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

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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Respondent fundamentally misconstrues the facts. He argues that he would have been released from jail sooner if only Deputy Banuelos had done more. In reality, there was nothing more Banuelos could have done. The true fugitive's fingerprints had not yet been sent from Arkansas.

Moreover, Respondent availed himself of prompt and effective procedural due process protections. Respondent was provided a hearing less than two days after his arrest. He had counsel at the hearing. And he was permitted to press his claim of innocence. The judge deferred extradition upon learning that Respondent's fingerprints had not yet been compared with the Arkansas fugitive's fingerprints. The state prosecutor[1] then required the fingerprints to be compared and re-compared to the Arkansas fugitive's fingerprints. Respondent was then promptly released. The district court summarized: "Further investigation into Plaintiff's identity was warranted in this case, and that is precisely what occurred." App. 27.

But the court below ignored this Court's decision in *Baker*, and held that Banuelos could be liable for breaching an individualized duty to investigate claims of mistaken identity. This purported duty is in conflict with the First and Fifth Circuits, which hold that procedural due process is not an individualized obligation,

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[1] Under California law, a local district attorney acts for the state when enforcing state law, and is not a municipal actor. *Pitts v. County of Kern*, 17 Cal.4th 340, 360 (1998).

but rather a shared institutional duty. The Ninth Circuit further conflicts with five other circuits by imposing constitutional liability under a simple negligence standard. No other circuit takes that extraordinary approach, and the circuit conflict calls out for this Court's resolution.

Moreover, this case presents an ideal vehicle for addressing a longstanding question – whether a right can be "clearly established" notwithstanding circuit disagreement. The Ninth Circuit below held that it need only consider its own precedent, and may disregard other circuits' decisions. This Court's jurisprudence is to the contrary, as other circuits have recognized.

Certiorari is warranted to address both issues.

I. The Ninth Circuit Stands Alone In Imposing An Individualized "Duty To Investigate," And Review Is Warranted

A. The Decision Below Conflicts With *Baker*.

Respondent attempts to sidestep *Baker* by arguing that the decision leaves the door open, at least a crack, to procedural due process claims against individual jailers. Respondent does not contend (and cannot contend) that *Baker* provides any express caveats or exceptions relevant here.[2] Instead, he argues, *Baker*

[2] The only exception considered by *Baker* deals with egregiously lengthy detentions (unlike the nine-day detention here). Tellingly, even in that context, the focus remained on the overall procedural protections afforded by the institution, not the

authorizes a broad category of constitutional torts through its use of a negative pregnant. Opptn. p. 18 (relying on holding that "we do not think a sheriff . . . is required by the Constitution to investigate independently . . . *every* claim . . . of mistaken identity.") (emphasis supplied by Respondent).

Baker itself forecloses such a reading. An individual who is wrongfully jailed based on mistaken identity is entitled to procedural due process, but those rights are a shared institutional responsibility. The Constitution does not impose that responsibility on any individual jailer. Rather, "[t]he ultimate determination of such claims of innocence is placed in the hands of the judge and the jury." *Id.* at 146.

The position adopted by the court below – that Banuelos had a constitutional duty to conduct a reasonable investigation – is precisely the position that this Court rejected. *Id.* at 147 (reversing Fifth Circuit's "duty to exercise due diligence").

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deficiencies of any individual actor. *Baker*, 443 U.S. at 145 ("We may even assume, *arguendo*, that, *depending on what procedures the State affords defendants* . . . mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process of law.' ") (emphasis supplied).

B. The Circuits Are Split Along Two Axes – Whether to Permit Individualized Due Process Claims, And If So, What Culpability Standard To Apply.

Respondent strains credulity in arguing that the various circuits are aligned in their interpretations of *Baker*. At least one court of appeal has expressly acknowledged a circuit split, and two district courts have done the same. *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. . . ."); *Diaz v. Bullock*, 258 F. Supp. 3d 640, 654 (D.N.J. 2017); *Helm v. Palo*, 2015 WL 437661, at *7 (E.D. Pa. Feb. 3, 2015). Respondent ignores these repeated judicial acknowledgements, which correctly identify a split that is both real and deep.

