No. 19-289

In The
Supreme Court of the United States

COUNTY OF SAN DIEGO and
ERNESTO BANUELOS,

Petitioners,

v.

JAMES SOLER,

Respondent.

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

RESPONDENT JAMES SOLER'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The First, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits hold a person may allege a constitutional violation if s/he complained to a jailer about being wrongly detained on a warrant and the jailer was aware of facts corroborating the complaint but failed to reasonably investigate. No circuit holds to the contrary. San Diego Sheriff's Department (SDSD) Policy Q.80 goes further than the case law described, requiring a jailer to investigate any complaint of mistaken identity – corroborated or not – and to release the person "immediately" if the investigation substantiates the complaint.

The first question presented is whether SDSD Deputy Ernesto Banuelos may be held liable under 42 U.S.C. §1983 for James Soler's wrongful detention because Banuelos: (1) was ordered to do a "wrong person on warrant" investigation under his Department's policy; (2) recognized there was strong evidence that Soler was not the person wanted (*e.g.*, mismatching scars and eye color); (3) did not have a fingerprint comparison done, as required by his Department's policy; (4) kept Soler in custody and lied to his superiors by telling them he had confirmed identity by matching fingerprints, scars, and mug-shots; and (5) two weeks later filed a false police report, and doctored records, to cover up his wrongdoing?

2. The second question presented is whether the Court should grant review to hold that, for qualified

QUESTIONS PRESENTED – Continued

immunity purposes, a circuit's binding case law cannot clearly establish a constitutional principle applicable to officers working in that circuit unless there is "a robust consensus of cross-circuit precedent," even though: (1) that issue was not raised or ruled on below; (2) SDSD Deputy Banuelos, and anyone similarly situated, cannot benefit from an opinion on that issue; and (3) the regime Petitioners advocate would encourage officers to violate binding circuit precedent, leading to suppression of evidence in criminal cases?

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INTRODUCTION

James Soler was arrested on a warrant intended for another man, and he complained about that when he was booked into jail. That triggered San Diego Sheriff's Department (SDSD) Policy Q.80, which requires an investigation of *any* such complaint, and if the complaint is substantiated the detainee must be released "immediately." SDSD Deputy Ernesto Banuelos was ordered to do the Q.80 investigation and he noticed strong evidence that Soler was not the wanted man (*e.g.*, mismatching scars and eye color). He did not, however, have a fingerprint comparison done, as required by SDSD policy. Worse, Banuelos lied to his superiors, claiming he had confirmed identity by matching Soler's fingerprints, scars, and mug-shot with those of the wanted man. As a result, Soler spent nine days in solitary confinement. Six days after Soler was released, Banuelos doctored official records to cover up his wrongdoing.

The Ninth Circuit held that Soler could proceed with a wrongful detention claim under 42 U.S.C. §1983, concluding Banuelos "should have investigated further" because Soler's protests were corroborated by "significant differences between Soler's and [the wanted man's] physical appearances." *Soler v. County of San Diego*, 762 Fed. App'x 383, 386 (9th Cir. 2019). The petition for a writ of certiorari reads as if that holding was based on a new rule. In fact, the panel relied on a principle first announced in *Cannon v. Macon County*, 1 F.3d 1558, 1563 (11th Cir. 1993), which was adopted by the Ninth Circuit in *Lee v. City*

of Los Angeles, 250 F.3d 668, 683-84 (9th Cir. 2001), and has been applied in several published cases. Accordingly, no reasonable officer in Banuelos's shoes could doubt his constitutional duty to reasonably investigate Soler's corroborated complaint of mistaken identity.

Petitioners nonetheless claim this Court should grant review because the relevant Ninth Circuit case law conflicts with *Baker v. McCollan*, 443 U.S. 137 (1979), and cases from four other circuits. In fact, all six circuits that have addressed the constitutional claim involved here have applied *Baker* and held that (1) there is no duty to investigate uncorroborated claims of mistaken identity but (2) there is a duty to reasonably investigate if an officer knows of "significant differences" between the physical appearance of the detainee and the wanted person. *See*, *e.g.*, *Rivera v. County of Los Angeles*, 745 F.3d 384, 392 (9th Cir. 2014) ("[u]nsupported claims of mistaken identity, by themselves, do not trigger a duty to investigate"). Also wrong is Petitioners' claim that some circuits require a "heightened showing of culpability" for such claims, but the Ninth Circuit does not. The Ninth Circuit requires a showing that the officer acted "recklessly and with deliberate indifference," *Lee*, 250 F.3d at 684, which is consistent with every circuit that has addressed the issue.

Petitioners also claim that the Court should eschew the broad national consensus reflected in case law and instead assess Soler's wrongful detention claim by using the procedural due process balancing test in *Matthews v. Eldrige*, 424 U.S. 319 (1976). The

thrust of Petitioners' claim is that if the Court applies the *Matthews* balancing test it will conclude the procedures the SDSD uses to deal with mistaken identity complaints are adequate in light of the liberty interests at stake. That claim was not raised or ruled on below. Furthermore, it is far off-mark because Soler's wrongful detention claim is not directed at the SDSD's procedures for dealing with mistaken identity complaints, it is directed at Banuelos's conduct. And that conduct involved Banuelos violating SDSD procedures and lying to his superiors. Had Banuelos instead followed the SDSD's procedures, Soler would have been released within hours, not nine days.

In their second question presented, Petitioners ask the Court to grant review and hold that in the qualified immunity context, clearly established principles of constitutional law may not be based on case law from a single circuit, even if an officer-defendant works in that circuit. Instead, Petitioners say, the Court should hold that clearly established law must be based on "a robust consensus of cross-circuit precedent, or a decision of this Court." Pet. at 7. The upshot would be that officers working in a circuit could ignore that circuit court's binding authority unless several other circuit courts issued consistent opinions. Review on this question should be denied for several reasons. First, the issue was not raised or ruled on below. Second, this case is not an appropriate vehicle for addressing Petitioners' single-circuit claim because Ninth Circuit authority related to investigating mistaken identity claims is consistent with "a robust consensus

of cross-circuit precedent." Third, Banuelos's intentional, reprehensible conduct violates clearly established law everywhere, thus he, and those similarly situated, cannot benefit from an opinion on this issue. Finally, the regime Petitioners advocate would encourage officers to violate binding circuit precedent, leading to suppression of evidence in criminal cases.

