No. _____

In The
Supreme Court of the United States

COUNTY OF SAN DIEGO AND
ERNESTO BANUELOS,

Petitioners,

v.

JAMES SOLER,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Based on a neighbor's fraudulent report that Respondent James Soler was an Arkansas fugitive living in San Diego under a false name, an Arkansas judge issued an Affidavit of Probable Cause. The governor of Arkansas then issued a requisition for extradition, the governor of California issued a warrant, and San Diego sheriff's deputies arrested Soler, as commanded.

The next morning, Soler informed Petitioner Ernesto Banuelos, a jail deputy, that he was not the fugitive. The next day, Soler appeared at a previously-scheduled hearing, and his counsel informed the court that Soler was claiming mistaken identity. Fingerprints were examined and re-examined, and Soler was released eight days after his arrest.

The questions presented are as follows.

1. When a prisoner is held under authority of a facially valid warrant, do individual jail staff members have a duty under the Fourteenth Amendment to investigate claims of mistaken identity (as the Ninth Circuit held below), or is procedural due process evaluated by analyzing the totality of process afforded to an arrestee (as this Court and other circuits have held)?

2. Is a circuit court decision sufficient to "clearly establish" a constitutional right for purposes of qualified immunity, or is something more—a robust cross-circuit consensus, or a decision by this Court—required to give fair notice to a reasonable officer?

PARTIES TO THE PROCEEDING

James Soler was the plaintiff in the district court and is the respondent here. The County of San Diego and Detective Ernesto Banuelos were defendants, and are now petitioners.

Soler also erroneously sued the County of San Diego as "San Diego County Sheriff's Department," and named additional defendants employed by the County of San Diego (Deputies Robert Germain, Ken Smith, Rick Turvey, Javier Medina, and Mark Milton). These claims have been resolved and are not at issue here.

Soler also named as defendants two deputies (Lisa Wilkins and Ray Hobbs) from the Arkansas Department of Corrections. Wilkins and Hobbs have indicated that they will be filing a separate Petition for Certiorari, on different grounds.

RELATED CASES

- *Soler v. County of San Diego, et al.,* No. 3:14-cv-2470, U.S. District Court for the Southern District of California. Judgment entered Aug. 11, 2017.
- *Soler v. County of San Diego, et al.*, No. 17-56270, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Feb. 26, 2019.
- *Soler v. County of San Diego, et al.*, No. 17-56270, U.S. Court of Appeals for the Ninth Circuit. Judgment entered June 4, 2019.

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PETITION FOR A WRIT OF CERTIORARI

The County of San Diego and Detective Ernesto Banuelos respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the United States District Court for the Southern District of California granting defendants' motion for summary judgment is reported at 274 F. Supp. 3d 1043, and is reproduced at App. 10-34.

The Ninth Circuit's memorandum opinion reversing the district court's decision is not officially reported. It is reproduced in the Appendix ("App.") at 1-9. The County of San Diego and Banuelos timely petitioned for rehearing and rehearing *en banc* on April 26, 2019. The Ninth Circuit's order of June 4, 2019 denying the County's petition is reproduced at App. 35-36.

STATEMENT OF JURISDICTION

Petitioners seek review of the decision of the United States Court of Appeals for the Ninth Circuit entered on February 26, 2019. The Ninth Circuit, on June 4, 2019, denied petitioners' timely petition for rehearing and rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Factual Background

In May 1985, Steven Lee Dishman escaped from an Arkansas prison, where he was serving a seven-year sentence for burglary.

Some 30 years later, San Diego County resident James De Wolfe Soler and his next-door neighbors were in a prolonged dispute over repayment of borrowed money. Soler's neighbors happened upon an online fugitive notice describing Dishman's appearance, and contacted the Arkansas Department of Corrections to report that Dishman was living next door to them in California under the name James De Wolfe Soler.

The report was not true. Soler and Dishman are not the same person.

Based on the report, however, the Director of the Arkansas Department of Corrections sought an extradition warrant. An Arkansas judge issued an Affidavit of Probable Cause. Governor Mike Beebe of Arkansas then issued a requisition for extradition to Governor Jerry Brown of California. Governor Brown then issued a Governor's Warrant of Rendition commanding:

> [I]t has been represented to me by the Governor of the State of Arkansas that Steven Lee Dishman aka James De Wolfe Soler stands convicted under the laws of that state . . . , thereafter escaped from custody, . . . and is now found to be in the State of California. . . . I, Edmund G. Brown Jr., Governor of California . . . command you to arrest and secure Steven Lee Dishman aka James DeWolfe Soler. . . .