1. The Seventh Circuit and First Circuit treat procedural due process as a shared institutional responsibility.

Seventh Circuit. The decision below conflicts most glaringly with the Seventh Circuit.[3] In his *Hernandez* opinion, Judge Easterbrook interprets *Baker* as a decision about the proper allocation of constitutional responsibilities. Once a valid warrant issues, as it did here, the obligation to free the innocent does not

[3] Respondent appears to concede that at least some conflict exists. *See* Opptn. p. 37 (arguing that Banuelos "violated clearly established law everywhere, including in the Seventh Circuit").

and should not fall on the shoulders of individual jailers. Rather, the prosecutor, the judge, and the jury are best equipped to make such determinations. The court thus held that a sheriff had no liability for failing to release a misidentified individual for 15 days, and upheld a policy of categorically ignoring claims of innocence:

> The Sheriff's policy is simple: Ignore all claims of misidentification (and any other version of the assertion that a suspect is innocent). It is the same policy that Tommy Lee Jones (portraying a U.S. Marshal) announced in *The Fugitive* when Harrison Ford's character proclaimed his innocence: "I don't care." A judge had committed Ford's character to prison, and that was that.

Id. at 776.[4] Here, Respondent was jailed pursuant to Governor Brown's orders, based on an Affidavit of Probable Cause signed by a judge. It was not for Banuelos to second-guess those judicial and executive determinations.

Respondent attempts to distinguish *Hernandez* by arguing that Banuelos's "conduct" occurred before Respondent was taken to court. *See* Opptn. p. 31. True, Banuelos's interaction with Respondent occurred only hours after Respondent was arrested. But that is not

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[4] The County's policy required far more. Respondent argues that Banuelos failed to follow the policy, but even if that were true, that would not support his claim. The Constitution mandates adherence to procedural due process guarantees, not to internal municipal policies.

relevant to Respondent's theory of the case. Respondent contends that Banuelos violated his rights through inaction, *i.e.*, declining to release him for the eight days *after* their encounter. But Respondent appeared in court just one day after his encounter with Banuelos. The process that resulted in Respondent's pre-extradition release went forward in due course, without regard to anything that Banuelos did or did not do.

Legally, what matters is not whether the hearing occurred before or after Respondent's encounter with Banuelos. Rather, what matters to procedural due process is that Respondent received prompt access to the courts, and was permitted to press his claim of innocence. Procedural due process does not require more. As Judge Easterbrook explains, the constitutional obligation to entertain claims of mistaken identity "rests on the judiciary rather than the jailer." *Id.* at 778.

Two additional Seventh Circuit decisions, *Tibbs* and *Hudson*, align with *Hernandez*. Respondent attempts to avoid *Tibbs* through misdirection, *i.e.*, focusing on the fact that the officer there took steps before the arrest to verify the suspect's identity, while Banuelos did not. Opptn. p. 29. But Banuelos could not have done so here (he was not involved in the arrest), and the actual holding of *Tibbs* is not so limited. Rather, *Tibbs* imposes a categorical bar to claims of mistaken identity. *Tibbs v. City of Chicago*, 469 F.3d 661 (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."). *See also*

Hudson v. Salier, 676 F. App'x 587, 588 (7th Cir. 2017) (probable cause negates need for investigation into mistaken identity).

First Circuit. The decision below also conflicts with *Brady v. Dill*, 187 F.3d 104 (1st Cir. 1999). There, the Court emphasized the distinction between individual actors and institutional protections, holding that it is the latter that matters to the due process analysis. The court explained:

> [*Baker*] venerates the separation of functions among government actors. This respect for the separation of functions . . . largely explains why the *Baker* Court declined to impose on police officers an affirmative duty of investigating claims of innocence.

Id. at 111. To be sure, *Brady* found that *Baker* does not impose an absolute bar "as if writing a rule of plane geometry." *Id.* at 112. But exceptions will lie only in "extreme circumstances," under the most egregious of facts. *Id.* at 115.

2. Five circuits impose a heightened culpability standard. The Ninth Circuit stands alone in requiring only negligence.

Respondent concedes that several circuits impose a heightened culpability requirement. He characterizes this as a "deliberate indifference" standard, and claims that the Ninth Circuit is in accord. He is wrong on both fronts. The decision below applies a simple

negligence standard to the constitutional claim, as have the prior Ninth Circuit cases. And while three circuits (the Sixth, Eighth, and Eleventh) have adopted a deliberate indifference standard, the Fifth Circuit employs a higher standard, and the First Circuit employs a higher standard still.

