No. _____

In The
Supreme Court of the United States

DEPUTY SHERIFF MARTIN MARQUARDT,

Petitioner,

v.

WILLIAM FLETCHER,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, an unarmed jail guard, was questioning Respondent, a pretrial detainee, about Respondent's apparent violation of jail rules. When Respondent became argumentative, Petitioner put his hand on Respondent's shoulder to turn Respondent toward the wall, in response to which Respondent told Petitioner, "Get your hands off me" and yelled for help to the 20 or more other inmates who were then out of their cells on "out time." At this point, Petitioner forcibly took Respondent to the ground and, because Respondent kept yelling for help to the other at-large inmates and resisting handcuffing, hit Respondent once in the back to stop his resistance. The forcible take down and single blow to Respondent's back caused no visible injuries. The questions presented are:

1. Whether the U.S. Court of Appeals for the Ninth Circuit correctly held that Petitioner does not have qualified immunity on the ground that "[t]he law is clearly established that a reasonable correctional officer cannot administer strong blows upon a compliant pretrial detainee."

2. Whether the Ninth Circuit correctly based "clearly established" law on one prior, inapposite Ninth Circuit decision that conflicted with decisions of other circuits on an issue as to which this Court later ruled against the Ninth Circuit's position.

QUESTIONS PRESENTED—Continued

3. Whether a right can be clearly established by circuit precedent despite disagreement in the courts of appeals.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), Petitioner states that all the parties to the proceedings in the United States Court of Appeals for the Ninth Circuit below are named in the caption.

LIST OF PROCEEDINGS PURSUANT TO RULE 14.1(b)(iii)

- *William Fletcher v. Deputy Marquardt*, No. 1:15-CV-00029-REB, United States District Court for the District of Idaho. Judgment entered Sept. 27, 2017.
- *William Fletcher v. Marquardt, Ada County Sheriff Deputy*, No. 17-35862, U.S. Court of Appeals for the Ninth Circuit. Judgment entered on Feb. 15, 2019. Order denying rehearing entered on Apr. 16, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Deputy Sheriff Martin Marquardt, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1–2) is reported at 753 F. Appx. 449. The opinion of the district court (App. 3–29) is not published in the Federal Supplement but is available at 2017 WL 4287193.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on February 15, 2019. It denied a petition for rehearing on April 16, 2019. App. 30. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.

Rev. Stat. § 1979, 42 U.S.C. § 1983, provides in relevant part:

> **§ 1983. Civil action for deprivation of rights**
>
> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

INTRODUCTION

This case involves the same law-enforcement measure at issue in *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (per curiam): a forcible takedown. Here, as in *City of Escondido*, the forcible takedown occurred in response to a situation of escalating danger and resulted in no visible injuries to the subject of the takedown. Here, as in *City of Escondido*, the subject of the takedown filed a § 1983 claim for excessive force against the officer who executed the takedown. And here, as in *City of Escondido*, the Ninth Circuit rejected qualified immunity in a one-sentence analysis followed by a citation to one Ninth Circuit decision with starkly different facts. The Ninth Circuit's decision in this case conflicts with *City of Escondido* and other decisions of

this Court because it defines "clearly established" law at too high a level of generality and relies on inapposite circuit precedent as the sole source of the supposedly "clearly established" law.

Besides conflicting with decisions of this Court, the decision below presents an important question on which this Court has reserved decision. That question is whether "a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals." *Taylor v. Barkes*, 135 S. Ct. 2042, 2045 (2015) (per curiam); *see also City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015) (reserving the question whether "a controlling circuit precedent could constitute clearly established federal law"); *Carroll v. Carman*, 574 U.S. 13, 135 S. Ct. 348, 350 (2014) (per curiam) (same); *Reichle v. Howards*, 566 U.S. 658, 665–66 (2012) (same). The Ninth Circuit below relied on 1991 circuit precedent that conflicted with the law of other circuits, a conflict that this Court resolved in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), against the Ninth Circuit's position. This case provides an occasion for the Court to confirm that the law cannot be clearly established by circuit precedent that conflicts with that of other circuits. At the same time, the Court can correct a lower court decision that creates unnecessary danger for correctional officers and pretrial detainees by characterizing Respondent's dangerous conduct as "complian[ce]." App. 2.

STATEMENT OF THE CASE

1. Facts

Because this case arises in a summary judgment posture, the evidence must be viewed in the light most favorable to Respondent. *See*, *e.g.*, *Sheehan*, 135 S. Ct. at 1769. We identify matters as to which the parties' accounts differed, however, to facilitate understanding of the Ninth Circuit's decision below. The Ninth Circuit's decision was vague when identifying an issue of fact as to which it believed a genuine dispute existed. And though the district court below denied summary judgment, it did not identify *any* specific issue of fact as to which it believed a genuine dispute existed.

