No. 19-1085

In the Supreme Court of the United States

SHANNON DEASEY, et al.

Petitioners,

v.

DANIELLA SLATER, et al.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

INTRODUCTION

Joseph Slater died at age 28, while in petitioners' custody. Evidence demonstrates that he suffocated—he died of positional asphyxiation—while *hogtied* in the rear of a police cruiser. Immediately prior, three officers had knelt on Slater, pinning his chest to the ground.

In an unpublished, memorandum decision, the court of appeals held that, taking the facts in the light most favorable to respondents (Slater's children and parents), petitioners' conduct violated his clearly established rights. In particular, nearly two decades ago, the court had held that "squeezing the breath from a compliant, prone, and handcuffed individual despite his pleas for air involves a degree of force that is greater than reasonable." *Drummond ex rel. Drummond* v. *City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003). Here, the officers engaged in the same conduct—and they had the materially similar indications that Slater was struggling to breathe. Respondents state a viable constitutional claim, and the court of appeals correctly held that summary judgment is improper.

Petitioners now offer a grab bag of arguments. Not one has merit.

The question presented asserts that, in applying the qualified immunity standard, the panel here used the phrase "sufficiently analogous." And, petitioners contend, some decisions from the Seventh Circuit have instead used the phrase "closely analogous." This is not a circuit conflict warranting review. To begin with, the unpublished decision here created no new

law in the Ninth Circuit, and that court has used "sufficiently analogous" and "closely analogous" interchangeably. That makes sense, of course, because the term "sufficient" alone does not answer *what* constitutes sufficient. But, in the balance of the panel's analysis, the court made clear that it followed precisely this Court's qualified immunity jurisprudence. What is more, the Seventh Circuit *also* uses these terms interchangeably. So too does *this* Court. The question presented is a game of semantics, not a serious conflict of law warranting review.

What the petition actually appears to seek is error correction. That claim fails on multiple scores. There was no such request in the question presented. And, critically, there is quite simply no error to be found. In-circuit precedent gave officers fair warning that their conduct was lawful. So too did a broad consensus of authority from around the country. And, if any constitutional violation qualifies as "obvious," it is this one—hogtying a nonviolent, mentally unstable individual, immobilizing him with prolonged application of body weight, and leaving him to suffocate in the back of a police car is shockingly egregious conduct, for which no immunity is available.

Against this backdrop, the petition attempts to tell a vastly different factual story, painting Slater as resisting officers in an effort to justify his death in the backseat of a police cruiser. But, in so doing, petitioners spin a tale divorced from any factual determination of the court below. Because the petition offers page after page of factual narrative without even a single record cite, it is impossible to understand the basis of the petition's very different version of events. The Court certainly should not engage in error correction based on a sequence of events that petitioners have invented to suit their interests.

That is not all. The ambitious petition next asserts that the unpublished panel opinion shifted the burden to them. According to petitioners, the panel's unpublished opinion conflicts with *intra*-circuit precedent. Once more, that is no basis for further review.

There is yet more reason to deny the petition. While the court of appeals properly applied this Court's qualified immunity precedents, it is imperative that this Court revisit that law, reversing or amending it, so as to substantially cut back on the scope of the qualified immunity doctrine. A chorus of voices—Justices on this Court, judges around the country bound to apply qualified immunity, scholars, and even the public at large—have taken notice of qualified immunity. It lacks legal foundation, and it improperly shields officers from accountability for constitutional violations. While the court of appeals was not free to consider a fresh qualified immunity doctrine, this Court may. Thus, prior to any embrace of a qualified immunity defense, the Court must first wrestle with the sustained—and correct—criticism of the doctrine.

For all these reasons, further review is unwarranted. The Court should deny the petition.

STATEMENT

A. Factual background.

Joseph Slater, then 28, died on April 15, 2015, during an arrest by Sheriff's deputies of the County of San Bernardino. Pet. App. 2.[1] He suffocated to death, while hogtied in the rear of a police car. Pet. App. 6.

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[1] Petitioners' recitation of the facts, which spans 15 pages, is remarkable insofar as it does not cite—not even once—the record in this case. Needless to say, we disagree with substantial aspects of petitioners' factual accounting. The specific objections we raise here are far from the full range of misstatements in the

The deputies, petitioners here, knew that Slater was mentally ill as a result of their prior contacts with him. Pet. App. 2. Deputy Deasey had previously placed Slater on a mental health hold, and officers were aware that Slater did not have a history of violence. D. Ct. Dkt. 103, at 5; D. Ct. Dkt. 114, at 2.[2] See also Pet. App. 21 ("Slater was known by local law enforcement in the City of Highland, and they knew that Slater suffered from mental disorders which caused him to act abnormal at times, that Slater had been hospitalized for psychiatric reasons, and that Slater had had several prior contacts with the [sheriff's department]."). Officers responded to a call that Slater was engaging in non-violent vandalism. Pet. App. 22.