OPINIONS BELOW

Soler v. County of San Diego, 274 F. Supp. 3d 1043 (S.D. Cal. 2017), and *Soler v. County of San Diego*, 762 Fed. App'x 383 (9th Cir. 2019).

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT

I. Factual Background

The petition focuses on Soler's wrongful detention claim against Deputy Banuelos, thus Banuelos's conduct gets most of the attention below. Soler also summarizes related events, for context and to demonstrate

that the duty to investigate recognized by the Ninth Circuit is not onerous.[1]

A. Pre-Arrest Events

Soler is fifty-five years old, law-abiding, and a longtime business owner in the San Diego area. Since 2001, he, his wife, and their daughter have lived in the same home.

In 2011, Jose and Connie Lara moved in next door, and soon began harassing the Solers. That culminated in Connie Lara telephoning the Arkansas Department of Correction (ADC) at midnight on August 7, 2013, and claiming Soler is Steven Dishman, who the ADC's website listed as having escaped from an Arkansas prison in 1985. Lt. Smart at the ADC immediately called the SDSD and spoke with Deputy Knowles, who said he "could not verify" that Soler is Dishman. *See* Opp. MSJ at 3-4.

Later that morning, without any investigation, ADC employees Lisa Wilkins and Ray Hobbs began the process of causing Soler's arrest in California and extradition to Arkansas. That led to a warrant being issued for "Steven Lee Dishman aka James De Wolfe Soler." *Id.* at 5-8.

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[1] Record cites are to Soler's opposition to Banuelos's motion for summary judgment (Opp. MSJ). *See* S.D. Cal. Case No. 3:14-cv-2470 (Docket #147). Because the case was decided in the district court on that motion, the facts are set out in the light most favorable to Soler, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), though the facts are almost entirely undisputed.

B. Soler's Arrest

On January 13, 2014, SDSD Deputy Germain went to arrest Soler at his home. Within minutes, Germain was convinced Soler was not the man wanted on the warrant because he noticed Soler doesn't have the same scars as the wanted man. Germain was also receptive when Soler said the Laras were likely behind the warrant, because Germain knew the Laras had made false claims about the Solers to the SDSD. Soler agreed to go to a Sheriff's sub-station a few miles away so Germain could clear up the matter with a fingerprint comparison. *See* Opp. MSJ at 13-16.

At the sub-station, Germain couldn't compare fingerprints because officials in Arkansas had not loaded Dishman's prints into the national prints database. Nonetheless, Germain and several other deputies compared Soler's physical characteristics with those of the man wanted on the warrant and were convinced Soler is not that man.[2] Germain telephoned Wilkins at the ADC and said he was going to release Soler. Wilkins pleaded with Germain to hold Soler, but Germain responded that he could only do that if Wilkins emailed him fingerprints for Dishman, so he could have those compared to Soler. Wilkins told Germain she did not want to drive to her office to get Dishman's fingerprints

[2] Petitioners state that at the sub-station "the deputies discussed apparent discrepancies between Soler's features and their photo of Dishman (from 30 years earlier)," and imply the deputies couldn't tell much from the photo. Pet. at 3, 4 n.1. Deputies didn't rely on a photo, they relied on written materials that listed Dishman's physical characteristics. *See* Opp. MSJ at 17.

and she convinced Germain to hold Soler overnight, promising she would send him Dishman's fingerprints early the next morning. *See id.* at 16-18.

Germain then took Soler to be booked into the San Diego jail, but Germain didn't tell anyone there about the identity issue. More troubling, when Germain received Dishman's fingerprints and other identifying documents from Wilkins at 6:00 the next morning, he did nothing. When asked about that during his deposition, Germain said, "I had done [my] part." Opp. MSJ at 19, 27-28. Though there was undisputed testimony that was bad police work, the district court granted Germain summary judgment and the Ninth Circuit affirmed. *See id.* at 28. However, the Ninth Circuit reversed the grant of summary judgment to SDSD Deputy Banuelos. His conduct is discussed next.

C. Events At Jail – Deputy Banuelos

At the jail, Soler told a processing officer that he is not the man wanted in Arkansas. That triggered SDSD Policy Q.80, which states that "any time" an inmate claims s/he is not the person wanted on a warrant the official to whom the claim is made must start a Q.80 form and notify his/her superiors. A "Jail Investigator . . . [is then] responsible for" investigating the matter and "document[ing] . . . findings," and "[i]f the inmate is determined to be the wrong person, the Watch Commander . . . will ensure" s/he is released "immediately." Opp. MSJ at 19-20.

At 4:46 a.m. on January 14, 2014, Deputy Banuelos's boss ordered him to do the Q.80 investigation. Soler told Banuelos he is not Dishman and asked Banuelos to check with (1) his California neighbors from the mid-1980s, who are SDSD deputies, and (2) two of his friends who are federal law enforcement agents. Banuelos responded by calling Soler "a f***ing liar" and demanded, unsuccessfully, that Soler admit he is Dishman. *Id.* at 20-21. Banuelos's deposition testimony and documentary evidence reveal many other disturbing things.

In his deposition, Banuelos acknowledged that during his "investigation" he looked at identifying documents for Dishman and recognized that Dishman's identifying characteristics don't match Soler. Most glaringly, he noticed that Soler doesn't have the scars indicated for Dishman, and Soler has brown eyes, whereas Dishman's are blue. *See id.* at 21-22. Despite this, Banuelos didn't have a fingerprint comparison done, even though: (1) it is SDSD policy to do that; (2) there is an established procedure for the SDSD's Records Division to do that; and (3) it takes no more than a few hours. *See id.* Banuelos then lied to his superiors, causing them to believe he reasonably confirmed the right person was in custody.

Most troubling, Banuelos lied on the Q.80 form. That form has a pre-printed section titled "Disposition," below which the first printed option is, "Prints Match With Person on Warrant," followed by a line where the investigating deputy can hand-write whether the prints matched. There, Banuelos wrote,

"Confirmed by Omie Futch AK. Class Fugitive Unit." Opp. MSJ at 22. During her deposition, Futch said she did not, and could not, confirm a prints match, and she never spoke with anyone at the SDSD. *See id.* Furthermore, during his deposition Banuelos admitted that Futch didn't tell him that Soler's and Dishman's prints matched. Banuelos offered no explanation for his false entry, and when asked if he told anyone that Soler's and Dishman's prints matched he said, "I believe I think I told – I don't recall honestly." *Id.* at 23.

