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; AND NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

So that the judges of this Court may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following persons and entities have an interest in the outcome of this case. 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; and
8. 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 __ day of ____, 2018.

/s/ G. Todd Butler
Counsel for Amici Curiae

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AMICI CURIAE HAVE SUBSTANTIAL INTERESTS IN THIS CASE

This case involves the proper application of qualified immunity and thus will have consequences that reach far beyond the parties in this case. Amici Curiae seek not to address factual issues but instead to address the Panel's methodology for determining what constitutes "clearly established" law. In short, because all Amici Curiae represent the interests of law enforcement officers whom qualified immunity was designed to protect, they have a significant interest in assisting courts in getting the law right.

The Mississippi Municipal Service Company is a non-profit company that provides Mississippi municipalities with liability coverage, including public official and law enforcement coverage, through the Mississippi Municipal Liability Plan. 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 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

In compliance with F.R.A.P. 29(a)(4)(E), no party or party's counsel authored this brief or contributed money to this brief. The brief instead was paid for by Amici Curiae and authored by their counsel.

ARGUMENT

This case involves step two of the qualified immunity analysis, which requires a showing that an officer violated "clearly established" law to be held liable under Section 1983. *See Cole v. Carson*, ___ F.3d ___, 2018 WL 4577156, *4-5 (5th Cir. Sept. 25, 2018). At step two, in all except an "obvious" case, a plaintiff is required to identify controlling authority where an officer was held to have violated federal law in a similar factual circumstance. *See White v. Pauly*, 137 S.Ct. 548, 552 (2017).

The Panel here misclassified this case as an "obvious" one, *see Cole*, 2018 WL 4577156 at *8, and, by doing so, expanded liability against police officers in Louisiana, Mississippi, and Texas in a manner that conflicts with Supreme Court precedent as well as the law of other Circuits.

The starting point is that the "obvious" case under step two is a "narrow exception" to the ordinary qualified immunity analysis. *See, e.g., JW by and through Tammy Williams v. Birmingham Bd. of Educ.*, ___ F.3d ___, 2018 WL 4560682, *7 (11th Cir. Sept. 24, 2018). To be sure, the general rule is that a plaintiff must identify a factual analogue of controlling authority. *See White*, 137 S.Ct. at 552 (reversing the Tenth Circuit because "[i]t failed to identify a case where an officer [had] act[ed] under similar circumstances"). This rule is so strong that it has led to no less than 14 Supreme Court reversals within the past seven years, with the High Court repeatedly criticizing lower courts for failing to identify factually similar cases. *See, e.g., Wesby v. District of Columbia*, 816 F.3d 96 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (collecting 11 reversals prior to several more in 2017 and 2018).

Speaking directly to step two, the Supreme Court said just last Term that only in the "rare" case would a plaintiff be able to satisfy the "obviousness" exception. *See District of Columbia v. Wesby*, 138 S.Ct. 577, 590 (Jan. 22, 2018). The Supreme Court then emphasized that such a case would be even more rare in the Fourth Amendment context because a heightened level of specificity is required. *Id.* ("We

have stressed that the 'specificity' of the rule is 'especially important in the Fourth Amendment context.'"). Despite these warnings, the panel opinion defines "obviousness" in a manner that is anything but "rare."

The central problem with the panel opinion is definitional. It draws a distinction between what it calls indeterminant general rules and determinate general rules, saying that the former cannot constitute clearly established law while the latter can constitute clearly established law. *See Cole*, 2018 WL 4577156 at *6-7. Respectfully, the Panel's formulation is analytically problematic. Respectfully also, the Panel's application of the formulation finds little support in federal case law.

Consider the examples contained in the panel opinion itself. As an illustration of an indeterminant general rule that would not be sufficient to constitute clearly established law, the panel points to the following rule from *Mullenix v. Luna*: deadly force is prohibited "against a fleeing felon who does not pose a *sufficient* threat of harm to the officers or others." *Id.* at *6 (quoting 136 S.Ct. 305, 308-09 (2015)) (emphasis in panel opinion). Conversely, as an illustration of a determinant general rule that would be sufficient to constitute clearly established law, the panel points to the following rule from *Tennessee v. Garner*: "officers are prohibited from using deadly force against a suspect where the officers *reasonably* perceive no immediate threat." *Id.* at *7 (citing 471 U.S. 1, 2 (1985)) (emphasis added).