"Deputy Deasey responded to the scene and recognized that Slater was on drugs." Pet. App. 2-3. Slater was "calm and cooperative" throughout this encounter, and he "willingly placed both of his hands behind his back" to be "handcuffed." Pet. App. 23. Deasey agreed that he had not observed Slater "commit any crime." D. Ct. Dkt. 114, at 3. Deasey "placed Slater under arrest, handcuffed him without resistance, and attempted to place him in the back of a patrol car with the intention of taking him to the hospital for psychiatric care." Pet. App. 3.

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petition. And, since petitioners' statement has *no* citation support, respondents submit that it should be disregarded in the whole, as it is impossible to understand the basis on which petitioners tell a materially different version of the events, much less rebut it. Additionally, the video that petitioners reference (at 7) does not capture the events petitioners describe, largely because they occur out of view. By contrast, video and audio from the officers' belt recorders supports Slater's version of events.

[2] Petitioners' assertion to the contrary (at 7) lacks any factual support and is contradicted by Deasey's own testimony.

Slater soon became "fearful," "telling Deputy Deasey several times, 'You're not a cop, sir,' and, 'You're going to kill me.'" Pet. App. 3. Deasey ordered Slater to slide into the car, and then—while Slater remained handcuffed, and waiting just thirteen seconds after his initial order—"deployed three pepper sprays at Slater." *Ibid*.[3] "Slater reacted by moving around and yelling things like, 'You're blinding me.'" *Ibid*. He also called out repeatedly for his mother, "Oh, my God, Mom! Oh, Mom! Oh, Mom! Ah!"

Slater ended up on the ground with Deputy Deasey using his body weight to pin Slater down. Pet. App. 3.[4] Deasey also kicked Slater with his knee. Pet. 9.[5] Slater continued to yell, "Help! Help!" and began

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[3] Petitioners' contention (at 8), without citation, that Slater was kicking is vigorously disputed by respondents. Neither the video nor audio evidence supports this claim. See D. Ct. Dkt. 102, at 9 (whether Slater was kicking is a disputed question of fact). Similarly, petitioners claim that Deasey deployed a second burst of pepper spray because Slater became "more aggressive," was "flailing in the back seat," and was "screaming[] and pushing his feet and torso out of the patrol car with * * * greater force." Pet. 8. Again, the video evidence does not support this, and respondents dispute it.

[4] Petitioners are wrong to assert, without citation, that Slater "bumped Deasey." Pet. 9. The video does not show that. Rather, the video indicates that Deasey pulled Slater out of the back of the patrol unit by grabbing the back of Slater's t-shirt. Slater landed on the ground and rolled away from the patrol car, unable to break his fall because his hands were handcuffed behind his back as he called out for his "Mom." Deasey stood and watched as Slater hit the ground and rolled. Deasey then stepped over to where Slater was handcuffed on the ground, placed his knee on Slater's neck, and radioed to dispatch, at which point Slater again said, "You're not a cop" and screamed for "Help!"

[5] Again, petitioners are wrong to assert, without citation, that Slater "kick[ed] his feet back toward Deasey." Pet. 9. The video shows that when Deasey restrained Slater on the ground, Slater's legs were moving *away from*, not toward, Deasey. And,

calling out his mother's name and phone number, "LA * * * Tina Slater * * * Twenty-seven * * * 76772."

Before Deputy Gentry arrived, Deputy Deasey applied his body weight to restrain Slater on the ground for about one minute. Once Deputy Gentry arrived, both deputies applied their body weight to Slater. And, finally, Sergeant Rude arrived, and also used his body weight to restrain Slater on the ground. Slater was restrained on the ground under the weight of one to three deputies for nearly three minutes. While pinning him down, the deputies placed "a hobble restraint to Slater's ankles, connecting it to his handcuffs from the back." Pet. App. 3. Slater began to say, "You're going to kill me." *Ibid*.

"Due to the slack in the hobble, Slater was able to sit on his own, and he did so without further resistance." Pet. App. 3. Paramedics "performed a medical evaluation of Slater, determined he was stable, and released him to the deputies to transport him to jail." *Id*. at 24.

After waiting about ten minutes, the deputies attempted "to wash pepper spray off Slater," and they carried him back to the patrol car, and slid him onto the back seat on his stomach. Pet. App. 3. That was the same seat that was already contaminated by the earlier pepper spray bursts. D. Ct. Dkt. No. 102, at 11. Slater "thrash[ed] about" (Pet. App. 25), and he slid "out of the open car door on the other side" (*id*. at 3).