Acting on the warrant, San Diego sheriff's deputies arrested Soler and brought him into custody the evening of January 13, 2014 (a Monday).

Soler claimed he was not Dishman, and the deputies discussed apparent discrepancies between Soler's features and their photo of Dishman (from 30 years earlier). The old photo appeared to show modest scarring near Dishman's forehead, and Dishman was listed as having blue eyes. Soler had brown eyes, and no

visible scars. Nonetheless, the deputies carried out the warrant, as they were required to do.[1]

The next morning (Tuesday), Soler again claimed mistaken identity, as arrestees so often do. Specifically, he told a jail staff member, Detective Ernesto Banuelos, that he was not Dishman. Soler claims that Banuelos refused to listen, and called him a "f****ing liar."

It is undisputed that the San Diego Sheriff's Department had an established protocol for "Possible Wrong Person on Warrant." It calls for officers to fill out a form, and to notify various officials. Soler contends that Banuelos waited too long to fill out the form, and claims that the form included inaccurate information.[2]

It is also undisputed that on Wednesday—within a day of claiming mistaken identity to Banuelos—Soler appeared in court for a hearing. A sheriff's deputy informed Soler's counsel that he was claiming mistaken identity, and his counsel informed the court. The Court set a further hearing for a week later to consider

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[1] When Dishman himself was eventually captured by Arkansas officials after 32 years as a fugitive, he bore little resemblance to his own photo from decades earlier. *See* AN ARKANSAS PRISON ESCAPEE IS CAPTURED AFTER 32 YEARS, N.Y. TIMES, June 26, 2017, available at www.nytimes.com/2017/06/26/us/Arkansas-prison-escapee-captured.html.

[2] Among other things, Soler contends that Banuelos incorrectly stated that he (Soler) has blue eyes. Soler does not dispute, however, that the state prosecutor's office required independent verification of prisoner mistaken identity claims in such situations.

Soler's mistaken identity claim, so fingerprint examinations could be completed.

The state prosecutor's policy required two fingerprint technicians to separately examine the prints of a person claiming mistaken identity. On Thursday, the state prosecutor's office requested a fingerprint comparison. The results came back that same day. Soler's prints did not match the Arkansas fugitive's prints.

The prints were then forwarded to another technician for re-examination. On Tuesday (following the Martin Luther King holiday weekend) the second technician verified that the prints did not match.

The County released Soler that same day.

B. Proceedings Below

Soler filed suit under 42 U.S.C. § 1983 in the U.S. District Court for the Southern District of California, alleging, *inter alia*, Fourteenth Amendment violations by Detective Banuelos, and municipal liability claims pursuant to *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978) against the County. Soler raised other claims and named other defendants, but those claims are not relevant here.

The district court granted summary judgment in favor of all defendants on all claims.

A Ninth Circuit panel reversed in part, in an unpublished memorandum opinion. It held that "detention based on mistaken identity violates due process

[under the Fourteenth Amendment] if the circumstances indicated to the defendants that further investigation was warranted," and that "once further investigation is warranted, the investigation should involve readily available and resource-efficient identity checks, such as a fingerprint comparison, to ensure that they are not detaining the wrong person." App. 5-6. Absent from the decision was any mention of *Baker v. McCollan*, 443 U.S. 137 (1979), which held that there is no constitutional duty to investigate claims of mistaken identity.

The County and Banuelos petitioned for rehearing. On June 4, 2019, the panel denied the petition for rehearing and the Ninth Circuit denied the petition for rehearing *en banc*. App. 35-36.

REASONS FOR GRANTING THE PETITION

In the nation's jails and prisons, claims of mistaken identity, just like other claims of innocence, are everyday events. Under this Court's decision in *Baker*, individual jail staff members have no constitutional duty to investigate such claims, nor to release arrestees whom they believe are innocent. Rather, procedural due process is a matter of shared institutional responsibility. The responsibility for ceasing a prosecution rests with the prosecutor, and the responsibility for adjudicating guilt rests with the jury.