There is not, in reality, any material difference between the two illustrations provided by the Panel. Significantly, both the *Mullenix* rule and the *Garner* rule contain qualifiers: *Mullenix*, on the one hand, said that a threat must be "sufficient" while *Garner*, on the other hand, said that a no-threat perception must be "reasonable." In each circumstance, factual analogues are required so that an officer knows what a "sufficient threat" is and what a "reasonable no-threat perception" is. This is the precise reasoning utilized by a different Panel in *Hatcher v. Bement*, 676 Fed. App'x 238 (5th Cir. 2017) (King, Owen, Haynes, J.J.) but that the Panel in this case disavowed. *See Cole*, 2018 WL 4577156 at *8 ("We note in passing that, in dictum to an unpublished opinion last year, *Hatcher v. Bement*, this court characterized the *Garner* no-threat rule as a 'general test[.]'").[1]

[1] The *Hatcher* Panel's reasoning is consistent with the Ninth Circuit's recent decision in *Sharp v. Cnty. of Orange*, 871 F.3d 901 (9th Cir. 2017). There, the court held that the officer made an unlawful arrest but nonetheless granted qualified immunity. *See Sharp*, 871 F.3d at 910. Although there is "a general rule that an unreasonable mistake of identity renders an arrest unconstitutional," the court explained that it could not "simply apply that general rule to the facts of this case." *Id.* at 910-11. The court went into great detail about why, in cases like this one that use "reasonableness" as a qualifier, courts must reject the obviousness exception: "It is true that in a sufficiently 'obvious' case of constitutional misconduct [ ] we do not require a precise factual analogue in our judicial precedents." *Id.* at 911. "But this obviousness principle, an exception to the specific-case requirement, is especially problematic in the Fourth-Amendment context. When a violation is obvious enough to override the necessity of a specific factual analogue, we mean to say that it is almost always wrong for an officer in those circumstances to act as he did. But that kind of categorical statement is particularly hard to make when officers encounter suspects every day in never-before-seen ways. There are countless confrontations involving officers that yield endless permutations of outcomes and responses. So the obviousness principle has real limits when it comes to the Fourth Amendment." *Id.* at 912. "With these observations in mind, we find this is not 'one of those rare cases' in which a violation was so 'obvious' that qualified immunity does not apply 'even without a case directly on point.'" *Id.* (quoted case omitted).

Although the Panel did not cite to the Sixth Circuit's 13-year-old decision in *Sample v. Bailey*, 409 F.3d 689, 699-701 (6th Cir. 2005), the panel opinion seems to track *Sample*'s reasoning. This is telling, however, because the Sixth Circuit itself has more recently undercut *Sample* and specifically held that *Garner*'s rule is not "sufficiently 'particularized'" to deny qualified immunity. *See Mitchell v. Schlabach*, 864 F.3d 416, 424 (6th Cir. 2017). *Mitchell*, unlike *Sample*, had the benefit of the Supreme Court's recent reminders that "obviousness" is a "rare" occurrence.

A proper interpretation of the "obviousness" exception focuses on the "outrageousness" of the facts of a given case, not necessarily on the determinacy (or lack thereof) of how the relevant constitutional rule has been articulated. Take, for example, the rule of *Maryland v. Garrison*, 480 U.S. 79, 88 (1987), which requires officers to make "reasonable efforts" to identify the correct house when serving a search warrant. If there is a case where an officer has made no effort whatsoever to identify the correct house, then that case presents an "obvious" scenario where there need not be a prior case where an officer failed to make any efforts at all. *See, e.g., Gerhart v. McLendon*, 714 Fed. App'x 327 (5th Cir. 2017) (denying qualified immunity to officer who entered wrong house after making no efforts to identify correct house). This makes sense because an officer who makes no effort necessarily has not made a "reasonable" effort to do something. If, by contrast, some efforts are

made, then the result is different. *See, e.g., Thomas v. Williams*, 719 Fed. App'x 346 (5th Cir. 2018) (granting qualified immunity to officer who entered the wrong house after making efforts to identify correct house).[2] In this situation, factual analogues are necessary to determine whether the efforts were reasonable or not. *See, e.g., White v. McLain*, 648 Fed. App'x 838 (11th Cir. 2016) (distinguishing between the scenarios where an officer makes some effort and where an officer makes no effort).