In response, Deputy Gentry kicked Slater multiple times. Petitioners also "pushed him back onto the seat and applied second and third hobbles to hogtie Slater—the second hobble to bind his feet and hands more tightly together, and the third hobble to secure

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contrary to petitioners' claim, Slater was never in the process of "getting up and running off." *Ibid*.

him to the car." Pet. App. 3-4. See also Pet. 15 (these hobbles further "restrict[ed] Slater's leg movements by bending his legs farther back, closer to the cuffs and Slater's backside"). Throughout this time, "Slater remained on his chest and stomach." Pet. App. 4.

The officers have since "admitted" that they applied "pressure on Slater's ribs and shoulder during the application of the second and third hobbles." Pet. App. 4. "Brandt put his right foot against the top of Slater's left shoulder, near the top of the shoulder blade." *Id*. at 25. Likewise, "Deputy Gentry testified that he placed pressure on Slater's left rib area with his knee while applying the second hobble." *Id*. at 6. Indeed, Slater's "autopsy showed extensive bruising," which respondents maintain "is consistent with pressure to Slater's shoulders and back." *Id*. at 4.

In all, "Slater was hogtied and placed on his stomach in the back of the police car, and the deputies applied pressure to his body during the second and third hobbling, after pressure was already applied to his shoulders in the prone position during the first hobbling." Pet. App. 6. The deputies did so, even though they have since conceded that they are trained not to restrain subjects in prone positions because of the danger of positional asphyxia. The deputies were also trained that subjects, particularly those who are handcuffed and hobbled, should be placed on their side so that they can breathe. See D. Ct. Dkt. No. 102, at 10-11, 17.

Deputy Brandt acknowledges that, "[p]rior to closing the patrol car door," he "heard Slater make a spitting noise." Pet. App. 6. "Before long, Slater had vomited and largely stopped breathing." *Ibid*. Medics were on the scene, but they could not revive him. *Id*. at 4.

Evidence indicates that Slater "died from positional asphyxiation." *Id*. at 2.[6]

B. Proceedings below.

1. Respondents, Slater's children and parents, filed this action pursuant to 42 U.S.C. § 1983, asserting claims pursuant to the Fourth and Fourteenth Amendments, as well as state law claims. Pet. App. 26-27. Petitioners filed a motion for summary judgment, which respondents opposed. *Id*. at 20-21.

The district court granted petitioners summary judgment. Pet. App. 19-44. The court concluded that "Deasey's use of pepper spray, Deasey's knee strike to Slater, and the application of the first hobble (including any force that may have been used by the deputies in applying that hobble) were reasonable and did not violate Slater's Fourth Amendment rights." Pet. 29.

With respect to the imposition of the second and third hobble restraints—and Slater's resulting death—the court determined that "the trier of fact could find in [respondents'] favor with respect to [respondents'] Fourth Amendment claim." Pet. App. 34. But, the court found that respondents' authorities demonstrating that use of a "comparable amount of force constitutes a violation of the Fourth Amendment" were "distinguishable" because of differences as

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[6] Petitioners argue (at 19-20) that Slater's death was not caused by the excessive force and restraints that the deputies used against him. That issue is independent of the excessive force claim here. Nonetheless, this issue is heavily disputed: Respondents' expert forensic pathologist, Dr. Ronald O'Halloran, opined that the excessive use of force and restraint was a cause of Slater's death, noting specifically that Mr. Slater lost consciousness, stopped breathing, and was found with vomit or sputum in and around his mouth, while he still had a pulse. D. Ct. Dkt. No. 102, at 14-15, 18-19.

to how precisely the individuals were handcuffed or where specifically force was applied. Pet. App. 36-37.

2. Respondents appealed, and petitioners cross-appealed the district court's finding of a constitutional violation. Pet. App. 2 & n.1.

In an unpublished, memorandum decision, the court of appeals agreed with the district court that "the application" of the first hobble restraint to Slater's legs "did not constitute excessive force." Pet. App. 3. The court likewise "agree[d] with the district court that the force used in applying the second and third hobbles was excessive." Pet. App. 5. The court observed that "Fourth Amendment excessive force claims require courts to balance 'the nature and quality of the intrusion' with the 'countervailing governmental interests at stake' to evaluate the objective reasonableness of the force in context." *Ibid*. (quoting *Graham* v. *Connor*, 490 U.S. 386, 396 (1989)). Especially relevant here, when known to the officer, "'a detainee's mental illness' is a factor bearing on the government's interest." *Ibid*.

The court of appeals reversed the district court's "clearly established" holding. Pet. App. 5-7. In conducting this analysis, the court took "seriously the Supreme Court's warning that 'clearly established law should not be defined at a high level of generality.'" Pet. App. 5-6 (quoting *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017)). Specific precedent, *Drummond ex rel. Drummond* v. *City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003), "provide[d] 'fair warning' to Defendants that their alleged actions were unconstitutional." Pet. App. 6. That decision "clearly established that 'squeezing the breath from a compliant, prone, and handcuffed individual . . . involves a degree of force that is greater than reasonable.'" *Ibid*. (quoting *Drum-*

mond, 343 F.3d at 1059). In addition, the Court evaluated authority from the First, Sixth, and Tenth Circuits, each of which confirmed the clarity of the legal right at stake here. Pet. App. 7 n.3.

