NO. 14-10228

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RANDY COLE; KAREN COLE; RYAN COLE
Plaintiffs-Appellees

v.

CARL CARSON
Defendant-Appellant

consolidated with

No. 15-10045

RANDY COLE; KAREN COLE; RYAN COLE,
Plaintiff-Appellees

v.

MICHAEL HUNTER; MARTIN CASSIDY,
Defendants-Appellants

On Appeal from the United States District Court
for the Northern District of Texas, Case No. 3:13-cv-2719

AMICUS CURIAE BRIEF OF MISSISSIPPI MUNICIPAL SERVICE COMPANY; CITIES OF ARLINGTON, GARLAND, AND GRAND PRARIE, TEXAS; TEXAS ASSOCIATION OF COUNTIES; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; TEXAS MUNICIPAL LEAGUE; TEXAS CITY ATTORNEYS ASSOCIATION; COMBINED LAW ENFORCEMENT ASSOCIATIONS OF TEXAS; HOUSTON POLICE OFFICERS' UNION; AND NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS IN SUPPORT OF APPELLANTS

G. Todd Butler
PHELPS DUNBAR LLP
4270 I-55 North
Jackson, Mississippi 39211-6391
P.O. Box 16114
Jackson, Mississippi 39236-6114
Telephone: (601) 352-2300
Telecopier: (601) 360-9777

Attorney for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS

In addition to the persons and entities previously identified by the parties, undersigned counsel certifies that the following persons and entities have an interest in the outcome of this case:

A. Amici Curiae:

1. International Municipal Lawyers Association;
2. Texas Municipal League;
3. Texas City Attorneys Association;
4. Texas Association of Counties;
5. Combined Law Enforcement Associations of Texas;
6. Cities of Arlington, Garland, and Grand Prairie, Texas;
7. Mississippi Municipal Service Company;
8. Houston Police Officers' Union; and
9. National Association of Police Organizations.

B. Garry Merritt, General Counsel for Amicus Curiae Texas Association of Counties.

C. Phelps Dunbar, LLP and G. Todd Butler, counsel for Amici Curiae.

SO CERTIFIED, this the 15th day of March, 2019.

/s/ G. Todd Butler
Counsel for Amici Curiae

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AMICI CURIAE HAVE SUBSTANTIAL INTERESTS IN THIS CASE

This case involves how qualified immunity is applied to constitutional claims and thus will have consequences that reach far beyond the parties. Amici Curiae were granted permission to participate at the rehearing-request stage and now seek to participate again. All Amici represent the interests of law enforcement officers whom qualified immunity was designed to protect, so they have a significant stake in the development of the doctrine.

The Mississippi Municipal Service Company is a non-profit company that administers the Mississippi Municipal Liability Plan, which provides Mississippi municipalities with liability coverage, including public official and law enforcement coverage. The MMLP is funded through resources pooled together by its members in order to assure their protection and defense against municipal risks.

The Cities of Arlington, Garland, and Grand Prairie are incorporated municipalities within the State of Texas. Each manages and operates a police department dedicated to serving and protecting its citizens. When necessary, these Cities defend their public officials, law enforcement included, against suits arising from the performance of their duties.

The Texas Association of Counties is a Texas non-profit corporation with all 254 counties as members. The following associations are represented on the Board of Directors of TAC: the County Judges and Commissioners Association of Texas;

the North and East Texas Judges' and Commissioners' Association; the South Texas Judges' and Commissioners' Association; the West Texas Judges' and Commissioners' Association; the Texas District and County Attorneys' Association; the Sherriff's Association of Texas; the County and District Clerks' Association of Texas; the Texas Association of Tax Assessor-Collectors; the Texas County Treasurers' Association; the Justice of the Peace and Constables' Association of Texas; and the County Auditors' Association of Texas.

The International Municipal Lawyers Association is a non-profit, professional organization whose membership roll exceeds 3,000. IMLA's members consist of local governmental entities and individual attorneys dedicated to advancing governmental interests, which has been the organization's mission since 1935.