Banuelos's equivocation supports the inference that he didn't just falsify the Q.80 form, he also made false claims to his superiors on January 14. An entry in the jail's database confirms that, indicating that Banuelos told his superiors that he "confirmed that Soler was positively identified by a mug shot and documented scars from Arkansas." *Id.* But, as Banuelos acknowledged during his deposition, he had noticed that the scars and eye colors *did not match*.

Another document, called a "Warrant Face Sheet," reveals more disturbing facts. In printer-type, that form lists Soler's identifying information consistent with his SDSD booking records. In the box for eye color, "Bro" is written in printer-type, but someone later hand-wrote "/BLU" (*i.e.*, Dishman's eye color) next to that. That is, the Warrant Face Sheet was evidently doctored – though poorly – to indicate that Soler has the same eye color as Dishman. *See* Opp. MSJ at 23-24. When asked about this during his deposition, Banuelos said he had never seen the form, or even that sort of form, and that the "/BLU" handwriting was not

his. After reviewing his deposition transcript for accuracy a month later, Banuelos changed his answer (in writing) and admitted the "/BLU" handwriting is his, though he didn't explain his false deposition testimony or the circumstances surrounding his changing the Warrant Face Sheet. *See id.* Those are questions Soler's counsel would have asked had Banuelos answered truthfully during the deposition, particularly because Banuelos should not have had access to the Warrant Face Sheet. That indicates Banuelos improperly got a hold of the Warrant Face Sheet after Soler was released and added the "/BLU" handwriting in a clumsy cover-up effort.

Banuelos's related report also raises questions about his conduct and credibility. To begin with, he wrote it thirteen days after his "investigation," six days after Soler was released. During his deposition, Banuelos claimed the delay was because he was busy. *See* Opp. MSJ at 24. A jury could easily conclude the report was a belated effort by Banuelos to cover-up his misconduct. Several things Banuelos wrote in his report support that conclusion.

First, the report says nothing about the fact that during his "investigation" Banuelos noticed Soler doesn't have the same eye color or scars as the wanted man. *See id.* at 25. When Banuelos wrote the report, he knew Soler had been released, and is not Dishman, and he should have recorded in his report the things that indicted Soler is not Dishman. Indeed, he should have noted those facts in a contemporaneous report.

Second, in a repeat of the Warrant Face Sheet situation, the first page of Banuelos's report mostly lists Soler's identifying information correctly, consistent with SDSD booking records, but the report falsely claims Soler has blue eyes (*i.e.*, Dishman's eye color). When he wrote the report, Banuelos knew Soler's eyes are brown – indeed, he recognized the eye-color discrepancy during his January 14 "investigation." When asked about this during his deposition, Banuelos said, "I don't know, I could have pressed B." Opp. MSJ at 25.

Third, Banuelso's report claims that Futch at the ADC told him that "Soler was the right person on the warrant," a claim Banuelos reiterated during his deposition testimony. *Id.* at 26. As discussed above, Futch said no such thing.

Fourth, Banuelos's report claims he recommended Soler have an identity hearing in court, but there is no record of him making that recommendation. *See id.* at 27. Indeed, the documentary evidence shows Banuelos told his superiors that he had confirmed identity through fingerprints, scars, mugshots, and a call to the ADC. Thus, it is surprising that in granting summary judgment the district court relied on Banuelos's report to assert that Banuelos "determined that further investigation was warranted into Plaintiff's claim of mistaken identity, and recommended that an identity hearing be scheduled." *Soler*, 274 F. Supp. 3d at 1054. That finding is directly contrary to the evidence – it surely is not consistent with construing the evidence in the light most favorable to Soler. That will be discussed further below.

There are several other aspects of Banuelos's report that are suspicious, but there is limited utility in cataloguing all that here. Considering these circumstances, it is astonishing that Petitioners tell this Court that Banuelos's only role in the case was filling out a form indicating that Soler had claimed mistaken identity, and that Soler's only complaint is that Banuelos "waited too long to fill out the form, and . . . the form included inaccurate information." Pet. at 4. This gross mis-characterization of the facts alone warrants denying the petition. *See* S. Ct. R. 14.4.

D. Post-Banuelos Events

Although the following events didn't involve Banuelos, they provide further context and refute Petitioners' characterization of a January 15, 2014 San Diego Superior Court hearing, which occurred more than twenty-four hours after Banuelos sabotaged the Q.80 investigation.

Before the January 15 hearing, Soler told San Diego County public defender Salvatore Tarantino that he is not Dishman and that his neighbors were likely behind his false arrest. Tarantino cut Soler off and moments later told the court that "Dishman" was not contesting identity and Arkansas officials could come get him. The court began to order Soler extradited, at which point SDSD Detective Smith told Tarantino that a fingerprint comparison needed to be done. *See* Opp. MSJ at 32-33. Tarantino then interrupted the court as it was ordering Soler extradited and said:

> I just spoke to Officer Ken Smith, who is involved in the extradition. I was under the impression that the prints of Mr. Dishman and the person who is claimed to be the fugitive are one and the same. Mr. Dishman [sic] informs me – he says that's not him. . . . Can we stay this hearing today for one week?

Id. at 34. The court responded, "Mr. Tarantino, your sense is that the Sheriff's Department is going to get this print examination done. I see [Smith] from the Department in the back of the courtroom nodding . . . . his head. . . . I will just continue this in its present status for a week." *Id.*

After the hearing, Tarantino and Smith walked out of the courtroom and began talking. Soler's wife approached and asked if she should hire an attorney. Smith responded that she shouldn't waste her money because he did not believe Soler was the wanted man, and that the matter would be cleared up quickly – he told Soler's wife to wait by her phone. *See* Opp. MSJ at 36-37.

The next day, Smith learned that a technician in the San Diego District Attorney's Office had done a comparison of Dishman's and Soler's fingerprints, and concluded the prints didn't match. Smith did not, however, order Soler's release, nor did he take any other action. *See id.* at 37-38.

On January 21, 2014, a second print comparison was done by a technician in the DA's Office, and a prosecutor was informed of the negative result. The

prosecutor also quickly recognized "that the name, DOB, SSN and eye color [for the two men] did not match." *Id.* at 38. The prosecutor contacted Detective Smith about the mismatch, and Smith called the jail and ordered Soler's release, though that didn't occur until 10:00 p.m. Notably, Smith didn't need the prosecutor's approval to order Soler's release, nor did he go to court to get permission to do so.[3] *See id.* at 9-10.