This petition for certiorari followed.

REASONS FOR DENYING CERTIORARI

No further review is warranted. The question presented is an issue of semantics, not a serious legal disagreement among the courts. Petitioners' request for error correction should also be rejected: No error occurred below, petitioners fail to take the facts in the light most favorable to respondents, and this Court does not address such fact-bound issues, good for this case only. Petitioners' undeveloped burden argument lacks all merit. And, finally, prior to any further consideration of qualified immunity, the Court should first revisit the doctrine wholesale, reversing or revising it.

A. There is no circuit conflict.

The petition asks the Court to review the unpublished opinion's use, in passing, of the phrase "sufficiently analogous" (Pet. App. 6), arguing that it departs from the Seventh Circuit's use of the phrase "closely analogous." Pet. i, 25-26. For multiple reasons, that contention fails.

1. The unpublished, memorandum panel opinion plainly employed the governing legal standard for qualified immunity. In using the passing phrase "sufficiently analogous," the court did not cite to it as a standard for the doctrine. Pet. App. 6-7. Nor did it incorporate some established, specific body of law. There is no indication—none whatsoever—that the panel's ultimate result had anything to do with its use of the "sufficiently analogous" phrase. Nor could "suf-

ficiently analogous" serve as an independent standard, as it fails to answer the question *how* analogous a case must be to qualify as "*sufficiently* analogous."

The court did, however, specify just what standard governed, reciting the legal standard mandated by this Court's precedent: To qualify as clearly established, it must be "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Pet. App. 5. Cf. *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 590 (2018) ("The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'") (quoting *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001)).

The court recognized "that 'clearly established law' should not be defined 'at a high level of generality.'" Pet. App. 6 (quoting *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017)). And past precedent must provide "fair warning." *Ibid*. Cf. *Tolan* v. *Cotton*, 572 U.S. 650, 656 (2014) ("[T]he salient question is whether the state of the law at the time of an incident provided 'fair warning" to the defendants that their alleged conduct was unconstitutional.") (quotation marks and alteration omitted).

Not only did the panel faithfully apply this Court's precedent, but this Court likewise refers, in passing, to the concept of "sufficient" when describing the clearly established test. Thus, this Court holds that a "clearly established right is one that is *sufficiently* clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (emphasis added). See also *Wesby*, 138 S. Ct. 577, 589 (2018) ("To be clearly established, a legal principle must have a *sufficiently* clear foundation in then-existing precedent.") (emphasis added); *Ashcroft* v. *al-Kidd*, 563

U.S. 731, 741 (2011) ("A Government official's conduct violates clearly established law when, at the time of the challenged conduct, 'the contours of a right are *sufficiently* clear' that every 'reasonable official would have understood that what he is doing violates that right.'") (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added).

2. In fact, precedent from the court of appeals confirms that it has *not* established a "sufficiently analogous" test as distinct from "closely analogous." In *Sharp* v. *County of Orange*, 871 F.3d 901 (9th Cir. 2017), the court once invoked "sufficiently analogous" and then elsewhere, with no distinction, referenced "closely analogous." *Id*. at 912, 920.

What is more, the Ninth Circuit itself uses the formulation "closely analogous" to describe the second prong of the qualified immunity inquiry. In *Thomas* v. *Dillard*, 818 F.3d 864 (9th Cir. 2016), for example, the Court denied qualified immunity because "the facts of the cases existing at the time are not so *closely analogous* to this case such that [the officer's] mistaken view of the law was unreasonable." *Id.* at 891. The essential premise that undergirds the petition—that there is a "conflict" among the circuits "as to whether the existence of a merely 'sufficiently analogous' case is enough" (Pet. 25)—is transparently incorrect.

3. On the other side of the ledger, the Seventh Circuit too uses the "sufficiently analogous" phrasing with some frequency, confirming that there is simply no conflict.

Petitioners rest their claim on *Reed* v. *Palmer*, 906 F.3d 540 (7th Cir. 2018), which used the term "closely analogous." In so doing, *Reed* quoted *Findlay* v. *Lendermon*, 722 F.3d 895 (7th Cir. 2013). Critical for present purposes, *Findlay* used the phrase "suffi-

ciently analogous" interchangeably with "closely analogous." 722 F.3d at 900 ("Because he has neither identified a *sufficiently analogous* case nor adequately explained how Lendermon's actions were so plainly excessive that any reasonable officer would know it violated the constitution, he cannot defeat Lendermon's qualified immunity defense.") (emphasis added).