The Texas Municipal League is a non-profit association comprised of more than 1,100 incorporated cities within the State of Texas. TML's purpose is to empower Texas cities by advocating for and representing the interests of its members so they may better serve their citizens. The Texas City Attorneys Association is a TML affiliate with a membership of over 400 attorneys who represent Texas municipalities and their officials in the execution of their duties.

The Combined Law Enforcement Associations of Texas is the largest labor organization representing the rights and interests of law enforcement in Texas. CLEAT's membership consists of more than 20,000 law enforcement professionals

statewide. The organization provides legal, legislative, and collective bargaining services to its members and affiliated associations.

The Houston Police Officers' Union is the largest single municipal police labor organization in the State of Texas. HPOU's membership consists of more than 5,200 law enforcement professionals of the Houston Police Department. HPOU provides legal, legislative, health and disability benefits, and meet and confer representation to its members.

The National Association of Police Organizations is a nationwide alliance of organizations committed to advancing the interests of law enforcement officers. Since NAPO's founding in 1978, it has become the strongest unified voice supporting law enforcement in the United States. The organization represents over 1,000 police units and associations, over 241,000 sworn officers, and more than 100,000 citizens mutually dedicated to fair and effective law enforcement.

NO PARTY'S COUNSEL AUTHORED OR PAID FOR THIS BRIEF

No party or party's counsel authored this brief or contributed money to this brief. The brief instead was paid for by Amici and authored by their counsel.

ARGUMENT

Qualified immunity is a hot-button issue. At one end of the spectrum, the doctrine has been attacked as providing too much protection for out-of-control law

enforcement officers[1] and as having no textual or historical footing in Section 1983 itself.[2] At the other end of the spectrum, the doctrine has been defended as a necessary response to judicial activism[3] and as a noble means for protecting those who protect us.[4] Members of this Court have highlighted these "competing policy goals" and suggested "recalibration" may be necessary.[5]

No matter: the Highest Court has answered calls for change with an emphatic "No." Fifteen times in eight years, the Supreme Court has reversed qualified immunity denials, frequently through "strongly worded summary reversals."[6] The

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1 *E.g.*, Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 27, 2014), http://nyti.ms/1ASeUKc (arguing that the Supreme Court's qualified immunity decisions "mean that the officer who shot Michael Brown and the City of Ferguson will most likely never be held accountable in court").

2 *E.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 46 (2018) (arguing that the Supreme Court's qualified immunity decisions are "far removed from ordinary principles of legal interpretation").

3 *E.g.*, *Crawford-El v. Britton*, 523 U.S. 574, 612 (1998) (Scalia, J., dissenting) (arguing that, due to prior misinterpretations of Section 1983, the Supreme Court has been forced to "craft[ ] a sensible scheme of qualified immunities for the statute we have invented").

4 *E.g.*, *Cortez v. McCauley*, 478 F.3d 1108, 1141 (10th Cir. 2007) (en banc) (Gorsuch, J., concurring in part and dissenting in part) (explaining that qualified immunity protects law enforcement officers "from the whipsaw of tort lawsuits seeking money damages"); *cf. Roberts v. Louisiana*, 431 U.S. 633, 646-47 (1977) (Rehnquist, J., dissenting) ("Policemen on the beat are exposed, in the service of society, to all the risks which the constant effort to prevent crime and apprehend criminals entails. Because these people are literally the foot soldiers of society's defense of ordered liberty, the State has an especial interest in their protection.").

5 *E.g.*, *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring).

6 *See City of Escondido v. Emmons*, 139 S.Ct. 500 (2019) (summary reversal); *Kisela v. Hughes*, 138 S.Ct. 1148 (2018) (summary reversal); *District of Columbia v. Wesby*, 138 S.Ct. 2561 (2018); *White v. Pauly*, 137 S.Ct. 548 (2017) (summary reversal); *Mullenix v. Luna*, 136 S.Ct. 305 (2015) (summary reversal); *Taylor v. Barkes*, 135 S.Ct. 2042 (2015) (summary reversal); *City & County of San Francisco v. Sheehan*, 135 S.Ct. 1765 (2015); *Carroll v. Carman*, 135 S.Ct. 348 (2014) (summary reversal); *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014); *Wood v. Moss*, 134 S.Ct. 2056 (2014); *Stanton v. Sims*, 134 S.Ct. 3 (2013) (summary reversal); *Reichle v. Howards*, 566 U.S. 658 (2012); *Ryburn v. Huff*, 132 S.Ct. 987 (2012) (summary reversal); *Messerschmidt v. Millender*, 132 S.Ct. 1235 (2012); *Ashcroft v. al–Kidd*,

message? Stop diluting qualified immunity.[7] Just this Term, the Supreme Court issued yet another summary reversal when the Ninth Circuit was unfaithful to recent decisions.[8]