If the Constitution imposed liability on individual jail staff for failure to investigate claims of mistaken

identity, as the Ninth Circuit held below, our jails and prisons would be forced to adopt an entirely new species of investigation procedures and hearings. As Judge Posner recognized when he rejected a duty to investigate—as other circuits have done too, in varying measures—this would render our nation's jails unmanageable.

Moreover, the denial of summary judgment by the Ninth Circuit below turns this Court's qualified immunity principles on their head. The Ninth Circuit did not simply fail in its obligation to identify clearly established precedent that would place an officer on notice that his conduct violated constitutional rights. Here, the Ninth Circuit disregarded authority by this Court and decisions by other circuits that would assure a reasonable officer that his actions *complied* with the Constitution.

This petition thus presents an ideal vehicle for addressing an open question—perhaps the key open question—in qualified immunity jurisprudence. Does the law of a single circuit court, standing alone, suffice to "clearly establish" constitutional principles? Or is something more required – a robust consensus of cross-circuit precedent, or a decision of this Court?

Certiorari is warranted to address these questions, and to correct the Ninth Circuit's errors below.

I. The Ninth Circuit's "Duty to Investigate" Is Inconsistent with this Court's Authority, and Conflicts with the Decisions of Four Other Circuits.

A. The Ninth Circuit's Decision Conflicts with this Court's Precedent.

The facts in this action are not materially distinguishable from *Baker*. Both cases involved an arrest pursuant to a facially-valid warrant. App. 12-13. Both warrants identified the prisoner as the person to be detained. App. 13. Both warrants were mistaken, and both prisoners were innocent. App. 15. Both prisoners claimed mistaken identity, but officers declined to release them (App. 14), leaving both prisoners in custody for roughly a week prior to release (App. 14-15). Both prisoners sued, alleging denial of procedural due process under the Fourteenth Amendment. App. 15.

In *Baker*, this Court held—with "relative ease"—that following an arrest pursuant to a valid warrant, jail officials have no constitutional obligation to independently investigate claims of innocence. Although an innocent arrestee may raise claims of false imprisonment or wrongful arrest under state tort law, they will not state a claim under the Constitution. *Baker*, 443 U.S. at 145-46. The Court explained:

> The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished without "due process of law." A reasonable division of functions between law enforcement officers, committing magistrates,

> and judicial officers—all of whom may be potential defendants in a § 1983 action—is entirely consistent with "due process of law." Given the requirement that an arrest be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence. . . .

Id. at 145-46.

Here, the Ninth Circuit did not follow *Baker*. Its decision did not cite or analyze *Baker* at all. Instead, it relied on a purported constitutional duty that is inconsistent with *Baker*—an individualized duty to reasonably investigate claims of mistaken identity.

Whereas *Baker* recognized that Fourteenth Amendment protections to arrestees claiming mistaken identity are best achieved through sound processes—in which checks and balances will guard against both erroneous detention and erroneous release—the Ninth Circuit below held that each individual officer has a duty of reasonable investigation, regardless of whether there is a facially valid warrant*, and regardless of whether the overall process produced the correct result.*

Specifically, the Ninth Circuit held that even if a detention is predicated on a valid arrest warrant, officers are obligated to investigate claims of mistaken identity any time "the circumstances indicate[] to the defendants that further investigation was warranted." App. 5, citing *Rivera v. Cnty. of Los Angeles*, 745 F.3d

384, 389-90 (9th Cir. 2014); *see also Garcia v. Cnty. of Riverside*, 817 F.3d 635, 641 (9th Cir. 2016). In so holding, this Court disregarded the key teaching of *Baker*—that officers have no obligation to second-guess judicial adjudications of probable cause. *Baker*, 443 U.S. at 146.

Indeed, the Ninth Circuit's holding below—that officers must exercise due diligence in investigating claims of mistaken identity—is precisely the position that the Supreme Court reversed. *Id.* at 146 (reversing Fifth Circuit's decision, which held that officers have "a duty to exercise due diligence in making sure that the person arrested and detained is actually the person sought under the warrant. . . .").

The Ninth Circuit adopted a legal principle that stands in direct conflict with this Court's precedent, and this alone warrants certiorari.