II. District Court And Ninth Circuit Opinions

Soler sued six SDSD deputies, and the Ninth Circuit affirmed summary judgment for five. The only claim at issue is Soler's wrongful detention claim against Deputy Banuelos.

In granting summary judgment, the district court reasoned that "[f]urther investigation into Plaintiff's identity was warranted," and Banuelos fulfilled his constitutional duty in that regard because he "interviewed Plaintiff the morning after his arrest, determined that further investigation was warranted . . . and recommended that an identity hearing be scheduled." *Soler*, 274 F. Supp. 3d at 1054. For those

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[3] Petitioners state that the "prosecutor's office required independent verification of prisoner mistaken identity claims." Pet. at 4 n.2, 5. This is, at best, misleading. The prosecutor's office does fingerprint comparisons for litigation purposes. As two prosecutors testified in depositions, however, the SDSD's decision to hold Soler was a "law enforcement decision," and the SDSD could have released Soler at any time if it concluded he was not the wanted man. *See* Opp. MSJ at 9-10. Indeed, SDSD Policy Q.80 required that.

conclusions the court relied solely on what Banuelos wrote in his report thirteen days after the relevant events. *See id.* at 1050, 1054. Even setting aside that the "interview" involved Banuelos calling Soler a "f***ing liar" and demanding a confession, there is no contemporaneous documentary evidence to support that Banuelos determined further investigation was warranted *or* recommended an identity hearing. To the contrary, the documentary evidence shows Banuelos told his superiors that he had "confirmed" Soler was the right man by matching fingerprints, mug-shots, and scars, and by talking with Futch at the ADC. Furthermore, the person to whom Banuelos would have recommended an identity hearing was Detective Smith, and Smith denied that occurred. Of course, there are many other reasons jurors could/would disbelieve anything Banuelos said, in his report or otherwise.[4] Given this, the district court's findings were inconsistent with construing the facts in the light most favorable to Soler. Indeed, undisputed evidence shows Banuelos failed to do the investigation he was ordered to do; lied to his superiors, thereby obstructing them from looking into the matter; and later filed a false report and doctored the Warrant Face Sheet to cover-up his misconduct.

In its memorandum opinion, the Ninth Circuit cited its clearly established law and held that because

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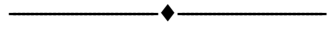
[4] During the Ninth Circuit argument (at 19:35 of the recording), Judge Owens, a former prosecutor, said that based on the content of Banuelos's deposition transcript, jurors would be justified in disbelieving anything Banuelos said.

"Soler's repeated protests of mistaken identity were" corroborated by "significant differences between Soler's and Dishman's physical appearances," "Banuelos should have investigated further." *Soler*, 762 Fed. App'x at 836. The Ninth Circuit also mentioned some of the evidence that calls Banuelos's credibility into question:

> Banuelos stated in his deposition that he observed that Soler had brown eyes and no visible scars, and that he was aware that Dishman had blue eyes and scars, but Banuelos did not tell anyone of this discrepancy. *In fact, a San Diego officer wrote in a report the same day that Banuelos visited Soler that a detective from Banuelos's unit confirmed that Soler was positively identified as Dishman – a reasonable juror could conclude that this detective was Banuelos. Banuelos even admitted to handwriting over a piece of Soler's paperwork that Soler had blue eyes. Moreover, Banuelos never conducted a fingerprint comparison, despite filling out paperwork stating that a print match was confirmed.*

Id. at 836-37 (emphasis added). The court then turned to the claim in Banuelos's report that he recommended an identity hearing and stated, "he completed this report six days after Soler's release, and the report is inconsistent with the evidence discussed above." *Id.* at 837. "In sum," the court found, "a reasonable juror could conclude that [Banuelos] violated Soler's rights." *Id.*



REASONS FOR DENYING THE WRIT

I. Summary Of Argument

In Section II below, Soler refutes Petitioners' claim that the Ninth Circuit's holding in this case conflicts with *Baker v. McCollan*, 443 U.S. 137 (1979), and case law from four other circuits. The Ninth Circuit's holding in this case, and its published case law on which that holding was based, is actually consistent with *Baker* and case law from five circuits – including three of the circuits cited by Petitioners to support their circuit-split claim. There are no contrary circuit court decisions. Furthermore, Petitioners' request that the Court eschew the broad consensus reflected in the case law and apply a procedural due process balancing test ignores that Soler is not challenging the SDSD's procedures, which Banuelos grossly violated.

In Section III below, Soler addresses Petitioners' claim that binding circuit authority is not enough to clearly establish a constitutional principle for qualified immunity purposes. The Court should deny review on that claim because it was not raised below, and it is founded on Petitioners' false circuit-split assertion. Furthermore, the regime Petitioners advocate would encourage officers to violate binding circuit precedent, leading to suppression of evidence in criminal cases.

II. The Ninth Circuit's Holding, And Case Law, Is Consistent With *Baker* And Case Law From Five Other Circuits

A. Ninth Circuit Case Law Does Not Conflict With *Baker*

Petitioners' primary argument is that the Ninth Circuit panel in this case ignored *Baker*, and that Ninth Circuit case law conflicts with *Baker*. *See* Pet. at 5, 8. Both claims are wrong.

In *Baker*, Leonard McCollan was arrested, used a fraudulent identification to pass himself off as his brother Linnie, and was released on bond. Bond was later revoked and an arrest warrant was issued for Linnie, who was picked up and held until "officials compared his appearance against a file photograph of the wanted man and, recognizing their error, released him." *Baker*, 443 U.S. at 141. Linnie sued, asserting that "despite his protests of mistaken identity, he was detained" for three days. *Id.* at 143-44. Rejecting a Fourteenth Amendment due process claim, this Court said, "we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently *every* claim of . . . mistaken identity. . . . Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an *error-free investigation of such a claim*." *Id.* at 145-46 (emphasis added). This language implies that in some circumstances officers have a duty to investigate. *See also id.* at 147-48 (Blackmun, J., concurring).