Indeed, the Seventh Circuit routinely uses the phrase "sufficiently analogous" in describing the "clearly established" prong of qualified immunity. See, *e.g.*, *Denwiddie* v. *Mueller*, 775 F. App'x 817, 820 (7th Cir. 2019) ("The rights must be described with adequate specificity, but there need not be a case directly on point so long as existing precedent is sufficiently analogous as to place the officers on notice that their conduct was unlawful."); *Broadfield* v. *McGrath*, 737 F. App'x 773, 776 (7th Cir. 2018) ("In making this determination, we do not require a case be directly on point, but existing precedent must be sufficiently analogous to place the officers on notice that their conduct was unlawful."); *Weinmann* v. *McClone*, 787 F.3d 444, 450-451 (7th Cir. 2015) (holding that, even if there had been no "sufficiently analogous" decisions, qualified immunity would still be inappropriate under the Seventh Circuit's alternative test of "plainly excessive conduct").

As the Seventh Circuit precedent proves, there is no material divergence between these formulations, which are used by the courts interchangeably. There surely is no conflict between these circuits regarding the applicable standard.

4. To gild the lily, examination of other circuits confirms that reference to "sufficiently analogous" precedent is not some innovation of the court below. That language is as ubiquitous as it is unobjectionable. See *e.g.*, *Gray* v. *Cummings*, 917 F.3d 1 (1st Cir.

2019) (considering whether use of a taser was "sufficiently analogous" to past precedent); *Kaminsky* v. *Schriro*, 760 Fed. App'x. 69, 73 (2d Cir. 2019) (emphasis added) ("sufficiently analogous"); *L.R.* v. *Sch. Dist. of Philadelphia*, 836 F.3d 235, 249 (3d Cir. 2016) ("Although there is no case that directly mirrors the facts here * * * there are *sufficiently analogous* cases that should have placed a reasonable official in Littlejohn's position on notice that his actions were unlawful.") (emphasis added); *Wilson* v. *Prince George County*, 893 F.3d 213, 222 (4th Cir. 2018) ("The cases we have examined are not *sufficiently analogous* to the present case to have placed [the officer] on such notice.") (emphasis added); *Maldonado* v. *Rodriguez*, 932 F.3d 388, 393 (5th Cir. 2019) ("the right * * * was not clearly established * * * because neither the Fifth Circuit nor the Supreme Court had addressed the issue * * * and neither had addressed an issue *sufficiently analogous* that a reasonable official would understand [the conduct at issue was unconstitutional].") (emphasis added); *Rafferty* v. *Trumbull County*, 915 F.3d 1087, 1097 (6th Cir. 2019) ("*sufficiently* analogous"); *Norman* v. *Schuetzle*, 585 F.3d 1097, 1110 (8th Cir. 2009) (finding an officer was entitled to qualified immunity because his conduct was not "sufficiently analogous" to prior cases that thus did not put him on notice that his actions were unconstitutional); *Estate of Ceballos* v. *Husk*, 919 F.3d 1204, 1216-1217 (10th Cir. 2019) (using both "sufficiently" and "closely" analogous interchangeably).

* * *

In all, there is no circuit conflict: The Seventh and Ninth Circuits—the only two courts addressed in the petition—both alternately use the phrases "sufficiently analogous" and "closely analogous." This Court uses the concept of "sufficient." And that language is

reflected across all circuits. The issue that headlines the petition is all semantics and no substance.

B. The Court should decline petitioners' request for summary reversal.

In fact, the claimed circuit conflict is little more than window dressing for what the petition actually seeks—review of the fact-bound, case-specific question whether, in the court of appeals, this particular right was clearly established at the relevant time. See Pet. 35 (requesting summary reversal). Given that the holding below was unpublished, that issue, as resolved here, is truly good for this case only. There is no basis—none whatsoever—to engage such claims of error correction.

What is more, while the petition gesticulates at a summary reversal request (Pet. 27-33, 35), that issue is not set forth in the question presented. Nor is it fairly encompassed within the question presented, which raised the supposed distinction between "sufficiently" and "closely" analogous precedent. Having failed to raise this as a question presented, it is not properly before the Court. See S. Ct. Rule 14.1(a).

1. In all events, there is certainly no error to correct. The panel faithfully applied this Court's qualified immunity precedents. It took care not to define clearly established law at the proscribed "high level of generality." Pet. App. 6 (citing *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017); *S.B.* v. *County of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017) ("We hear the Supreme Court loud and clear.")). Rather, the panel below "t[oo]k seriously the Supreme Court's warning," and instead considered "whether the right was clearly established in the light of the specific context of the case." Pet. App. 5-6.