While the Supreme Court may someday garner enough votes to change course,[9] this Court should resist temptation in the interim. As three highly respected jurists have reminded in other contentious contexts,[10] neither academic criticism nor political pressure authorize courts to disregard binding precedent. What follows is a discussion of the relevant qualified immunity principles as set forth by the Supreme

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563 U.S. 731 (2011). In 2016, then-Judge Kavanugh made a similar point while dissenting from the D.C. Circuit's refusal to hear *Wesby* en banc, at which time the Supreme Court had "issued 11 decisions reversing federal courts of appeals in qualified immunity cases" "in just the past five years[.]" *See Wesby v. District of Columbia*, 816 F.3d 96 (D.C. Cir. 2016) (Kavanaugh, J., dissenting).

7 *See Morrow v. Meachum*, __ F.3d __, No. 17-11243 at p.8 (5th Cir. Mar. 8, 2019) ("We'd be ill advised to misunderstand the message and deny qualified immunity. . . .").

8 *See Emmons*, 139 S.Ct. at 504.

9 Judge Willett's concurrence in *Zadeh* notes that at least four current Justices have suggested they would be inclined to modify the current state of qualified immunity. *See* 902 F.3d at 498 n.1.

10 The three examples of restraint come from Judge Sutton's Affordable Care Act concurrence and Second Amendment cases penned by Judge Easterbrook and then-Judge Kavanaugh. In *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 559 (6th Cir. 2011), Judge Sutton wrote that disagreement with the Highest Court "does not free lower court judges from the duty to respect the language and direction of [Supreme] Court[ ] precedents[.]" Similarly, in *Nat'l Rifle Ass'n of America, Inc. v. City of Chicago*, 567 F.3d 856, 858 (2009), Judge Easterbrook wrote that, "[i]f a court of appeals [could] strike off on its own, [it would] undermine[ ] the uniformity of national law" and upset "the proper relation between the Supreme Court and a court of appeals." Finally, in the second round of *Heller v. District of Columbia*, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), Judge Kavanaugh wrote that, despite criticism of *Heller* from the likes of such jurists as Judges Wilkinson and Posner, it was not the job of the D.C. Circuit "to re-litigate *Heller* or to bend it in any particular direction[;]" instead, the court's obligation was "to faithfully apply *Heller* and the approach it set forth[.]" To summarize the point the way Judge Easterbrook did: Reform is "for the Justices rather than a court of appeals." *See Nat'l Rifle Ass'n of America, Inc.*, 567 F.3d at 860.

Court and supplemented by this Court. "The qualified-immunity doctrine makes" obtaining "money damages from the personal pocket of a law enforcement officer" "difficult in every case."[11]

I. There is a two-step analysis, but courts should usually skip to step two.

Two questions control qualified immunity: (1) whether the facts demonstrate a constitutional violation, and (2) whether the implicated constitutional right was "clearly established" at the time of the defendant's conduct.[12] Despite there being two questions, however, courts normally should not address the first question at all. The Supreme Court has colorfully "stress[ed] that lower courts 'should think hard, and then think hard again,' before addressing both qualified immunity and the merits of an underlying constitutional claim."[13]

II. If step one is addressed, the facts must be construed in the light most favorable to the plaintiff, although that does not mean that courts may ignore undisputed facts.