B. There Is A Recognized Circuit Split Over *Baker*, And The Ninth Circuit Stands Alone In Imposing An Unqualified Duty to Reasonably Investigate.

The Ninth Circuit's "duty to investigate" stands in conflict with at least four other circuits. Even among those circuits, the interpretations of *Baker* vary considerably, as several courts have expressly acknowledged.[3]

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[3] *See Diaz v. Bullock*, 268 F. Supp. 3d 640, 654 (D.N.J. 2017) ("[T]he threshold question facing the Court is whether Plaintiff has established that his constitutional right or rights were

The Seventh Circuit interprets *Baker* as a categorical bar to claims of failure to investigate. *See Tibbs v. Chicago*, 469 F.3d 661, 665 (7th Cir. 2006) ("Where a person is lawfully arrested pursuant to a valid warrant, police officers and jailers have no constitutional duty to investigate whether the arrestee is actually the person named in the warrant."); *Hudson v. Salier*, 676 F. App'x 587, 588 (7th Cir. 2017) (Easterbrook, J.) (probable cause for arrest negates any requirement to investigate claims of mistaken identity).

Indeed, in *Hernandez v. Sheahan*, 455 F.3d 772 (7th Cir. 2006) the court upheld a sheriff's department policy of ignoring all claims of mistaken identity, even though the policy led to the plaintiff's 15-day wrongful detention. Such a policy, the court held, is "entirely lawful" in all but the most extreme circumstances—where "the custodian knows that the judge refuses to make an independent decision or there is doubt about which person the judge ordered held." *Id.* at 776-77. A more relaxed rule, the court held, would undermine enforcement of the criminal laws:

> The rule that Hernandez wants the Sheriff to follow, under which every deputy must be open to persuasion for as long as a person is

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violated when the Officer Defendants failed to investigate and confirm that Plaintiff was not the right person. The short answer is that, at best, it is not clear."). *See also Toribio v. Spece*, 558 F. App'x 227, 230 (3d Cir. 2014) ("The existence and scope of an officer's duty to seek the release of a suspect after lawful arrest is unsettled. . . ."); *Helm v. Palo*, 2015 WL 437661, at *7 (E.D. Pa. Feb. 3, 2015) (same, and "[o]ther Courts of Appeal disagree on the scope of this duty as well.").

> in custody, would create a substantial possibility that by presenting his contention over and over even a guilty suspect would eventually find a deputy who did not understand the weight of the evidence and let him go. That would frustrate the public interest in carrying out the criminal law.

Id. at 777.

The First Circuit, in *Brady v. Dill*, 187 F.3d 104 (1st Cir. 1999), similarly holds that a due process claim could proceed only in the most egregious of circumstances. The court correctly noted that an officer will rarely come to "know" that a detainee is innocent, and will instead ordinarily have, at most, subjective suspicion or belief in the detainee's innocence. *Id*. at 112. Acting on such subjective suspicions would disturb the balance of responsibilities between the various players in the criminal justice system:

> When [a detainee] asserts that he is a victim of mistaken identities, he in effect is pressing a claim of innocence in fact—a claim not analytically distinct from any other factual defense (say, an alibi defense or a defense premised on a lack of specific intent) tendered by a person whom the police arrest in pursuance of a warrant issued by a judge or magistrate. Regardless of the merits of the defense, our legal system simply does not rely on police officers to determine its bona fides, even though they may have information bearing on that ultimate question and even though they

> may harbor strong and informed opinions one way or the other.

Id. at 112.

Instead, after an arrest pursuant to a valid warrant, it is the responsibility of the prosecutor to determine whether to proceed. If he or she chooses to do so, the final determination of guilt or innocence rests with the judge or jury. It is not "for the police to take matters into their own hands." *Id. See also Thompson v. Olson*, 798 F.2d 552 (1st Cir. 1986) ("once the arrest has been properly effected, it is the magistrate and not the policeman who should decide whether probable cause has dissipated to such an extent following arrest that the suspect should be released").[4]

The Ninth Circuit stands in clear conflict. While the First Circuit and Seventh Circuit allow due process claims of mistaken identity only in the most egregious of circumstances, the Ninth Circuit imposes a duty to investigate any time "the circumstances indicate . . . that further investigation was warranted." App. 5.