The Ninth Circuit recognized such a duty in *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001). In that case, Kerry Sanders sued officers "who incorrectly identified [and detained him] as the fugitive Robert Sanders." *Id.* at 676. He alleged those officers failed to investigate even though they "knew or should have known that [he] was not . . . the fugitive Robert Sanders because [his] mental incapacity is 'obvious,' and because neither his fingerprints nor his physical characteristics match those of Robert Sanders." *Id.* at 678. Assessing that claim, the Ninth Circuit noted that the Eleventh Circuit had relied on *Baker* to hold that "a detainee has 'a constitutional right to be free from continued detention after it was or should have been known that the detainee was entitled to release.'" *Id.* at 683-84 (quoting *Cannon v. Macon County*, 1 F.3d 1558, 1563 (11th Cir. 1993)). The Ninth Circuit agreed and found that Sanders could prevail on his claim if he showed officers knew or should have known he was not the wanted man and acted "recklessly and with deliberate indifference" to his liberty interest. *Id.* at 684.

Like *Lee*, every published Ninth Circuit case that has dealt with wrongful detention on a warrant has addressed *Baker* and rejected the argument Petitioners make here. *See*, *e.g.*, *Garcia v. County of Riverside*, 817 F.3d 635, 639 (9th Cir. 2016);[5] *Gant v. County of Los Angeles*, 772 F.3d 608, 614 (9th Cir. 2014); *Rivera v. County of Los Angeles*, 745 F.3d 384, 390 (9th Cir.

[5] The same argument was made in a petition for a writ of *certiorari* in *Garcia*, which was denied on October 17, 2016. *See Baca v. Garcia*, No. 16-321.

2014). This refutes Petitioners' claim that the Ninth Circuit panel in this case "ignored *Baker* entirely." Pet. at 18. Instead, the panel cited two Ninth Circuit opinions that rejected Petitioners' *Baker* argument, and summarized clearly established law: (1) "[u]nsupported claims of mistaken identity, by themselves, do not trigger a duty to investigate further;" (2) however, an investigation must be done if "circumstances indicate[ ] to [officers] that" there are "significant differences between the arrestee and the true suspect;" and (3) that investigation should involve "readily available and resource-efficient identity checks, such as a fingerprint comparison." *Soler*, 762 Fed. App'x at 386 (citing and quoting *Rivera*, 745 F.3d at 391-92, and *Garcia*, 817 F.3d at 642). In sum, Petitioners' claim that Ninth Circuit case law conflicts with *Baker* is wrong, as is their suggestion that the panel in this case was oblivious to *Baker*.

It also bears noting that Petitioners' assertion that "[t]he facts in this action are not materially distinguishable from *Baker*" is ridiculous. Pet. at 8. In *Baker*, the defendant "checked the files and released [McCollan] as soon as [he] became aware of [McCollan's mistaken identity] claim." 443 U.S. at 148 (Blackmun, J., concurring). Had Banuelos acted similarly, Soler would not have spent nine days in solitary confinement grinding to the conclusion that he'd been successfully framed.

B. Ninth Circuit Case Law Is Consistent With The First, Fifth, Sixth, Eighth, And Eleventh Circuits

Petitioners also claim that Ninth Circuit case law conflicts with cases from four other circuits. *See* Pet. at 10. As discussed below, case law from three of those – the First, Fifth, and Sixth – is consistent with the Ninth Circuit, as is case law from the Eighth and Eleventh Circuits, which Petitioners ignore. There is no conflicting case law, not even the two Seventh Circuit cases on which Petitioners rely heavily.

1. Sixth Circuit

In *Gray v. Cuyahoga County Sheriff's Dep't*, 150 F.3d 579, 582 (6th Cir. 1998), Dwayne Gray was arrested in Ohio on a Michigan warrant and extradition request for a man with the same name. Gray protested that he was the wrong man, and jail officials received an identification packet from Michigan officials that included a "photograph that looked nothing like [plaintiff], and the physical description provided . . . referred to certain scars that [plaintiff] did not have." *Id.* at 580. The "question presented . . . [was] whether someone who is wrongly imprisoned as a result of mistaken identity can state a constitutional claim against his jailers based on their failure to ascertain that they had the wrong man." *Id.* at 582. The court noted that *Baker* had not foreclosed such claims, and held that the jailer-defendants could be held liable under the due process clause based on a failure to "conduct[] a reasonable inquiry into the apparent discrepancy between the

photograph and the appearance of the real Gray. . . ." *Id.* at 583. The court referred to the failure to "conduct[ ] a reasonable inquiry" as "something akin to deliberate indifference." *Id.*

The Sixth Circuit held the same in *Seales v. City of Detroit*, 724 Fed. App'x 356, 363 (6th Cir. 2018), stating that "it is clear that officers act with 'something akin to deliberate indifference' when they fail to verify the identity of the person they have in custody, despite knowledge or notice that the person in custody is not the one listed in the arrest warrant."

In support of their circuit-split claim, Petitioners say the "Sixth Circuit leave[s] the door open to due process claims" like Soler's "but . . . require[s] a heightened showing of culpability," "something akin to deliberate indifference." Pet. at 14. In comparison, Petitioners say, "[t]he Ninth Circuit did not require any heightened showing of culpability. Indeed, its decision did not address the requisite level of culpability at all." Pet. at 14. Petitioners evidently believe a memorandum opinion should address every aspect of the surrounding legal terrain, even those not contested. At any rate, the panel in this case relied on *Lee*, 250 F.3d at 684, which states that a plaintiff must show an officer acted "recklessly and with deliberate indifference," and there is no doubt Banuelos's conduct sailed over that threshold. More to the point, the intent requirements in the Sixth and Ninth Circuits are consistent.

2. Eighth Circuit

In *Kennell v. Gates*, 215 F.3d 825, 826-27 (8th Cir. 2000), Sharon Kennell was arrested on a warrant for her sister, Deborah, evidently because the warrant said Deborah used the name Sharon. When she was being processed at the jail, "Sharon protested to [Officer] Gates that she was not Deborah Kennell. Gates obtained record photographs of both sisters and concluded that Deborah's photograph matched Sharon. Sharon then requested that her fingerprints be taken in order to prove that she was not Deborah. . . . [S]he eventually was fingerprinted in the normal course of processing." *Id.* at 827. Later that day, a notice was sent to Officer Gates indicating that Sharon's prints didn't match the person wanted on the warrant.[6] *See id.* Sharon was not released until six days later, however, when Deborah's parole officer visited the jail. During trial, Gates claimed she never received notice that the prints didn't match, but "it is apparent the jury did not find her testimony credible" because "the [district] court submitted Sharon's §1983 claim to the jury on a deliberate indifference instruction," and the jury found for Sharon. *Id.* at 828, 830. Gates nonetheless argued that the verdict should be vacated because the evidence supported only a finding of negligence.