The leading step one case is *Tolan v. Cotton*, where the Supreme Court reversed a grant of immunity by this Court.[14] But *Tolan* says nothing about step two. *Tolan* admittedly "express[ed] [no] view as to whether [the officer's] actions violated clearly established law."[15] All *Tolan* does is remind courts that facts must

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11 *Morrow*, No. 17-11243 at p.4.
12 *Pearson v. Callahan*, 555 U.S. 223, 230-32 (2009).
13 *Wesby*, 138 S. Ct. at 589 n.7 (quoted case omitted).
14 134 S.Ct. 1861.
15 *Id*. at 1868.

be construed in the light most favorable to the plaintiff.[16] That reminder does not alter the corollary principle from this Court's en banc decision in *Little v. Liquid Air Corp.*, which explains that courts must consider all of the undisputed facts, not just those highlighted by a plaintiff hoping to avoid dismissal.[17] Defining the factual record is the first step of the qualified immunity analysis.

III. At step two, there is both a "nomination" and a "qualification" phase.

Step two itself has two sub-steps: (1) a nomination phase[18] and (2) a qualification phase.[19] These sub-steps apply in all except an "obvious"[20] case, which will be addressed in the next section. This section focuses on the sub-steps.[21]

Nomination Phase. A recent decision from this Court illustrates the nomination phase. In *Vann v. Southaven*, a Panel reversed a grant of qualified immunity on a Fourth Amendment claim due to perceived factual disputes.[22] After rehearing, however, the opinion was vacated.[23] Unlike the original opinion, the new

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16 *Id*.

17 *See* 37 F.3d 1069, 1075-76 (5th Cir. 1994) (en banc).

18 *See White*, 137 S.Ct. at 552 (reversing the Tenth Circuit because the plaintiff "failed to identify a case where an officer acting under similar circumstances [ ] was held to have violated the Fourth Amendment"); *Vann v. Southaven*, 884 F.3d 307, 310 (5th Cir. 2018) (granting qualified immunity because the plaintiff "cited nary a pre-existing or precedential case").

19 *See Wesby*, 138 S.Ct. at 589-90 (explaining that the identified case must be both "authoritative" and "specific").

20 *Id*. at 590.

21 A recent district court opinion in this Circuit adopted the phraseology used in this brief. *See Carr v. Hoover*, 2018 WL 3636563, *8-9 (N.D. Miss. 2018).

22 884 F.3d 307 (5th Cir. 2018).

23 *See Vann*, 884 F.3d at 310.

opinion recognized that "[i]t is the plaintiff's burden to find a case in his favor[.]"[24] The plaintiff had "cited nary a pre-existing or precedential case . . . showing specific law on point[,]" so qualified immunity was reinstated.[25]

Following *Vann*, other decisions from this Court have highlighted the plaintiff's obligation of "pointing" the court to a specific case.[26] These decisions are consistent with the rule in other Circuits.[27] Most importantly, though, the plaintiff's nomination obligation grows out of Supreme Court precedent.[28]

Qualification Phase. The next sub-step, once a particular case has been identified, is to determine if the nominated case qualifies as "clearly established law." This qualification determination involves inquiry into whether the identified case is both "authoritative" and "specific."[29] The Supreme Court reversed the D.C. Circuit in *Wesby* for "not follow[ing]" the sub-steps.[30]

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24 *Id*. at 310.

25 *Id*.

26 *E.g.*, *Bustillos v. El Paso Cnty. Hosp. Distr.*, 891 F.3d 214, 222 (5th Cir. 2018) ("Appellant has not carried her burden of pointing this panel to any case that shows, in light of the specific context of this case, that the Doctors' or Nurses' conduct violated clearly established law."); *Morrow*, No. 17-2443 at p.8 (explaining that the appellants "have not identified a controlling precedent . . . .").

27 *E.g.*, *Farrell v. Montoya*, 878 F.3d 933, 937 (10th Cir. 2017) ("In this circuit, to show that a right is clearly established, the plaintiff must point to a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.") (emphasis added; quoted case omitted).

28 *See White*, 137 S.Ct. at 552 (granting qualified immunity due to "fail[ure] to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment").

29 *See Wesby*, 138 S.Ct. at 589-90.

30 *Id*. at 591.