The panel correctly concluded that *Drummond* sufficed to clearly establish the right at issue. Pet. App. 5-6. The parallels are clear: Slater and Drummond were unarmed. *Drummond*, 343 F.3d at 1054. In both cases, the involved officers knew that the decedent was mentally ill. *Ibid*. In both cases, the decedent was paranoid and hallucinating. *Ibid*. Both cases concern an encounter in a convenience store parking lot and in both cases, officers intended to transport the decedent to a hospital to get them help. *Ibid*. In both cases, the decedent was handcuffed behind his back, after which time officers used their body weight to hold the decedent down. As was the case in *Drummond* (*ibid*.), and based on the disputed facts as construed favorably to Slater, Slater did not resist or attempt to kick any of the deputies after he was handcuffed and on the ground. See page 5 n.3, *supra*. In both cases, the officers were warned of the dangers of positional asphyxia and of the risk of death. *Drummond*, 343 F.3d at 1059. In both cases, some minutes passed between the moment when officers initially handcuffed the decedent and when officers decided to hobble the decedent at his ankles. *Id.* at 1054. In both cases, the decedent went limp shortly after supplemental restraints were applied. In both cases, the officers had received training about the potentially fatal risks of positional asphyxia caused by kneeling on a subject's back or neck to restrain them. *Id.* at 1056, 1060 n.6. In *Drummond*, the plaintiff fell into a coma from which he never recovered, whereas here, Slater could not be revived.

This was a specific and granular rule—and it provides the requisite clarity demanded by the Court's precedent. Indeed, the setting and circumstances are nearly identical.

Petitioners' efforts to create meaningful daylight from *Drummond* each fail. Petitioners first argue that Drummond repeatedly told the officers that he could not breathe, whereas Slater did not use those words. Pet. 27, 29. But no reasonable officer could have concluded that *Drummond*'s constitutional holding turned on whether Slater said the magic words, "I can't breathe," rather than whether the circumstances were such that the officers knew or had reason to know that Slater, after being pepper sprayed, restrained, hobbled, subjected to the application of the body weight of multiple officers, and was heard spitting while in a hogtied position, was at substantial risk for respiratory distress.

If anything, petitioners appear to concede that, while hogtied, Slater was arching his back like a bow, and trying to lift his head and chest off of the back seat. This was yet more clear, objective evidence that Slater was in respiratory distress.

What is more, in attempting to distinguish *Drummond*, petitioners rest on a factual narrative quite different than the one most favorable to respondents. Petitioners claim that, unlike Drummond, Slater resisted the officers. Pet. 31. But that assertion—again, made without a hint of citation to the record—is little more than factual dispute. As respondents see it, Slater never kicked the deputies, never threatened the deputies, was respectful to the deputies, called Deputy Deasey "sir," and was so paranoid that he repeatedly pled with Deputy Deasey that he was not an actual police officer. And he begged for his mother throughout the encounter. Taking the facts in the light favorable to respondents, no conduct by Slater meaningfully distinguishes this case from *Drummond*.

Petitioners also try to distinguish the precise nature of the force applied. Pet. 31. However, according to respondents' version of events, which is supported by video evidence, multiple officers applied their body weight to Slater while he was chest-down, handcuffed, and hobbled, in order to further restrain him and stop him from positioning himself so that he could breathe. The fact that Slater was restrained in a prone position, while handcuffed, hobbled, *and hogtied* under the weight of officers *in a patrol unit*, while Drummond was restrained in a prone position, while handcuffed and hobbled, under the weight of officers *on the ground* is not a distinction that should provide petitioners in this case any less notice that their conduct was unconstitutional. Were it otherwise, qualified immunity would lose sight of any practical mooring—turning on technicalities rather than an honest appraisal as to whether past precedent supplied "fair warning."

2. What is more, a consensus of authority from courts of appeals from around the country have similarly found this conduct to violate the Fourth Amendment's prohibition on excessive force. That is, other circuits have similarly held that petitioners' conduct, in applying body weight to further restrain Slater so as to apply the second and third hogtie connections, after he was handcuffed, hobbled, and restrained in the prone position, constitutes excessive force in violation of the Fourth Amendment. The court of appeals thus properly referenced (Pet. App. 7 n.3) the "robust 'consensus of cases of persuasive authority,'" which further renders this right a clearly established one. *Wesby*, 138 S. Ct. at 589-590.

The law is clear and well-understood. See *Gutierrez* v. *City of San Antonio*, 139 F.3d 441, 446-447 (5th Cir. 1998) (sufficient evidence existed about

the dangers of hogtying that its use "would have violated law clearly established prior to November 1994"); *Champion* v. *Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004) (clearly established "that putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force); *Martin* v. *City of Broadview Heights*, 712 F.3d 951, 961 (6th Cir. 2013) ("The prohibition against placing weight on [the subject's] body *after* he was handcuffed was clearly established in the Sixth Circuit as of August 2007"); *Abdullahi* v. *City of Madison*, 423 F.3d 763, 771 (7th Cir. 2005) (unreasonable force where an officer knelt on the plaintiff's shoulder and held the plaintiff down with his body weight while another officer handcuffed the plaintiff); *Cruz* v. *City of Laramie*, 239 F.3d 1183, 1188 (10th Cir. 2001) (while hogtying alone does not violate clearly established law, "officers may not apply this technique when an individual's diminished capacity is apparent); *Weigel* v. *Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008) ("[T]he law was clearly established that applying pressure to [plaintiff's] upper back, once he was handcuffed and his legs restrained, was constitutionally unreasonable" due to the significant risk of positional asphyxia [].").

