No. 18-695

IN THE

Supreme Court of the United States

CHRISTOPHER CHUNG, *et al.*,

Petitioners,

v.

GULSTAN E. SILVA, JR., AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SHELDON PAUL HALECK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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Only by defining the clearly established law without the requisite specificity was the Ninth Circuit able to ignore the fact that the officers spent 11 minutes in the middle of a busy, dark roadway trying unsuccessfully to remove a much larger man. They first issued commands to get out of the street and then spent several minutes chasing him and trying to grab him with their hands. Only *after* these efforts proved unsuccessful did they issue warnings that pepper spray and then taser would be deployed. There is no law prohibiting the use of pepper spray or taser to remove a man from a busy street. Qualified immunity protects all but the plainly incompetent and knowing violators of the law. Petitioners were neither.

The brief in opposition focuses mostly on the first prong of qualified immunity (objective reasonableness), whereas both of the questions presented in the petition address the second prong (clearly established law). Respondents contend that the officers can be denied immunity by asserting factual disputes. This is not the law. Further, the opposition asserts "facts" that are either not in the record or are flatly contradicted by the record. In any case, the petition turns on purely legal errors.

Respondents agree with the Ninth Circuit that the officers were performing a community caretaking function. Given that police spend over 70% of their time performing such peacekeeping activities, it would be illogical to deny them immunity by only considering the objective reasonableness of their conduct while dispensing with the further requirement that such reasonableness be assessed in light of clearly established precedent. The panel's decision is incorrect, unjust to petitioners, and likely to deter police officers from serving as peacekeepers in future situations.

I. No Clearly Established Law Prohibited The Officers' Conduct.

Even if respondents are correct as to the first prong (which petitioners dispute), it does not resolve the immunity analysis. As the Court said recently, "even assuming a *Fourth Amendment* violation occurred—a proposition that is not at all evident—on these facts [petitioner] was at least entitled to qualified immunity." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam).

The primary error below is the level of generality used to define clearly established law. The Ninth Circuit focused on the *Graham* factors, and respondents endorse that approach. But this Court has squarely rejected it in a series of rulings spanning fifteen years, stating that "the general rules set forth in *Garner* and *Graham* do not by themselves create clearly established law outside an obvious case." *Kisela*, 138 S. Ct. at 1153 (*per curiam*, citations and internal quotation marks omitted), quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (*per curiam*); *Brosseau* v. *Haugen*, 543 U. S. 194, 199 (2004) (*per curiam*); *see also Plumhoff* v. *Rickard*, 572 U.S. 765, 779 (2014) (emphasizing that *Garner* and *Graham* "are 'cast at a high level of generality'"). This is not such an "obvious case," and both the Ninth Circuit and respondents ignored this line of authority.

The Ninth Circuit and respondents are unable to point to any factually similar precedent. And for good reason: there is no such case. Specificity is important because it can be difficult for officers to determine how the excessive-force doctrine will apply to the factual situation they confront. *Kisela*, 138 S. Ct. at 1152 (citation omitted).

The result depends on the particular facts of the case. *See id.* at 1153 (citation omitted). Precedent with similar facts provides notice to an officer that specific conduct is unlawful. *Id.*

The Ninth Circuit found clearly established law only by framing both the conduct and existing precedent at a high level of generality, rather than finding cases with facts sufficiently close to those presented here such that "*every* reasonable official" would have known that the conduct violated the law. *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (citation omitted). Rather than finding a case with similar facts to support the denial of immunity, respondents merely cite the same four cases relied on by the Ninth Circuit to reach the desired legal outcome on plainly distinguishable facts: *Young v. County of Los Angeles*, 655 F.3d 1156, 1168 (9th Cir. 2011) (denying immunity for pepper spraying a driver sitting on a curb eating broccoli and later hitting him with baton while he "lay face-first" on the ground); *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012) (denying immunity for shooting partygoer in the eye with a pepperball in an apartment complex without informing him how he could avoid police force); *Brooks v. City of Seattle*, one of the two cases in *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011) (denying immunity to officer for tasering pregnant woman sitting in her car after he had removed the key and there were "no other exigent circumstances"); *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010) (en banc) (denying immunity for tasering a motorist who had complied with requests to turn down his radio and pull to the side of the road). "Suffice it to say, a reasonable police officer could miss the connection between the situation confronting" the officers in those four cases and the situation confronting

the officers in the middle of a busy downtown street. *Kisela*, 138 S. Ct. at 1154.