Authoritative Requirement. Any case nominated by the plaintiff must be an "authoritative" precedent. Unfortunately, however, the Supreme Court has never said what precedents, other than its own, count as "authoritative." In two different cases, it was acknowledged that the question is unresolved in Supreme Court jurisprudence.[31]

By contrast, this Court has addressed the question. In the en banc decision of *Morgan v. Swanson*, three authoritative sources were identified: (1) Supreme Court decisions, (2) Fifth Circuit decisions, or (3) "a robust consensus of persuasive authority[,]" i.e. decisions not from the Supreme Court or this Court.[32] The first two are self-evident while the third is not.

Several principles have emerged on the "robust consensus" front. First, there can never be a robust consensus when there is a Circuit split.[33] Second, even when there is not a split, many other Circuits must be in agreement before there can be a "robust consensus."[34] Third, a Panel of this Court has said that unpublished decisions

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31 *Id*. at 591 n.8 (explaining that "[w]e have not yet decided what precedents – other than our own – qualify as controlling authority for purposes of qualified immunity[,]" and "[w]e express no view on that question here"); *Reichle*, 566 U.S. at 665 (same).

32 659 F.3d 359, 371-72 (5th Cir. 2011).

33 *Id*. at 372.

34 *See Vincent v. City of Sulphur*, 805 F.3d 543, 549 (5th Cir. 2015) (explaining that "two out-of-circuit cases . . . hardly constitute persuasive authority adequate to qualify as clearly established law sufficient to defeat qualified immunity in this circuit"); *but see Johnson v. Halstead*, __ F.3d __, 2019 WL 625144, *6 (5th Cir. Feb. 14, 2019) (stating, in dicta, that six out-of-circuit decisions, two of which were unpublished, amounted to a "robust consensus").

can "illustrate clearly established law[,]" but "not create clearly established law[,]"[35] although notable jurists in other Circuits have said that unpublished opinions should play no role at all.[36] Each of these principles deserves close examination because recent Supreme Court decisions, as well as Justices during oral argument, have questioned whether the "robust consensus" source remains a viable avenue for clearly establishing the law.[37]

Specificity Requirement. Even if "authoritative," a nominated case does not count as clearly established law unless it satisfies the "specificity" requirement. The starting point under this prong is an evaluation of the alleged constitutional violation in terms of the "particular conduct" at issue.[38]

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35 *See Delaughter v. Woodall*, 909 F.3d 130, 140 (5th Cir. 2018) (citing *Cooper v. Brown*, 844 F.3d 517, 525 n.8 (5th Cir. 2016)). *But see Morrow*, No. 17-11243 at p.6-7, which explains why dicta cannot "clearly establish" the law. The same concerns about dicta are transferrable to the unpublished opinion context – law enforcement officers should not be charged with knowing things that are not binding upon them.

36 Then-Judge Luttig's en banc opinion in *Hogan v. Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996) argues that courts should "not allow liability to be imposed upon public officials based upon unpublished opinions that we ourselves have determined will be binding only upon the parties immediately before the court." The Fourth Circuit has since explained that *Hogan* stands for the proposition that unpublished opinions "cannot be considered[.]" *See Booker v. South Carolina Dept. of Corrections*, 855 F.3d 533, 543 (4th Cir. 2017) (quoting *Hogan*).

37 *See Sheehan*, 135 S.Ct. at 1778 (stating that, "**to the extent** that a 'robust consensus of cases of persuasive authority' could itself clearly establish" law) (emphasis added); *see also Taylor*, 135 S.Ct. at 2044 (using same "to the extent" language). Plus, at oral argument during *Lane v. Franks*, 573 U.S. 228 (2014), Chief Justice Roberts questioned counsel as follows: "You spend a fair amount of time in your brief talking about court of appeals decisions from other circuits. . . . Do you really think we should be looking at the opinions from other circuits in deciding whether the law was clearly established in a different circuit?" *See* Oral Arg. Tr. at p.14, which is available on the Supreme Court's website.

38 *Mullenix*, 136 S.Ct. at 308.