In rejecting that claim, the Eighth Circuit began by citing *Baker* and stating that it "agree[d]" that "a negligent refusal to investigate claims of . . . mistaken

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[6] This evidences how quickly a fingerprint comparison of Soler could have been done.

identity of an individual detained pursuant to a facially-valid warrant for a few days does not amount to a constitutional violation." *Id.* at 828. The court then said, "[w]e are left, however, with the theory under which the District Court denied Gates's motion for a directed verdict," and concluded that "evidence that Gates was sent a report over an in-house computer message system indicating that the wrong sister was in custody [was] sufficient to allow [the] jury to find that Gates had actual knowledge of a substantial risk that Sharon was mistakenly imprisoned." *Id.* at 826, 829. That is akin to Soler's case against Banuelos, though the evidence of Banuelos's "knowledge of a substantial risk" is much stronger. Petitioners ignore *Kennell*.

3. Eleventh Circuit

In *Cannon v. Macon* County, 1 F.3d 1558, 1560 (11th Cir. 1993), Mary Parrott was arrested in Georgia on a Kentucky warrant for a person with the same name. At the jail, Parrott gave Deputy Collins her biographical information, and Collins also had Parrott's driver's license. Parrott's identifying information differed from the person wanted on the warrant, including height, eye color, and birth date. *See id.* The Eleventh Circuit (1) pointed out that in *Baker* this Court had indicated that "under certain circumstances . . . detention on the basis of misidentification may present a viable §1983 claim," and (2) held there was sufficient evidence to support such a claim based on Deputy Collins's acting with "deliberate indifference"

to Parrott's "due process rights. . . ." *Id.* at 1563-64; *see also Ortega v. Christian*, 85 F.3d 1521, 1526-27 (11th Cir. 1996). Petitioners ignore *Cannon* (and *Ortega*), though it was relied on by the Ninth Circuit in *Lee*, 250 F.3d at 683.

4. Fifth Circuit

In *Sanchez v. Swyden*, 139 F.3d 464, 465 (5th Cir. 1998), Oscar Sanchez was detained because his name and description matched a fugitive warrant from Tennessee. The next morning, Sanchez was taken to court and complained of mistaken identity. *See id.* at 466. The judge ordered the Sheriff "to hold Sanchez until his . . . identification could be confirmed." *Id.* Sanchez was taken back to the jail, his fingerprints were compared to those provided by officials in Tennessee, and when the prints didn't match he was released. *See id.* Sanchez alleged he was wrongfully detained because "the defendants were in the possession of the actual suspect's photographs, fingerprints, and information that the suspect had a rose tattoo on his left shoulder within two hours of Sanchez's initial detention." *Id.* at 468.

The court began its analysis by noting that *Baker* stated that officials in such a situation "are not required by the Constitution to perform an error-free investigation. . . ." *Id.* (quoting *Baker*, 443 U.S. at 145-46). The court then stated:

> Although we have held that illegal detention by way of false imprisonment is a recognized

> §1983 tort . . . we have required proof that the official's actions went beyond mere negligence before that tort takes on constitutional dimensions. *Sanders v. English*, 950 F.2d 1152, 1159 (5th Cir. 1992) (cases cited therein). Sanchez has failed to show that failure to act on the exculpatory information went beyond mere negligence.

Sanchez, 139 F.3d at 469. The *Sanders* case cited above applied a deliberate indifference standard to such claims. 950 F.2d at 1162. Thus, *Sanchez* indicates that the Fifth Circuit permits an unlawful detention claim if the plaintiff can show an officer-defendant was deliberately indifferent to evidence showing s/he was detaining the wrong person.

The Fifth Circuit's opinion in *Soto v. Ortiz*, 526 Fed. App'x 370 (5th Cir. 2013), is to the same effect. There, the plaintiff protested that he was wrongly arrested on a warrant bearing his name, to no avail. *See id.* at 371-72. The Fifth Circuit again noted that *Baker* permits §1983 claims in such circumstances, but not when an officer's "actions do not exceed mere negligence." *Id.* at 374. With a parenthetical to its opinion in *Sanchez*, the court also recognized that such claims will lie where there is "evidence the officer knowingly and willfully ignored substantial exculpatory evidence." *Id.*

Petitioners claim these cases support their circuit-split argument because the Fifth Circuit "requires a heightened showing of culpability," that being something "more than negligence." Pet. at 14. The Fifth

Circuit, like the Ninth, requires a showing of deliberate indifference.

5. First Circuit

In *Brady v. Dill*, 187 F.3d 104, 105 (1st Cir. 1999), David Buckley was arrested for drunk driving and gave officers William Brady's identifying information. When Buckley failed to appear in court, a warrant was issued for Brady and he was arrested. *See id.* The First Circuit noted that under *Baker*, officers who make an arrest on a warrant "ordinarily" have no duty to subsequently investigate whether they have the right man. But, the First Circuit said, this Court in *Baker* "took pains to note that [it] was not speaking in absolute terms, and left open the possibility that, under extreme circumstances, a plaintiff may be able to press such a claim." *Id.* As an example, the court in *Brady* cited the Sixth Circuit's opinion in *Gray*, 150 F.3d at 583, which, as discussed above, held a plaintiff may establish a due process violation if an officer fails to "conduct a reasonable inquiry" when warranted by the circumstances, showing "something akin to deliberate indifference" to the detainee's constitutional rights. The First Circuit concluded that the circumstances presented in *Brady* didn't meet that threshold because the defendant-jailers immediately investigated Brady's mistaken identity claim and promptly arranged for his release. 187 F.3d at 107. That is a far cry from Banuelos's conduct, and it is evident from the analysis in *Brady* that the First Circuit would allow Soler's claim to proceed.

Petitioners nonetheless claim their circuit-split argument is supported by *Brady*, asserting that the First Circuit held "a due process claim" in the context presented here "could proceed only in the most egregious circumstances." Pet. at 12. That is not correct – the First Circuit cited favorably to the Sixth Circuit's *Gray* opinion, which, as discussed above, is consistent with Ninth Circuit case law.

6. Seventh Circuit

The last two cases Petitioners cite for their circuit-split argument are *Tibbs v. City of Chicago*, 469 F.3d 661 (7th Cir. 2006), and *Hernandez v. Sheahan*, 455 F.3d 772 (7th Cir. 2006). *See* Pet. at 11-12. Neither addresses the constitutional claim at issue here, and both are factually distinguishable.