In fact, two more recent cases cited in the petition demonstrate that the panel's precedents could not have constituted "clearly established law" in 2015. Pet.18, 21, citing *Jones v. Las Vegas Metro. Police Dept.*, 873 F.3d 1123; (9th Cir. 2017) (granting immunity to officer after deploying taser twice against a nonthreatening misdemeanant who was evading police);[1] *Felarca v. Birgeneau*, 891 F.3d 809 (9th Cir. 2018) (granting immunity to officers using minimal reasonable force necessary to move protestors). Respondents ignore those cases.

II. The Denial of Qualified Immunity Presents A Purely Legal Issue That Cannot Be Countered By Asserting Factual Disputes.

Respondents play up the fact-intensiveness of this (like every) qualified-immunity case in an attempt to dissuade the Court from exercising review. Their

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1. *Jones* demonstrates that "the use of tasers in general is not objectively unreasonable, even where multiple discharges occur." *Rakestrau v. Neustrom*, No. 11-CV-1762, 2013 U.S. Dist. LEXIS 51182, at *30 (W.D. La. Apr. 8, 2013). Taser cases fall within one of two categories. *Id.*; *Bombard v. Volp*, 44 F. Supp. 3d 514, 521–22 (D. Vt. 2014), *citing Cockrell v. City of Cincinnati*, 468 F. App'x 491, 495–96 (6th Cir. 2012). The first includes plaintiffs who disobeyed officers; the second includes plaintiffs who have already been detained or subdued. *Id*. Courts considering the first type conclude that either there was no constitutional violation or the right not to be tased was not clearly established, while the second category results in courts finding that a §1983 excessive force claim is available to plaintiffs. *Id*. Petitioners fit into the first category.

argument that "there are *significant* disputed material facts" (at 3) is unavailing because the Ninth Circuit panel would have lacked jurisdiction to hear this case if it "involve[d] whether the pretrial record set forth a 'genuine' issue of fact for trial." *Roybal v. Toppenish Sch. Dist.*, 871 F.3d 927, 931 (9th Cir. 2017), citing *Johnson v. Jones*, 515 U.S. 304, 319–20 (1995). The right to appeal the denial of qualified immunity "is limited to the purely legal question of whether, assuming the factually supported version of events offered by the plaintiffs is correct, the district court erred by denying qualified immunity." *Lam v. City of San Jose*, 869 F.3d 1077, 1087 (9th Cir. 2017) (citation omitted). Both prongs of qualified immunity present questions of law. The reasonableness of an officer's conduct presents a "pure question of law." *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007). Likewise, whether the law is clearly established is also a "purely legal" question. *Johnson*, 515 U.S. at 319.

The panel's review in this case was de novo, viewing material facts and inferences therefrom in respondents' favor. Pet.App.2a. Petitioners' argument has always been that *even on those facts*, they did not violate the law, much less clearly established law. Moreover, this Court has not shied away from reviewing—and reversing—fact-intensive qualified immunity cases when circuit courts have misapplied settled qualified immunity law. *See, e.g., Kisela*, 138 S. Ct. 1148; *White*, 137 S. Ct. 548; *Mullenix v. Luna*, 136 S.Ct. 305 (2015) (per curiam); *Stanton v. Sims*, 134 S.Ct. 3 (2013) (per curiam); *Ryburn v. Huff*, 132 S.Ct. 987 (2012) (per curiam). The Court has reversed even when the circuit court found there to be genuine issues of material fact. *See White* (reversing circuit court ruling that denied immunity because it found "genuine disputes of material fact").

Respondents cannot defeat qualified immunity by creating "facts" that appear nowhere in the record or are contradicted by the record. The most important of respondents' invented facts is that the officers failed to provide warnings before using pepper spray and taser. This is significant because the panel's precedents involved *no-warning* cases—*Young*, *Nelson*, *Brooks*, *Mattos*—that are all distinguishable because the record here contains ample evidence that the petitioners gave multiple warnings. ER133–34, 140–41, 147, 186. Respondents introduced no facts to the contrary, other than to dispute petitioners' facts on the grounds that they involved "credibility determinations." ER126–27. But a court may not make credibility determinations on a motion for summary judgment. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). If summary judgment motions could be subverted merely by asserting "credibility determinations" without citing to particular facts in the record, then few such motions could ever be granted.

Respondents' description of this as a "*hotly disputed* case" (at 2) suffers further defects. First, the claim that Haleck "was incapable of understanding and complying with [the officers'] directions to get out of a public roadway" asserts a spurious fact that appears nowhere in the record and is legally irrelevant because respondents cite no authority holding that immunity can be denied if the suspect did not understand orders. Second, there is no evidence the officers knew he "had drugs in his system" (at 1) when they issued those orders. Third, the record is silent as to any alleged "mental illness" (at 1), or more importantly, the officers' awareness of such during the

incident. Finally, the "aggressive behavior" (at 6) is a red herring because the agreed facts in the petition do not claim otherwise.

