Pickens, Leija faced the officers and clenched and shook his fists." (App. 55). Leija then removed the gauze and tape from his arms, raised his arms, and stated that this was his blood. (App. 55-56). "Atnip and Beebe contend that they gave Leija several commands to step back, calm down, and get on his knees. They warned Leija that if he did not comply they would use a Taser on him. After Leija did not comply with their demands, Beebe fired the Taser at Leija with one prong hitting him in

the upper torso. The Taser did not appear to affect Leija." (App. 56).

The above facts are undisputed; it is the Tenth Circuit's interpretation of the above facts as indicating only "passive" resistance that allegedly did not pose a threat to the officers, which the Petitioners (and dissenting Judge Phillips) contest. (App. 29-34). Any reasonable analysis cannot consider the above facts as indicating "passive resistance." Recall that even the District Court characterized Leija's behavior as "aggressive." (App. 55). Respondent attempts to tear down a straw man by arguing that this Court may not reverse findings of fact concurred in by two lower courts. Petitioners seek no such reversal of findings of fact. Rather, Petitioners simply argue there was no clearly established law that would make clear to a reasonable officer, under the circumstances described in the above undisputed facts, that their conduct was constitutionally invalid. Whether or not the Tenth Circuit categorized the above facts as indicating "passive resistance," the above facts themselves are in fact uncontested. Moreover, the Tenth Circuit affirmed the District Court's denial of summary judgment based exclusively on the initial Taser strike rather than the subsequent tussle (App. 20), so Respondent's attempt to find disputed facts based on the subsequent tussle are both irrelevant and a misdirection. The Tenth Circuit has already determined that there was jurisdiction for an interlocutory appeal (App. 8), and Petitioners in no way attempt to

expand this interlocutory appeal beyond its permitted scope.

III. RESPONSE TO RESPONDENT'S CLAIM THAT "THE QUALIFIED IMMUNITY HOLDING DOES NOT WARRANT REVIEW"

In the final section of her Opposition Brief (Resp. 13-30), Respondent essentially attempts to argue that this Court should not grant certiorari because she claims that the lower courts' rulings on qualified immunity were correct. In so arguing, Respondent relies primarily on the general "reasonableness" standard from this Court's ruling in *Graham v. Connor*, 490 U.S. 386, 395 (1989). Of course, as this Court recently stated, *Graham* holds only that "'objective reasonableness' applies to excessive force claims under the 4th Amendment, and is at far too general a proposition to control this case. We have repeatedly told courts. . . . not to define clearly established law at a high level of generality." *Sheehan*, *supra*, 135 S. Ct. at 1775-76.

Respondent only seriously asserts that two Tenth Circuit cases allegedly put Petitioners on fair notice that their conduct in using a Taser on Mr. Leija was unconstitutional. The first case is *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007), which was cited by the Tenth Circuit in the instant case. As Judge Phillips correctly noted in dissent, *Casey* involved a situation where an individual posed no threat, was not warned, and was then tackled and

Tasered twice for no apparent reason, whereas here Mr. Leija was warned, and there was a pressing need to subdue Mr. Leija to get him his needed medical treatment. (App. 44-47). In interpreting *Casey*, Respondent completely ignores the fact that the individual in *Casey* was not warned, and then Tasered for no apparent reason; instead Respondent self-servedly declares that *Casey* is identical to the instant case because both individuals were unarmed and not "actively resisting." Contrary to Respondent's claim that the warning is irrelevant, the *Casey* opinion explicitly states: "The absence of any warning – or of facts making clear that no warning was necessary – makes the circumstances of this case especially troubling." *Casey*, *supra*, 509 F.3d at 1285. It further states "We do not know of any circuit that has upheld the use of a Taser immediately and without warning against a misdemeanant like Mr. Casey. Therefore, Officer Lor is not entitled to qualified immunity from this excessive force suit." *Id.* at 1286. Petitioners are at a loss to understand how Respondent interprets *Casey*, a case where the individual was tackled and Tasered twice for no apparent reason without warning, to give fair notice to the officers in this case, where Mr. Leija was warned and was, at the very least, "passively" if not "actively" resisting.