In *Tibbs*, Officer Koistra stopped a man who had a driver's license with the name Ronald A. Tibbs. Koistra ran a records check and found a warrant for Ronald L. Tibbs. When Koistra asked Tibbs "about the warrant, he replied that he thought it had been taken care of already, apparently confusing this warrant with a traffic violation he had actually committed. Despite the discrepancies in the middle initials and birth dates [between plaintiff and the wanted man]," Koistra arrested Tibbs because his responses to Koistra's "questions suggested he knew about the warrant, and the warrant's description matched his first and last names, race, and sex." *Tibbs*, 469 F.3d at 662-63. Two days later, Tibbs posted bond, and it was later determined

he was not the person wanted. *See id.* at 663. The Seventh Circuit held that "Tibbs's acknowledgment of the existence of a warrant – the officers could not have known it was a different warrant – ma[de] the arrest objectively reasonable." *Id.* at 665. The court went on to hold that Tibbs's "postarrest detention" was also not actionable because, having reasonably concluded he had the right man, Officer Koistra was not required to investigate further after he left Tibbs at the jail. *See id.* Moreover, the court said, "Officer Koistra had no contact with Tibbs and no responsibility for him after he was taken to the lockup area of the jail some thirty minutes after the arrest, so it is hard to see how he could be held liable based on Tibbs's two-day detention." *Id.*

Unlike Soler's case, *Tibbs* didn't involve a jailer who learned information that indicated s/he had the wrong person in custody and failed to reasonably investigate, much less a jailer who was ordered to investigate a claim of mistaken identity, grossly failed to follow his department's policies when doing so, and lied to his superiors about what he found. *Tibbs* instead dealt with an officer who was found to have made a lawful arrest because he reasonably reconciled conflicting identifying characteristics. Furthermore, it bears noting that the Ninth Circuit's opinion in Soler's case is actually consistent with *Tibbs* because the Ninth Circuit affirmed the district court's grant of summary judgment to Deputy Germain, who arrested Soler. *See Soler*, 762 Fed App'x at 387. The Ninth Circuit did that even though Germain knew facts

indicating he had the wrong man in custody – indeed, he was convinced of that – but did nothing to follow-up. Thus, the Ninth Circuit was more forgiving of Deputy Germain's conduct than it appears the Seventh Circuit would be in light of *Tibbs*.[7]

The other Seventh Circuit case on which Petitioners rely, *Hernandez*, also doesn't support their claimed circuit-split. In that case, Emiliano Hernandez was pulled over after he ran a stop sign, and police discovered he did not have insurance or a valid driver's license. *See Hernandez*, 455 F.3d at 773. A records check erroneously showed "the person assigned [plaintiff's] license number, Enrique Hernandez, was wanted on an outstanding warrant. Deeming 'Enrique' and 'Emiliano' to be aliases for a single person, the police took Hernandez into custody." *Id.* Notably, the two men also had the same birthday and matching "physical characteristics," including "sex, height, weight, and eye color." *Id.* The arresting officers refused to listen to Emiliano when he protested he was not the man wanted on the warrant. The next morning, Emiliano appeared in court and was referred to as "Enrique," but neither he nor his counsel protested that he was the wrong man. The judge "set bond at $5,000 and returned Hernandez to the Sheriff's custody pending the next hearing." *Id.* at 774. Emiliano bonded out two weeks later, and a prosecutor subsequently dismissed the case, but prior to that "deputies took the view that

[7] Considering the reasoning in *Tibbs*, Petitioners are wrong when they claim it establishes a "categorical bar to claims of failure to investigate." Pet. at 11.

they had the obligation to produce him in court on July 1, and were going to hold him, unless he bailed out, no matter what arguments and documents he and his family presented." *Id.* at 774.

Emiliano brought a municipal liability claim, asserting that "the Sheriff's policy of refusing to entertain mistaken identification violates the Constitution." *Id.* at 774. Comparing the facts to those in the movie *The Fugitive*, the court said the "judge had committed [Hernandez] to [custody,] and that was that." *Id.* at 777. It concluded the challenged policy "is entirely lawful unless the custodian knows that the judge refuses to make an independent decision or there is doubt about which person the judge ordered held." *Id.* That is the portion of *Hernandez* that Petitioners cite. *See* Pet. at 11. But that portion says *Baker* did not "carry the day for the Sheriff," the fact that the plaintiff was detained on a judge's order, and pursuant to a related department policy, did. *Hernandez*, 455 F.3d at 776.

Accordingly, *Hernandez* does not support Petitioners' claimed circuit- split – that case didn't address the type of claim Soler raises, and actually supports the conclusion that *Baker* doesn't bar Soler's claim. In addition, *Hernandez* is factually distinguishable on several important bases. First, Deputy Banuelos's conduct didn't occur after Soler was taken to court, thus Banuelos cannot assert that he followed a policy of detaining a person due to a judge's order. Second, SDSD Policy Q.80 required Banuelos to investigate whether Soler was the person wanted in Arkansas and, if not, to release him "immediately." Third, when Soler was

eventually taken to court the judge didn't order him detained, or set a bond. Instead, based on Detective Smith's representation that the SDSD would do a fingerprint comparison, the judge said, "I will just continue this in its present status for a week."[8] Fourth, and relatedly, no one with the SDSD thought the judge had issued an order precluding Soler's release, as evidenced by the fact that Smith had Soler released without seeking permission from the court.[9]

In sum, the Seventh Circuit cases relied on by Petitioners did not deal with an officer who had information indicating s/he had the wrong person in custody and failed to investigate, nor did those cases involve facts nearly as egregious as in this case. Accordingly, those cases don't conflict with the broad national consensus reflected in the other cases discussed above.

C. Petitioners' "Heavy Burden" Claim Is Nonsensical, Is Contradicted By SDSD Policy Q.80, And Was Not Raised Below

Petitioners resort to a policy argument, claiming that "[i]f the Constitution imposed liability on individual jail staff for failure to investigate claims of mistaken identity, as the Ninth Circuit held below, our

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[8] Petitioners inaccurately state that the judge "set a hearing for a week later to consider Soler's mistaken identity claim. . . ." Pet. at 4-5.

[9] The Sheriff in *Baker* also did not seek court permission before releasing Linnie McCollan, nor did the officers in any of the other cases discussed in Section II.B above.

jails and prisons would be forced to adopt an entirely new species of investigation procedures and hearings," and would become "unmanageable." Pet. at 6-7. There are several responses.