3. Finally, this same conclusion is appropriate based on the "obvious case" doctrine. See *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) ("Of course, in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law.").

Here, the constitutional violation is patently obvious: Petitioners hogtied a subdued, non-threatening, mentally disturbed individual, they applied pressure to his back while he was stomach down, and they left

him alone despite knowing that he was making spitting noises. Especially in light of training not to bind hobble a person's hands or handcuffs because of the risk of positional asphyxia (D. Ct. Dkt. No. 102, at 10; D. Ct. Dkt. No. 114, at 6), any reasonable officer would be aware that this dehumanizing conduct is as unlawful as it is immoral.

Indeed, in *Drummond*, the court of appeals recognized that, as early as 2003, "any reasonable person" (let alone a peace officer) should have known that the petitioners' conduct in the case involved a degree of force that is obviously unreasonable. 343 F.3d at 1059. Indeed, "it is even more striking that the officers had been specifically warned of the extreme danger of this sort of force," in part because there was "ample publicity in Southern California regarding similar instances of asphyxiation as a result of the use of similar force." *Ibid*.

A holding that these facts do not satisfy the "obvious case" doctrine would be tantamount to writing that law off the books—effectively overruling *Hope* v. *Pelzer*, 536 U.S. 730, 738, 741 (2002) ("a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'"). Indeed, it would be an indictment of the qualified immunity doctrine as a whole. In all, qualified immunity supplies no basis, on these facts at this juncture, to render judgment as a matter of law in petitioners' favor.

C. The petition does not present a question regarding the burden for qualified immunity.

Adding to its scattershot request for error correction, petitioners tack on an undeveloped argument (at

34) that the court below somehow erred by noting that "defendants bear the burden of proving that they are entitled to qualified immunity." Pet. App. 5. This assertion is insubstantial.

First, petitioners failed to identify this as a question presented by the petition. Because this issue was not set out as a question expressly raised here, it is not properly before the Court.

Second, petitioners affirmatively argue that this unpublished, memorandum opinion conflicts with published precedent from the same court. Pet. 34. Such an asserted intra-circuit conflict, between published and memorandum dispositions, is not the making of a petition for certiorari.

Third, there is no indication whatever that the allocation of burden did any work in this case—and petitioners certainly do not argue otherwise. Absent clear evidence that this formed the rule of decision, the issue is not squarely before the Court.

Fourth, in any event, because qualified immunity is an affirmative defense, there is every reason to conclude that the burden *does* rest on defendants to prove entitlement to it. As the Court has explained, "qualified immunity is an affirmative defense and * * * 'the burden of pleading it rests with the defendant.'" *Crawford-El* v. *Britton*, 523 U.S. 574, 587 (1998) (quoting *Gomez* v. *Toledo*, 446 U.S. 635, 640 (1980)). See also *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815 (1982) ("Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official."). A Section 1983 claim requires allegations that the defendant has violated a constitutional right; the Court "has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action." *Gomez*, 446 U.S. at 640.

And that is especially true in this context, because, at the summary judgment stage, Federal Rule of Civil Procedure 56 places on the moving party the burden of showing that there is no genuine dispute as to any material fact.

D. The Court should reverse or recalibrate the doctrine of qualified immunity.

The Court should deny certiorari for a more fundamental reason: qualified immunity lacks legal foundation, and, in an appropriate case, the Court should reverse or recalibrate the doctrine. Until such time, it should not expand upon it. While precedent foreclosed respondents from raising this argument below, it is an appropriate alternative basis to reach the judgment below—and thus serves as a question prior to all of the arguments contained in the petition for certiorari.

1. As Justice Thomas put it, "[t]here is likely no basis for the objective inquiry into clearly established law that our modern cases prescribe." *Baxter* v. *Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from denial of certiorari). To the contrary, "the Court adopted the test not because of 'general principles of tort immunities and defenses,' but because of a 'balancing of competing values' about litigation costs and efficiency." *Ibid.* (quoting *Malley* v. *Briggs*, 475 U.S. 335, 339 (1986), and *Harlow*, 457 U.S. at 816).

Because the Court's "analysis is no longer grounded in the common-law backdrop against which Congress" drafted Section 1983, the Court has stopped "interpreting the intent of Congress in enacting the Act." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987)) (quotation marks and alteration omitted). Indeed, the Court has acknowledged this

point time and again—Section 1983 "on its face admits of no immunities" (*Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976)), and "[Section 1983's] language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted" (*Owen* v. *City of Independence*, 445 U.S. 622, 635 (1980)).