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[4] The concurring opinion in *Brady* offered yet another formulation—that there is a constitutional duty to release an arrestee only when the custodians know "to a certainty" that he is not the right person. It further states: "I would instruct the fact-finder that the operative constitutional principle is the following: An affirmative duty to release arises only if an arresting or custodial officer ascertains beyond a reasonable doubt that the suspicion (probable cause) which forms the basis for the privilege of arrest is unfounded." *Brady v. Dill*, 187 F.3d 104, 124 (1st Cir. 1999) (Pollak, D.J., concurring).

The Fifth Circuit and Sixth Circuit leave the door open to due process claims broader than the First and Seventh Circuits, but still require a heightened showing of culpability. The Fifth Circuit does not specify the culpability standard, but does hold that negligence does not suffice. *See Sanchez v. Swyden*, 139 F.3d 464, 469 (5th Cir. 1998) (the fact that officials possessed exculpatory evidence did not result in a constitutional violation, because plaintiff did not demonstrate that the "failure to act on the exculpatory information went beyond mere negligence."); *Soto v. Ortiz*, 526 F. App'x 370, 375 (5th Cir. 2013) (same).

The Sixth Circuit, too, has held that failure to investigate a claim of mistaken identity can support a due process claim only if the officer acts with "something akin to deliberate indifference." *Seales v. City of Detroit*, 724 F. App'x 356, 362 (6th Cir. 2018).

The Ninth Circuit did not require any heightened showing of culpability. Indeed, its decision did not address the requisite level of culpability at all. Rather, it imposed an unqualified duty of reasonable investigation, in conflict with both *Baker* and the law of at least four circuits.

C. An Individualized Duty to Investigate Is Unnecessary, and Would Impose Heavy Burdens on Resource-Strained Jails.

Our constitutional system affords robust procedural protections to arrestees. They are entitled to representation, to prompt hearings, and to speedy trials.

Imposition of an individualized duty of jail staff members to investigate claims of innocence would be both unnecessary and unwise.

Existing procedural protections are sufficient to afford arrestees hearings into any claims of mistaken identity. Where the evidence supports it, existing procedures are sufficient to secure release. Indeed, that is exactly what happened here. Soler appeared before a court less than 48 hours after his arrest. His counsel informed the court that Soler claimed mistaken identity, and verification procedures promptly followed. The County then released Soler within days. *See* App. 27 ("Further investigation into Plaintiff's identity was warranted in this case, and that is precisely what occurred.").

As courts have recognized, imposing a duty to investigate on individual officers is unnecessary, and would impose heavy burdens on our nation's jails. *See Atkins v. City of Chicago*, 631 F.3d 823, 828 (7th Cir. 2011) (Posner, J.) (if there were "a continuing constitutional duty, even when there are constitutionally adequate formal administrative remedies against unjustified imprisonment, to conduct an exhaustive investigation of a prisoner's claim of misidentification, [p]risons would be unmanageable.").

So too would a duty to investigate impose unwarranted burdens on the courts. *See Safar v. Tingle*, 859 F.3d 241, 247 (4th Cir. 2017) ("[I]f every failure of a police officer to act in some unspecified way on the basis of new information gave rise to liability, we would

invite a legion of cases urging us to second-guess an officer's decision about whether to second-guess a magistrate's finding of probable cause.").

II. The Ninth Circuit Did Not Adhere to this Court's Qualified Immunity Principles.

A. The Ninth Circuit Ignored *Baker*, and this Court Should Exercise its Supervisory Powers.

In the last five years alone, this Court has reversed the Ninth Circuit's denials of qualified immunity on four occasions. Each time, this Court admonished the circuit courts to deny qualified immunity only where the constitutional principles are "beyond debate." *See City of Escondido, Calif. v. Emmons*, 139 S. Ct. 500, 503 (2019); *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018); *White v. Pauly*, 137 S. Ct. 548, 551 (2017); *City & Cnty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015). *Cf. Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.").[5]

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[5] At least one Ninth Circuit panel has taken note. "[W]e acknowledge the Supreme Court's recent frustration with failure to heed its holdings. . . . We hear the Supreme Court loud and clear. Before a court can impose liability . . . we must identify precedent . . . that put [the officer] on clear notice that [his actions] in these particular circumstances would [violate the Constitution]." *S.B v. Cnty. of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017). Still, even in cases that turn on the level of specificity required, Ninth Circuit judges continue to seek ways around this

This case, however, shows that the Ninth Circuit continues to resist the doctrine of qualified immunity. In finding that the purported right at issue in this case was "clearly established," the court did not cite any decision of this Court. Nor did it find that a "robust consensus of authority" established a constitutional right. *See Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (absent a controlling decision of this Court or a "robust consensus of cases of persuasive authority," law was not "clearly established"). This default alone warrants reversal.