As an initial matter, Ninth Circuit case law doesn't "impose[] an unqualified duty to reasonably investigate" mistaken identity complaints, as Petitioners claim. Pet. at 10. Instead, a jailer must only investigate if s/he is knows the complaint is corroborated by significant differences between the physical characteristics of the detainee and the person wanted on the warrant.

Turning to Petitioners' "burden" claim, its thrust is: (1) the SDSD's procedures for investigating mistaken identity complaints are adequate, based on balancing the costs of investigating versus the liberty interests at stake; and (2) if more were required "jails . . . would be forced to adopt an entirely new species of investigation procedures and hearings." Pet. at 7; *see also id.* at 15. This claim is far off-mark because Soler doesn't challenge the SDSD's procedures, nor assert that the SDSD should "adopt an entirely new species of investigation procedures." Had Banuelos followed the SDSD's *existing* procedures, rather than obstructing those procedures, Soler would have been released within hours, not nine days.

An independent reason to deny review on Petitioners' procedural due process claim is that it was not raised or ruled on below. *See Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005) ("we are a court of review, not

of first view"). In addition to the jurisprudential reasons for not considering a claim for the first time in this Court, it would be unfair to do so here because Soler didn't have notice and a corresponding opportunity to submit evidence about what resources officers have available for investigating mistaken identity, how quickly and efficiently those can be used, and at what cost. What is in the record, however, shows Petitioners' "burden" claim is specious. To begin with, that Deputy Germain was going to have a fingerprint comparison done on the night of Soler's arrest, but did not because he didn't have Dishman's prints, shows this prescribed investigative step is quick and cheap. Furthermore, SDSD Policy Q.80 requires jailers to investigate "any time" a detainee complains s/he is not the person wanted on a warrant, whereas case law only imposes a duty to investigate when the complaint is corroborated by objective evidence. Considering that the SDSD is voluntarily doing more than required by case law, it can hardly argue that the case law imposes an unreasonable burden. In addition, the case law establishing a duty to investigate substantially-corroborated claims of mistaken identity is widespread, and goes back at least as far as the Eleventh Circuit's 1993 *Cannon* opinion, yet there is no evidence that has crippled the nation's jails.

Finally, it bears noting that the duty recognized by the Ninth Circuit is not onerous, as evidenced by that court's affirming summary judgment for Deputy Germain. That is despite the fact that Germain was convinced he had the wrong person in custody and did

nothing to follow up when Wilkins at the ADC sent him fingerprints for the wanted man.

III. The Court Should Deny The Petition On The Qualified Immunity Issue Because It Was Not Raised Below, Petitioners Cannot Benefit From Their Proposed Rule, And That Rule Would Lead To Bad Consequences

Petitioners frame their second question as, "Does the law of a single circuit court, standing alone, suffice to 'clearly establish' constitutional principles [for qualified immunity purposes]? Or is something more required – a robust consensus of cross-circuit precedent, or a decision of this Court?" Pet. at 7. The Court should deny the petition with respect to that issue, for three reasons.

First, it was not raised or ruled on below. Instead, Petitioners argued that Deputy Banuelos was shielded by qualified immunity because there was not sufficient factual similarity between Ninth Circuit case law and Banuelos's conduct, so as to put Banuelos on notice that his conduct was improper. *See* Ans. Br. at 21-22, Ninth Cir. No. 17-56270 (Docket #17). Sensibly, Petitioners have now abandoned that claim.

Second, the foundation of Petitioners' qualified immunity claim – that Ninth Circuit case law conflicts with case law from four other circuits – is false. And, relatedly, if the Court were to grant the petition and hold there must be a "robust consensus of cross-circuit precedent" to "clearly establish" a legal principle for

qualified immunity purposes, Petitioners would gain nothing, because there is such a consensus. Lacking a concrete interest in resolution of the issue they press, they should be precluded from litigating it. *See*, *e.g.*, *Lewis v. Continental Bank Corp*., 494 U.S. 472, 477 (1990).

Finally, the regime Petitioners advocate is problematic. To understand why, it bears reiterating that Petitioners don't dispute here that Deputy Banuelos acted contrary to binding Ninth Circuit case law. Thus, Petitioners advocate a regime in which, to provide "fair notice" to officers, police departments would have to flag for officers those issues on which there is binding circuit case law but not a "robust consensus of cross-circuit precedent." Even if it were possible for departments to provide such law-school-level training, confusion would result, leading to officers acting contrary to binding circuit case law. That would lead, among other things, to suppression of evidence in criminal cases, and *Davis v. United States*, 564 U.S. 229, 232 (2011), would provide the prosecution no refuge because that case bars application of the exclusionary rule only when "officers acted in good faith reliance on *binding* circuit law." (Emphasis added.) For these reasons, it is much more sensible for clearly established law to be rooted in binding circuit precedent, when it exists. It is presumably for these reasons that this Court has looked to binding circuit case law in this context, *see Hope v. Pelzer*, 536 U.S. 730, 741-42 (2002), and very recently denied review on the same issue Petitioners raise here. *See Vernier v. Gallegos*, No. 18-1458.

IV. This Case Is A Poor Vehicle For Addressing Either Question Presented

The petition should also be denied because this case is a poor vehicle for addressing either question presented.

With respect to the first question, it bears noting that Deputy Banuelos's intentional, reprehensible conduct went well beyond deliberate indifference and thus violated clearly established law everywhere, including in the Seventh Circuit. *See Armstrong v. Squadrito*, 152 F.3d 564, 582 (7th Cir. 1998) (affirming wrongful detention liability where jailers' refusal to listen to detainee's complaints of mistaken identity "shocked the conscience"). Thus, this case is a poor vehicle for exploring what might be the outer edges of the law with respect to the duty to investigate mistaken identity claims. Relatedly, it is hard to imagine Deputy Banuelos, or a similarly-situated officer, benefitting from any rule or guidance the Court might provide.

The same considerations make this case a poor vehicle for considering the second question presented. "[Q]ualified immunity is intended to provide government officials with the ability reasonably to anticipate when their conduct may give rise to liability for damages," *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) – to give "fair notice" – and consistent with that it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). No reasonable officer in Deputy Banuelos's shoes would have believed his conduct was

reasonable. This is such an "obvious case" of misconduct that Banuelos can find no shelter in qualified immunity. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004).

CONCLUSION

Soler requests the Court deny the petition.

Respectfully submitted,

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