It is impossible to read the depositions of the six officers in the record and conclude other than that they were dealing with a complex, challenging, rapidly-evolving situation that required a series of split-second decisions. ER137–67. They sought Haleck's voluntary compliance before any force was threatened or used. The first two officers on the scene, Critchlow (who stated that she was five feet tall and 130 pounds), and Chung (considerably smaller than Haleck) chased the six-foot 200-pound Haleck around the street for several minutes trying to grab him with their hands. ER132, 139–40, 146, 185. They did not know Haleck prior to the incident or know him to be mentally ill. ER143, 149, 154. None of these facts are disputed.

III. Police Officers Are Entitled To Qualified Immunity When Performing Community Caretaking Functions.

Respondents concede that the community caretaking doctrine applies. Opp.i (second question presented), 17. But they dodge the entire discussion of that doctrine in the petition by positing a reductio ad absurdum, based on a New Jersey state case, that community caretaking is tantamount to a "roving commission or excuse for police officers to use any level of force in seeking compliance." Opp.18, citing *State v. Vargas*, 63 A.3d 175, 191 (N.J. 2013). The petition never advocates for such an omnipotent police power, and the New Jersey case only mentioned the doctrine in the context of a nonconsensual search of a home, a situation that has no bearing on the present case.

Over 70% of police work is devoted to community caretaking activities rather than investigating crimes. *See* Brief for National Association of Police Organizations et al. as *Amici Curiae* 3, 6. The officers here were performing such a function under challenging circumstances at an intersection where about 24,543 vehicles pass daily. *Id.* at 4. Haleck impeded traffic for some 11 minutes, *id.* at 5, which means that he may have prevented about 187 vehicles from passing. Though the traffic was temporarily stopped, the longer he remained in the roadway, the longer he exposed himself, the officers, and the public to the risk of oncoming traffic. For police officers this is no trivial matter, as 40 fellow officers have been struck and killed by vehicles in recent years. *Id.* at 7.

Respondents state (at 9) that "Petitioners would have this Court believe that the incident… was extremely dangerous to the public because… cars were actively 'attempt[ing] to go around him.' *Id.* at p.23." The petition says no such thing, but merely poses a crucial rhetorical question: "What, precisely, did the panel expect the HPD officers to do, faced with a man refusing to exit a busy downtown thoroughfare—wait until cars attempted to go around him, creating an even more precarious situation?" Pet.23.

Respondents description (at 18) of the community caretaking doctrine first formulated by *Cady v. Dombrowski*, 43 U.S. 433 (1973), as merely another name for the emergency aid doctrine is incorrect and falsely implies the need for an emergency to apply the doctrine. Instead, three basic police functions are involved: public servant, automobile inventories, and emergency aid. David Fox, Note: *The Community Caretaking Exception: How The Courts Can Allow The Police To Keep Us Safe Without Opening*

The Floodgates To Abuse, 63 Wayne L. Rev. 407, 408-09 (Winter 2018); Pet.8, 27. *Cady* involved an automobile inventory search, not emergency aid, but the public servant doctrine occupies more policing time, making it the most recognized form of caretaking. *See* Pet.9 (citation omitted).

Police officers face the constant prospect that a seemingly routine incident—any one of their myriad caretaking functions—could generate litigation and the threat of personal liability. The Ninth Circuit's refusal to dismiss respondents' suit, which involved neither unreasonable conduct nor a violation of clearly established law, exemplifies the unfortunate tendency of some courts to dilute the vital protection of qualified immunity. The panel's decision is not only incorrect and unjust to petitioners, but more importantly, it will deter police officers from serving as peacekeepers in future situations. If officers performing their many community caretaking functions can be denied qualified immunity by only considering the objective reasonableness of their actions, while ignoring the requirement of clearly established law particularized to the facts of the encounter—the position taken by the panel and endorsed by respondents—then such an officer will be deprived of "fair notice that her conduct was unlawful." *Kisela*, 138 S. Ct. at 1158 (citation omitted).

Much is at stake, not only for petitioners but for all police officers serving the public nationwide. The issue is important, it is novel, and the Court's guidance will provide much-needed clarification to all courts called on to apply qualified immunity in community caretaking cases.

CONCLUSION

This Court should grant the petition for certiorari or, alternatively, summarily reverse the Ninth Circuit's decision.

Respectfully submitted,

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