Worse still, however, the decision below ignored both controlling and persuasive authority that would assure a reasonable deputy that he was in compliance with the Constitution. Specifically, this Court's *Baker* decision teaches that there is no individualized duty to investigate claims of mistaken identity.

Moreover, several other published circuit court decisions reiterate the holding of *Baker*. As noted above, the Seventh Circuit and First Circuit hold there is no duty to investigate, and two other circuits (the Fifth and Sixth) find that an officer violates the Constitution only if he acts with a heightened level of culpability.

But the Ninth Circuit did not adhere to *Baker*. Nor did it find that *Baker* was distinguishable. Instead, it

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Court's unambiguous precedent. *See*, *e.g.*, *West v. City of Caldwell*, 931 F.3d 978, 985 (9th Cir. 2019) (2-1) (noting that dissent relied on generic principles, even though "the Supreme Court has warned us time and time again that we may not define clearly established law at a high level of generality.").

ignored *Baker* entirely. Likewise, it did not cite to any robust cross-circuit consensus, nor did it confront the run of circuit decisions that counsel *against* any duty to investigate. Rather, the Ninth Circuit ignored both controlling precedent and contrary circuit court decisions, and held that the officers' actions violate clearly established law.

It should go without saying that constitutional rights are not "clearly established" *beyond debate* when published authority—including binding precedent of this Court, and persuasive authority from other circuits—are to the contrary. The Ninth Circuit's decision is clearly erroneous, and certiorari is warranted for this reason alone.

B. This Petition Presents an Ideal Vehicle For Addressing A Fundamental Question: Whether a Circuit Court Decision Is Sufficient To "Clearly Establish" Law.

This Court's qualified immunity cases have not definitively answered a fundamental question—*which* courts are able to "clearly establish" constitutional rights? Can a circuit court decision "clearly establish" a constitutional right, or is a decision of this Court required? Assuming that a circuit court decision can ever suffice, can a right be clearly established in one circuit when other circuits disagree (such that rights under the U.S. Constitution are "clearly established" in some circuits, but not in others)?

In recent years, this Court has repeatedly noted these questions, but has not provided a definitive answer. *See Sheehan*, 135 S. Ct. 1776 ("[e]ven if a controlling circuit precedent could constitute clearly established federal law. . . ."); *Carroll v. Carman*, 574 U.S. 348 (2014) (same); *Reichle v. Howards*, 566 U.S. 658, 665 (2012) ("[a]ssuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law. . . ."); *Taylor*, 135 S. Ct. at 2045 ("[a]ssuming for the sake of argument that a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals. . . .").

Lower courts have reached inconsistent decisions as to which decisions can "clearly establish" the law, and have asked for this Court's guidance.[6]

Indeed, the circuits have even disagreed about the significance of circuit splits (like the split at issue here), even though this Court has spoken to the issue.[7] Specifically, some circuits, consistent with this Court's guidance, hold that a circuit split is fatal to the "clearly established" prong. *See*, *e.g.*, *Mocek v. Albuquerque*, 813

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[6] *See*, *e.g.*, *Hobson v. Wilson*, 737 F.2d 1, 25-26 (D.C. Cir. 1984) ("It is not clear how a court should determine well-established rights: should our reference point be the opinions of the Supreme Court, the Courts of Appeals, District Courts, the state courts, or all of the foregoing?").

[7] *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1868 (2017) ("[T]he fact that the courts are divided . . . demonstrates that the law on the point is not well established."); *Wilson v. Layne*, 526 U.S. 603, 618 (1999) (it would be unfair to subject officers to damages liability when even "judges . . . disagree"); *Reichle*, 566 U.S. at 669-70 (same).