In Fourth Amendment cases, defining the particularized conduct is "especially important" because the constitutional watchword is "reasonableness."[39] What might seem reasonable to one officer might not seem reasonable to another officer.[40] Qualified immunity accounts for the fact that officers are asked to make split-second decisions in dangerous, fast-paced situations.[41]

Once the factual context is identified, the question then becomes whether the authoritative precedent places the conduct "beyond debate."[42] "The 'beyond debate' standard is a high one[,]"[43] which is not met just because cases have factual similarities.[44] Unless every single reasonable officer on the street would know "in the blink of an eye"[45] that his or her conduct is unconstitutional because of the authoritative precedent, then qualified immunity must be granted.[46] This principle reflects a "manifestation of the law's general concern about retroactive punishment or liability."[47]

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39 *Mullenix*, 136 S.Ct. at 308.

40 *Id*. (explaining that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts'") (quoted case omitted).

41 *See Graham v. Connor*, 490 U.S. 386, 397 (1989).

42 *See White*, 137 S.Ct. at 551.

43 *See Hughes v. Kisela*, 862 F.3d 775, 793 (9th Cir. 2016) (Ikuta, J., dissenting). Of course, Judge Ikuta's dissent was vindicated when the Supreme Court subsequently summarily reversed in *Hughes*. Just last week, this Court similarly acknowledged that the "beyond debate" standard presents a "heavy burden." *See Morrow*, No. 17-11243 at p.5.

44 *See, e.g., Perry v. Durborow*, 892 F.3d 1116, 1126 (10th Cir. 2018) (granting qualified immunity despite "factual similarities" with a prior precedent).

45 *See Morrow*, No. 17-11243 at p.7.

46 *See Morgan*, 659 F.3d at 371 (quoting Supreme Court precedent).

47 *Wesby*, 816 F.3d at 110 (Kavanaugh, J., dissenting) (citing Supreme Court precedent).

IV. The obvious exception is very "narrow" and does not apply in the context of a case like this one.

There is one caveat to identifying a prior precedent that is both "authoritative" and "specific." It is known as the "obvious exception," and the Supreme Court recently explained that it will "rare[ly]" apply in the Fourth Amendment context.[48] Amici previously examined the obvious exception in detail at the rehearing-request stage,[49] so that discussion will not be repeated here.

Significantly, the obvious exception was mis-defined in the panel opinion. The Panel did not discuss the detailed test for determining obviousness that has developed throughout the Circuits.[50] Instead, the Panel created its own new test for obviousness, focusing on whether the rule at issue is determinant or indeterminant.[51]

Amici's prior brief explains why the test from other Circuits is the better one,[52] most importantly because the Panel's test conflicts with Supreme Court precedent. When a Fourth Amendment question turns on whether an officer faced a threat, the Supreme Court has emphasized that "[t]he general principle that deadly force requires a sufficient threat hardly settles this matter."[53] Judge Ikuta made this

48 *Wesby*, 138 S.Ct. at 590.
49 *See* Amicus Br., 2018 WL 5621396 (5th Cir. Oct. 22, 2018).
50 *Id*. at *8-9.
51 *Id*. at *5.
52 *Id*. at *5-9.
53 136 S.Ct. at 309 (emphasis added).

argument in his *Hughes* dissent[54] and was vindicated when the Supreme Court reversed his colleagues' contrary "reasonable-threat" analysis summarily.[55]

The very narrow obviousness exception should apply in the Fourth Amendment context only when an "authoritative judicial decision decides a case by determining that 'X Conduct' is unconstitutional without tying that determination to a particularized set of facts[.]"[56] As an example, Amici previously pointed to the constitutional test governing mistaken entries to a home – namely, whether an officer made reasonable efforts to identify the correct home before going in.[57] It was explained that it would be an "obvious" case if the officer made no efforts at all but that normal qualified immunity rules would apply if some efforts had been made.[58] The reason is straightforward: factual analogues are required to inform an officer what efforts are considered reasonable and what efforts are not.

This Court's decision in *Hatcher v. Bement* – which the panel opinion readily acknowledged had characterized the "the no-threat rule as a 'general test'" – should alone have been enough to defeat the Panel's reliance on obviousness. When different panels of judges themselves do not agree, law enforcement officers must

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54 *See* 862 F.3d at 791 (arguing that "the panel opinion adopts the same standard that the Supreme Court has repeatedly overruled").