Respondent also now cites to *Cavanaugh v. Woods Cross City*, 625 F.3d 661 (10th Cir. 2007) which had not been cited by the Tenth Circuit in this case as "clearly established" authority. In *Cavanaugh*, the Tenth Circuit held that a police officer's use of a stun

gun on a victim was objectively unreasonable where the officer had responded to a non-emergency request for help from the victim's husband in finding the victim after a domestic dispute, where the victim was heading towards her door when the officer used a stun gun on her, where the victim did not act aggressively towards officer or threaten him, where the victim did not have any weapon, where the officer did not give the victim any warning, where there was only a single bystander who was in his driveway next door, and where the victim was not fleeing or resisting arrest. *Id.* at 665. In denying qualified immunity, the Tenth Circuit again stated: "Following *Casey's* holding that the law was clearly established as of August 25, 2003, it was clearly established on December 8, 2006 that Officer Davis could not use his Taser on a nonviolent misdemeanant who did not pose a threat and was not resisting or evading arrest without first giving a warning." *Id.* at 667. Again, the lack of a warning, and the lack of aggression and resistance, were clearly vital elements to the Court's decision in *Cavanaugh*. In the instant case, by contrast, there was both a warning, and admitted resistance and aggression from Mr. Leija.

Notably, Respondent does not even attempt to defend the Tenth Circuit's claim that various other cases would put Petitioners on notice that their actions were illegal. Rather, as Respondent tacitly admits, the cases from other Circuits and District Courts discussed by the Tenth Circuit as additional support for the denial of qualified immunity not only

involved situations of far more egregious and shocking uses of force, but, importantly, they involved detainees who were clearly not aggressive and not posing a threat, and who were not provided warning. The cases even specifically state these important facts in their analysis. In fact, these cases would support the proposition that one may be able to use a Taser on a person who is acting in an aggressive fashion and posing a threat. *See Oliver v. Florin*, 586 F.3d 898, 901-02, 906-07 (11th Cir. 2009) (finding clearly established violation only where detainee was not aggressive or threatening and was tasered 8 to 12 times for five seconds each, while lying immobilized on hot pavement, without warning); *Borton v. City of Dotham*, 734 F. Supp. 2d 1237, 1242-44, 1249-50 (M.D. Ala. 2010) (finding clearly established violation only where detainee posed no threat due to being strapped to a gurney yet was tasered three times, including once on her face, without warning for being too loud, as she screamed "I give up"); *Asten v. City of Boulder*, 652 F. Supp. 2d 1188, 1194 (D. Colo. 2009) (after a mentally ill woman denied police entry into her home, an officer cut the screen on her door and used it to fire his Taser into her stomach, never warning her or telling her of their intent to take her into custody).

While Respondent does cite to *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001) for the general proposition that the diminished capacity of an individual may have some relevance to the legality of the use of force, Respondent fails to note that the

circumstances were extremely different than in the present case, as they did not involve the use of a Taser, but rather the use of a technique called hog-tying of a combative individual. *Id.*, 1189-90. Moreover, as Judge Phillips correctly pointed out in dissent, the Court there *granted* the Defendants qualified immunity, as it could not say that a rule prohibiting such a restraint in this situation was clearly established at the time of the incident. *Id.* It is beyond dispute that *Cruz* presents no clearly established law that it was illegal to use a Taser on Mr. Leija in the circumstances faced in the instant case.

Still, after innumerable rounds of briefing at every possible level of the federal court system, Petitioners respectfully contend that there are still no pertinent authorities that would make clear to a reasonable official in the Petitioners' position that their conduct violated the constitution under the highly unusual circumstances in this case. Moreover, Petitioners would additionally note that there are no pertinent authorities that would make clear to a reasonable official in the Petitioners' position that their conduct after the first Taser strike in attempting to physically subdue Leija so that he could be given the medical attention he needed, violated the Constitution. The Tenth Circuit, in denying Petitioners qualified immunity, both decided an important federal question in a way that conflicted with relevant decisions of this Court, and also so far departed from the accepted and usual course of judicial

proceedings as to call for an exercise of this Court's supervisory power.

CONCLUSION

For all the reasons contained in the Petition for Writ of Certiorari, and in this Reply Brief, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES D. NEAL, JR.
SEAN MCKELVEY
CLARK W. CRAPSTER
STEIDLEY & NEAL, P.L.L.C.
CityPlex Towers, 53rd Floor
2448 E. 81st Street
Tulsa, OK 74137
(918) 664-4612

JORDAN L. MILLER*
COLLINS, ZORN & WAGNER, P.C.
429 N.E. 50th Street, 2nd Floor
Oklahoma City, OK 73105
(405) 524-2070
jordan@czwglaw.com

**Counsel of Record*

Attorneys for Petitioners

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