The Ninth Circuit – Simple Negligence. The court below did not hold plaintiff to a heightened standard of culpability. Instead, it permitted the claim to proceed based solely on what Banuelos "should" have done:

- "Our precedent makes clear that detention based on mistaken identity violates due process if the circumstances indicated to the defendants that further investigation was warranted." App. 5.
- "[O]nce further investigation is warranted, the investigation should involve readily available and resource-efficient identity checks. . . ." App. 5-6.
- "Soler's repeated protests of mistaken identity were supported, and Banuelos should have investigated further." App. 6.

The decision below employs a simple negligence standard, nothing more.

Respondent claims a "deliberate indifference" requirement is implicit in the decision below, by virtue of its citation to *Lee*. As Respondent would have it, because *Lee* "states that a plaintiff must show an officer acted 'recklessly and with deliberate indifference'"

(Opptn. p. 22), the decision below must have applied that same standard.

This argument rests not on the actual holding of *Lee*, but instead on sleight of hand. *Lee* never adopted a "reckless with deliberate indifference" standard. Rather, it states only that the "plaintiffs *allege* that defendants acted recklessly and with deliberate indifference." *Lee v. City of Los Angeles*, 250 F.3d 668, 684 (9th Cir. 2001) (emphasis supplied). *Lee* found this allegation more than sufficient. *Id.* (plaintiff "more than adequately alleged defendants' failure to accord . . . due process appropriate to the circumstances"). It never, however, found "deliberate indifference" to be a necessary element of a procedural due process claim. Indeed, in its articulation of the standard, *Lee* made no mention of a heightened culpability requirement at all. *Id.*

Rather, under *Lee*, simple negligence is the law of the Ninth Circuit. *See Rivera v. County of Los Angeles*, 745 F.3d 384, 390 (9th Cir. 2014) ("In *Lee*, which relied on *Baker*, we confirmed that a [due process] violation could occur and explained that a plaintiff's burden is to show that 'it was or should have been known that [he] was entitled to release.' "); *Gant v. County of Los Angeles*, 772 F.3d 608, 622-23 (9th Cir. 2014) (same). *Garcia* likewise makes no mention of deliberate indifference, and instead employs a negligence analysis. *See Garcia v. County of Riverside*, 817 F.3d 635, 638-39 (9th Cir. 2016) (plaintiff alleged "that [Sheriff's Department] knew or should have known," and court found liability because "even a cursory comparison of Garcia to the warrant subject should have led officers

to question whether the person described in the warrant was Garcia").

The decision below, like *Lee, Garcia*, *Rivera* and *Gant*, applied a negligence standard. While the other circuits apply a variety of culpability standards, the Ninth Circuit stands alone in finding simple negligence sufficient.

First Circuit – "Extreme Circumstances" and "Egregious Facts." As noted above, the First Circuit will entertain the possibility of individual liability only in "extreme circumstances," under the most egregious of facts. *Brady*, 187 F.3d at 115.

Fifth Circuit – Deliberate Indifference Plus. The Fifth Circuit likewise requires a heightened showing of culpability, as Respondent acknowledges. In *Sanders v. English*, the court based its decision on an officer's failure to disclose "undeniably credible and patently exculpatory evidence." 950 F.2d 1152, 1162 (5th Cir. 1992). Such evidence, it held, met the applicable standard – "knowingly and willfully ignor[ing] substantial exculpatory evidence." *Id*. And in both *Sanchez v. Swyden*, 139 F.3d 464, 469 (5th Cir. 1998), and *Soto v. Ortiz*, 526 F. App'x 370, 375 (5th Cir. 2013), the court held that negligence does not suffice.

Sixth, Eighth, and Eleventh Circuits – Deliberate Indifference. The parties agree that these circuits employ a deliberate indifference standard. *Gray v. Cuyahoga County Sheriff's Dep't*, 150 F.3d 579, 582 (6th Cir. 1998); *Seales v. City of Detroit*, 724 F. App'x 356, 363 (6th Cir. 2018); *Kennell v. Gates*, 215 F.3d 825,

829 (8th Cir. 2000); *Cannon v. Macon County*, 1 F.3d 1558, 1564 (11th Cir. 1993).