F.3d 912, 929 n.9 (10th Cir. 2015) ("A circuit split will not satisfy the clearly established prong of qualified immunity."); *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) ("Where no controlling authority specifically prohibits a defendant's conduct, and when the federal circuit courts are split on the issue, the law cannot be said to be clearly established").

Other circuits, including the Ninth Circuit, have reached precisely the opposite conclusion. *See Morgan v. Morgensen*, 465 F.3d 1041, 1046 n.2 (9th Cir. 2006) ("The fact that there was a potential circuit split on this issue does not preclude our holding that the law was clearly established. . . ."); *Hall v. Zenk*, 692 F.3d 793, 799 (7th Cir. 2012) ("[A] split is not dispositive of the question."); *Williams v. Bitner*, 455 F.3d 186, 193 n.8 (3d Cir. 2006) ("Even if our sister circuits had in fact split on the issue, we would not necessarily be prevented from finding that the right was clearly established."). District courts, too, have persisted in disregarding circuit conflicts. *Allen v. Cnty. of Lake*, 2017 WL 363209, *9 (N.D. Cal. Jan. 25, 2017) (circuit split "does not preclude our holding that the law was clearly established"; "[I]f the right is clearly established by Ninth Circuit case law, the inquiry is settled."); *Manzo v. Cnty. of Riverside*, 2017 WL 10544292, *7 (N.D. Cal. Oct. 19, 2017) (same).

A chorus of legal scholars has likewise noted the ambiguity as to which courts can find clearly established law, and has called for clarity. Although scholarly views differ on how the question should ultimately

be answered, all agree on the importance of resolving the question.[8]

After years of percolating in the courts and exhaustive debate by legal scholars, the issue is ripe for this Court's determination. *See* KAREN M. BLUM, QUALIFIED IMMUNITY: TIME TO CHANGE THE MESSAGE, 93 Notre Dame L. Rev. 1887, 1935 (2018) ("[T]he proliferation of lower court case law with many different emphases and some highly questionable decisions suggests that the time may be nigh for the Supreme Court to take an opportunity to clarify the doctrine. . . . The

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[8] *See* TYLER FLINN, QUALIFIED IMMUNITY FORMALISM: "CLEARLY ESTABLISHED LAW," 119 Colum. L. Rev. 445, 450-454 (March 2019) ("[P]recedent provides little practical guidance to lower courts on how to define clearly established law. . . . The biggest commonality among the circuit court definitions of clearly established law may be irregularity in the approach to the question."); ERIC A. POSNER & ADRIAN VERMEULE, THE VOTES OF OTHER JUDGES, 105 Geo. L.J. 159, 161 (2016) ("[I]f some appellate courts say that a certain rule counts as 'clearly established law,' and some say that it doesn't, doesn't that mean it doesn't?"); WAYNE A. LOGAN, CONSTITUTIONAL CACOPHONY: FEDERAL CIRCUIT SPLITS AND THE FOURTH AMENDMENT, 65 Vand. L. Rev. 1137, 1177-79 (2012) (arguing that circuit court disuniformity can result in "underenforcement of an ostensibly national right"); ERWIN CHEMERINSKY & KAREN M. BLUM, FOURTH AMENDMENT STOPS, ARRESTS AND SEARCHES IN THE CONTEXT OF QUALIFIED IMMUNITY, 25 Touro L. Rev. 781, 787-88 (2009) (noting that "the Supreme Court has been very inconsistent, and certainly the lower courts are very inconsistent" with respect to the analysis of whether a right was clearly established); THE SUPREME COURT 2008 TERM: LEADING CASES, 123 Harv. L. Rev. 272 (2009) ("[T]he state of the doctrine with respect to the second stage of the qualified immunity inquiry remains fundamentally unclear.").

academy has done its job, and it is now the Court's turn.").

Here, the Ninth Circuit purported to rely on its own prior case-law, while ignoring both controlling authority (*Baker*) and conflicting cases from other circuits. This case thus presents an ideal opportunity to address the questions that were left unresolved in prior cases, and to provide the lower courts guidance as to what qualifies as "clearly established" law.

CONCLUSION

The Ninth Circuit decision conflicts with this Court's holdings, and conflicts with the decisions of at least four other Circuits. So too does the decision present an opportunity to address a fundamental issue of qualified immunity that has long been unresolved. *Certiorari* should be granted.

Respectfully submitted,

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