Other Circuits have articulated clear rules for when a court may invoke the "obviousness" exception of the step two analysis. The seminal decision is *Vinyard v. Wilson*, 311 F.3d 1340, 1350-51 (11th Cir. 2002) (emphasis added), where the Eleventh Circuit explained that, outside of the just-discussed "outrageous" scenario, the "obviousness" exception may be invoked only when an officer's conduct violates the Constitution or a federal statute "on its face" or 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[.]" The Seventh, Eighth, Tenth, and D.C. Circuits have all cited favorably to the Eleventh Circuit's reasoning, but the Panel in this case did not discuss these other Circuits' methodology for finding "obviousness." *See Thompson v. Cope*, 900 F.3d 414, 422 (7th Cir. 2018);

[2] *But see Gerhart v. Barnes*, 724 Fed. App'x 316 (5th Cir. 2018) (denying qualified immunity to officer who entered wrong house after making efforts to identify correct house). There are pending certiorari petitions in both *Williams* and *Barnes*, and the Supreme Court has called for responses in both cases.

McDonough v. Anoka Cnty., 799 F.3d 931, 944 (8th Cir. 2015); *Pierce v. Gilchrisst*, 359 F.3d 1279, 1298 (10th Cir. 2004); *Wesby v. District of Columbia*, 765 F.3d 13, 27 (D.C. Cir. 2014), *rev'd*, 138 S. Ct. 577, 591-92 (2018) (reversing district court after finding defendant did not violate clearly established law because existing precedent suggested alleged conduct was lawful).

If the same rules had been articulated and applied in this case, the outcome would have been different. Even taking as true the plaintiff's version of events, the panel opinion makes no finding of outrageousness. Nor was there any facial violation of federal law or identification of a judicial decision not tied to a particularized set of facts. Again, the legal rule that was the focal point of the Panel's decision is indeed tied to a particular set of facts, specifically when a perception of threat is reasonable and when it is not.[3] The Panel's "obviousness" analysis needs to be corrected.

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[3] Notably, throughout the panel opinion, the Panel cites to *Tolan v. Cotton*, 572 U.S. 650 (2015), a case in which the Supreme Court reversed this Court's grant of qualified immunity in a "reasonable perception of harm" case. In *Tolan*, however, the Supreme Court specifically stated that it "express[ed] [no] view as to whether [the officer's] actions violated clearly established law." *See Tolan*, 572 U.S. at 1868. If the Supreme Court would have thought that *Garner*'s "reasonable no-threat perception" rule was specific enough to constitute clearly established law, it certainly had the opportunity to make that holding in *Tolan*. It of course did not do so, instead limiting the holding to a reminder that the facts must be construed in the light most favorable to the plaintiff and then, after that is done, courts should consider whether the facts in that light could constitute a violation of clearly established law. *Id.* at 1868.

CONCLUSION

Rehearing should be granted, and this case should be heard en banc. Although qualified immunity recently has received heavy criticism from diverse factions, *see, e.g.*, Amicus Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law, *Almighty Supreme Born Allah v. Lynn Milling*, No. 17-8654 (2018), 2018 WL 3388317 (U.S. July 11, 2018), it remains the Law of the Land. If the doctrine is to be tinkered with, the tinkering must come from the Supreme Court and not through Circuit decisions applying a watered down version of the "clearly established" analysis mandated by recent Supreme Court decisions. This is simply not the "rare" case that justifies the "obviousness" exception.

Dated: _____ __, 2018.

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1. This brief complies with the type-volume limitation of Fed R. App. P. 29(b)(4) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 2,523 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally-spaced typeface, including serifs, using Word, in Times New Roman 14-point font, except for the footnotes, which are in proportionally-spaced typeface, including serifs, using Word in Times New Roman 12-point font.

Respectfully Submitted,

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Dated: _____ __, 2018

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CERTIFICATE OF SERVICE

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