The circuit conflict is real, it is entrenched, and there has been ample time for the variations to percolate. Certiorari is warranted to harmonize the discord.

C. The Ninth Circuit's Approach Imposes Unwarranted Process Burdens On Prisons And Jails.

The Ninth Circuit's authorization of claims against individual jailers – even on a heightened showing of culpability – should also be reviewed because it is simply bad policy. The appropriate procedural protection for a mistaken identity complainant is a hearing (which is precisely what happened here). Imposing parallel duties on individual jailers – *even when prompt hearings were actually afforded* – would necessitate duplicative and unnecessary processes.

Respondent disparages these policy concerns as "nonsensical" (Opptn. p. 32), even though they are shared by one of our most prominent jurists. *See Atkins v. City of Chicago*, 631 F.3d 823, 828 (7th Cir. 2011) (Posner, J.) (if individualized duties to investigate are imposed even if "there are constitutionally adequate formal administrative remedies against unjustified imprisonment . . . [p]risons would be unmanageable.").

II. This Case Presents An Ideal Opportunity To Resolve Acknowledged Confusion Regarding Qualified Immunity.

In response to the circuit split regarding *Baker*, Respondent tries extensively (albeit unsuccessfully) to harmonize circuit discord. Faced with the circuit split regarding the authority relevant to "clearly established law," however, Respondent is conspicuously silent.

Respondent makes no attempt to confront those cases holding that a circuit split is fatal to the "clearly established" prong (*i.e.*, *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011); *Mocek v. Albuquerque*, 813 F.3d 912, 929 n.9 (10th Cir. 2015)). Nor does he attempt to harmonize them with the cases holding exactly the opposite (*i.e.*, *Williams v. Bitner*, 455 F.3d 186, 193 n.8 (3d Cir. 2006); *Hall v. Zenk*, 692 F.3d 793, 799 (7th Cir. 2012); *Morgan v. Morgensen*, 465 F.3d 1041, 1046 n.2 (9th Cir. 2006)). Nor does he offer any rebuttal to the district courts that have acknowledged the split, nor to the legal scholars who call for this Court's assistance. *See* Pet. p. 21 n.8. All told, Respondent does not dispute that the question is exceptionally important, that it recurs regularly, and that it has squarely divided circuits for years.

Instead, Respondent faults Petitioners for not raising the circuit split below. But the appropriate tribunal for resolving circuit splits, of course, is this Court. S. CT. RULE 10(a). Asking the Ninth Circuit to

reject its own precedent in favor of other circuits would have been an exercise in futility.

Alternatively, Respondent claims that there is no circuit split, and that as a consequence, Petitioners lack a concrete interest in resolution of the issue. In so arguing, Respondent merely assumes what he sets out to prove. The circuit split is clear, and is deep enough that it has been widely debated by the academy. As noted above, Respondent makes no attempt to distinguish the cases requiring a cross-circuit consensus, nor does he attempt to harmonize them with conflicting decisions.

Respondent's purported policy concerns, too, are misplaced.[5] Training officers on clearly established law – *i.e.*, this Court's precedents and laws that are sufficiently clear to draw cross-circuit agreement – does not require "law-school-level training" for officers. *Cf.* Opptn. p. 36. Rather, it requires thoughtful selection of training topics by department leaders in consultation with legal advisors. That is how training is currently conducted, and that is how it should be conducted.

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[5] Among the many factual misstatements by Respondent, the following is perhaps the most flagrant: "Petitioners don't dispute here that Deputy Banuelos acted contrary to binding Ninth Circuit case law." Opptn. p. 36. That is not remotely accurate. There is no Ninth Circuit authority holding that an officer's failure to investigate claims of mistaken identity amount to a constitutional due process violation, even when the jailed individual promptly receives a judicial hearing, argues his innocence, and obtains his release.

Moreover, Respondent ignores the more pressing concern that arises if a single circuit decision can "clearly establish" the law, notwithstanding disagreement by other circuits. In such a regime, an officer's liability for a constitutional violation – even if based on precisely the same circumstances and conduct – could vary depending on the circuit. It would be incongruous for our Constitution to assign greater importance to *where* conduct occurred than to *what* conduct occurred. We are governed by one Constitution, and it should apply with equal force across the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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