Rather than emanating from text or history, qualified immunity was informed by judge-made policy determinations. In particular, the Court was concerned with the imposition of personal liability on public officials and the burden of litigation, an admitted policy judgment designed "to balance competing values." See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 813-814 (1982) (addressing perceived social costs of claims against government officials). But, as Justice Thomas observed, these "qualified immunity precedents * * * represent precisely the sort of freewheeling policy choices that [the Court has] previously disclaimed the power to make." *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring) (quotation and alteration omitted); See also *Baxter*, 140 S. Ct. 1862. See, *e.g., Bostock* v. *Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020) (Gorsuch, J.) ("[N]o court should ever" dispense with a statutory text "to do as we think best.").

Beyond that, qualified immunity has proven not to accomplish the goals it seeks. As for officer liability, indemnification is the norm. One study found that officers in a sample of settlements for police misconduct only paid 0.02% of the damages paid to plaintiffs, demonstrating the strong protection already afforded by indemnification. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014). And there is evidence that qualified immunity plays no meaningful role in alleviating litigation burdens. See Joanna C. Schwartz, *How Qualified Immunity Fails*,

127 Yale L.J. 2, 48-51 (2017). While justified solely by judicially identified policy aims, decades of experience have proven that those goals are not meaningfully advanced by the doctrine.[7]

2. Prior to further endorsing—and expanding upon—qualified immunity, it is essential for the Court to address these substantial concerns.

Indeed, Justice Sotomayor has identified the baleful impacts of the doctrine, especially when used by this Court in summary fashion. See *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). Because "[n]early all of the Supreme Court's qualified immunity cases come out the same way—by finding immunity for the officials," Justice Sotomayor cautioned that the current "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers." *Ibid*. In the Fourth Amendment context, the result is to "gut[]" its "deterrent effect." *Ibid*. More broadly, this "sends an alarming signal to law enforcement officers and the public"—"[i]t tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished." *Ibid*.

There is thus a dire need to revisit qualified immunity jurisprudence. Judge Willett, for example, recently added his "voice to a growing, cross-ideological

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[7] No factors counsel in favor of retaining qualified immunity in its current fashion. The Court has previously altered its judge-made rules regarding Section 1983, without serious hesitation. See, *e.g.*, *Pearson* v. *Callahan*, 555 U.S. 223, 233-234 (2009) (overruling *Saucier* v. *Katz*, 533 U.S. 194 (2001)); *Harlow*, 457 U.S. at 816-818. Having been "tested by experience" (*Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173-174 (1989)), existing doctrine has proven not just ineffective at accomplishing its stated ends, but affirmatively detrimental to litigants and the law alike.

chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence." *Zadeh* v. *Robinson*, 902 F.3d 483, 499-500 (5th Cir. 2018) (Willett, J., concurring dubitante) (footnotes omitted). Judge Willett continued:

> To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the first to behave badly. Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question "beyond debate" to "every" reasonable officer.

Zadeh v. *Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

These criticisms of qualified immunity are broad-based. See, *e.g.*, *Wyatt* v. *Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., joined by Scalia, J., concurring) (in qualified immunity cases, "we have diverged to a substantial degree from the historical standards"); *Crawford-El* v. *Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., joined by Thomas, J., dissenting) (the Court has not even "purported to be faithful to the common-law immunities that existed when § 1983 was enacted."); William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018).[8]

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[8] See also *Rodriguez* v. *Swartz*, 899 F.3d 719, 732 n.40 (9th Cir. 2018) (Kleinfeld, J.) ("Some argue that the 'clearly established' prong of the analysis lacks a solid legal foundation."); *Thompson* v. *Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018) (Hamilton, J.) ("Scholars have criticized [the qualified immunity] standard."); *Ventura* v. *Rutledge*, 2019 WL 3219252, at *10 n.6 (E.D. Cal. 2019) ("[T]his judge joins with those who have endorsed a com-

3. Ultimately, in this case, police officers hogtied and applied sustained body weight to a subdued, mentally-ill individual, leaving him in the rear of a police car, all contrary to their clear training. They left him in a position such that he could not breathe. Slater then died. Qualified immunity does not shield such official conduct from review. If, contrary to fact and law, the qualified immunity doctrine actually provided for summary judgment in these circumstances, that would be confirmatory evidence that qualified immunity must be revisited and, at a minimum, pared back substantially. Otherwise, qualified immunity would eviscerate fundamental constitutional rights.

Prior to any consideration of the application of qualified immunity to this case, the Court should revisit that doctrine entirely—reversing or substantially narrowing it.

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plete re-examination of the doctrine which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases."); *Thompson* v. *Clark*, 2018 WL 3128975, at *10 (E.D.N.Y. 2018) (Weinstein, J.) ("The legal precedent for qualified immunity, or its lack, is the subject of intense scrutiny.").

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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