55 *See* 138 S.Ct. at 1155.

56 *See, e.g., Vinyard v. Wilson*, 311 F.3d 1340, 1350-51 (11th Cir. 2002) (emphasis added).

57 *See* Amicus Br., 2018 WL 5621396 at *7-8.

58 *Id*.

receive the benefit of the doubt.[59] Neither the district court nor the Panel gave Appellants the required presumption in this case.

The undisputed facts show that Appellants were confronted with an armed suspect who they perceived was moving or about to move the gun he was holding to his own head. Are these the "rare"[60] facts which the Supreme Court has said do not require a factual analogue? The only "obvious" answer is "no."

CONCLUSION

Whether qualified immunity applies in any given case should turn only on a faithful application of Supreme Court precedent.[61] Six members of this Court recently invoked THE FEDERALIST NO. 78. and observed that "foundational constitutional principles" require lower courts to follow binding precedent – even when they disagree with it – "[t]o avoid an arbitrary discretion in the courts[.]"[62] It is requested that the en banc Court apply the principles articulated in this brief, derived from recent Supreme Court cases, to the facts of this case. Denying qualified immunity has rightfully been called "an extraordinary remedy."[63]

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59 *See Pearson*, 555 U.S. at 245 ("[I]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."); *Turner v. Lieutenant Driver*, 848 F.3d 678, 686 (5th Cir. 2017).

60 *Wesby*, 138 S.Ct. at 590.

61 *See Morrow*, No. 17-11243 at p.5 n.4 ("[W]e cannot ask" questions about the propriety of qualified immunity, "much less answer them. We apply the Supreme Court's precedents faithfully.").

62 *Alvarez v. City of Brownsville*, 904 F.3d 382, 397-98 (5th Cir. 2018) (en banc) (Ho, J., concurring, joined by Jolly, Jones, Smith, Clement and Owen, J.J.).

63 *See Morrow*, No. 17-11243 at p.8.

Dated: March 15, 2019.

Respectfully submitted,

By: /s/ G. Todd Butler
G. Todd Butler, MB #102907
PHELPS DUNBAR LLP
4270 I-55 North
Jackson, Mississippi 39211-6391
P.O. Box 16114
Jackson, Mississippi 39236-6114
Telephone: (601) 352-2300
Telecopier: (601) 360-9777

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

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Respectfully Submitted,

By: /s/ G. Todd Butler
G. Todd Butler

Dated: March 15, 2019.

CERTIFICATE OF SERVICE

I, G. Todd Butler, certify that I electronically filed this brief with the Clerk of the Court, using the electronic filing system, which sent notification of such filing to all counsel of record:

Rowe Jack Ayres, Jr.
Ayres Law Office, P.C.
Suite 150
5924 Royal Lane
Dallas, TX 75230
rjayres@ayreslawoffice.com
csayres@ayreslawoffice.com
972-991-2222

Christopher Scott Ayres
Ayres Law Office, P.C.
Suite 150
5924 Royal Lane
Dallas, TX 75230
csayres@ayreslawoffice.com
972-991-2222

James Mark Mann
Mann Firm
300 W. Main Street
Henderson, TX 75652
mark@themannfirm.com
903-657-8540

Attorneys for Appellees

James Thomas Jeffrey, Jr., Esq.
Law Offices of Jim Jeffrey
3200 W. Arkansas Lane
Arlington, TX 76016
jim.jeffrey@sbcglobal.net
817-261-3200

Norman Ray Giles
Lewis, Brisbois, Bisgaard & Smith, L.L.P.
Suite 1400
24 Greenway Plaza
Weslayan Tower
Houston, TX 77046
norman.giles@lewisbrisbois.com
832-460-4637

William S. Helfand
Lewis, Brisbois, Bisgaard & Smith, L.L.P.
Suite 1400
24 Greenway Plaza
Weslayan Tower
Houston, TX 77046
bill.helfand@lewisbrisbois.com
832-460-4606

Attorneys for Appellants

This, the 15th day of March, 2019.

/s/ G. Todd Butler
G. Todd Butler