The main events occurred at the Ada County Jail in Boise, Idaho, on August 7, 2013, starting at around 5:15 pm. App. 4; Excerpts of Record (ER) 353, 360.

Petitioner, Deputy Sheriff Martin Marquardt, was assigned—along with one other person, Deputy Sheriff Mark Losh—to guard Cell Block 8. ER 207, 360. Cell Block 8 has two tiers of cells, both with access to a common dayroom on the lower tier. ER 358 Jail Surveillance Camera Videos 1 & 2; ER 360.[1] At least 20, and as many as 45, of the cell block's inmates were out of their cells enjoying "out time." ER 208, 353, 360. Deputies Marquardt and Losh were expected during this time to watch for any unusual or disruptive behavior. ER 317. Neither deputy was armed. ER 353, 360.

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[1] Petitioner submitted two video recordings in support of his motion for summary judgment. ECF Nos. 64-11; *see also* ER 358.

Deputy Marquardt saw Respondent, pretrial detainee William Fletcher, on the upper tier walking away from Cell 841. ER 205, 353. Mr. Fletcher was not supposed to be in that area because Cell 841, relative to Mr. Fletcher's Cell (Cell 845), was in the opposite direction from the stairway down to the dayroom. ER 208, 353; ER 358 Video 1. That area was accordingly off-limits to Mr. Fletcher under the jail's rules. ER 254, 353. Those rules also prohibited inmates from visiting other cells. ER 204, 353. Part of Deputy Marquardt's job was to enforce the rules, which were designed for the safety of both guards and inmates. ER 243, 317.

Deputy Marquardt asked Mr. Fletcher what he had been doing near Cell 841. ER 205, 353. In response, Mr. Fletcher walked up so close to Deputy Marquardt that Deputy Marquardt "became uncomfortable" and ordered Mr. Fletcher to step back, which Mr. Fletcher did. ER 353.[2] Deputy Marquardt said in his affidavit

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[2] Deputy Marquardt said in his affidavit, "Mr. Fletcher proceeded to walk close enough into my personal space to where I became uncomfortable." ER 353. Mr. Fletcher gave a different account at his deposition, stating, "As I was walking he [*i.e.*, Deputy Marquardt] stepped in front of my face." ER 205 (deposition page 66). The jail surveillance camera video recording contradicts Mr. Fletcher's account: It shows the two walking toward each other on the upper tier's hallway. Deputy Marquardt stops first, right outside a cell door. After Deputy Marquardt has stopped, Mr. Fletcher continues walking until he seems to be only inches away from Deputy Marquardt's face. Deputy Marquardt apparently then tells Mr. Fletcher to back off (although the video recording lacks audio), because Mr. Fletcher takes one large step backwards. Video 2 at 0:00:05–0:00:11. *Cf. Scott v. Harris*, 550 U.S. 372, 380 (2007) (on motion for summary judgment, non-moving party's account must be disregarded when it is "blatantly

that Mr. Fletcher then became argumentative and was causing a disturbance. ER 353. This was another violation of jail rules. ER 268. Mr. Fletcher did not deny in his deposition that he grew argumentative when Deputy Marquardt questioned him about being near Cell 841. *See* ER 206. And Mr. Fletcher admitted that, when Deputy Marquardt began questioning him, "everybody on the tier just . . . stopped and watched" this interaction. ER 205; *see also id*. at 208 ("[O]nce they heard [Deputy Marquardt] yelling at me that is when people came out of their cell and start looking to see what is going on").

"With a large number of inmates out of their cells at that time," Deputy Marquardt attested, he "was concerned about Mr. Fletcher causing a disturbance." ER 354. Deputy Marquardt explained:

> Inmates often act tough in front of other inmates. Allowing an inmate to argue shows weakness, threatening loss of control and increasing the risk that the situation will escalate. . . . I was also concerned about the risk of other inmates coming up from behind.

Id. Deputy Marquardt accordingly told Mr. Fletcher to move into the nearby cell, a measure that, in the deputy's experience, calms down argumentative inmates.

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contradicted" by unchallenged video recording). Regarding this initial interaction, Petitioner's expert said, "Deputies are trained to maintain a distance of four to six feet (or more in certain instances) from the subject they are interacting with to ensure safety"; when an inmate walks up close to a deputy, "[a] reasonable deputy would see this as a potential pre-attack indicator and a reason to be concerned for the deputy's safety." ER 318.

ER 206, 354. Mr. Fletcher deposed that he asked why he was being moved into the cell; in response, Deputy Marquardt asked Mr. Fletcher why Mr. Fletcher "had an attitude"; and Mr. Fletcher "tried to explain I didn't have one." ER 205, 206; *see also* ER 353. Deputy Marquardt decided at that point to "secure Mr. Fletcher and to move him to a holder cell to cool off." ER 354.

To secure Mr. Fletcher, Deputy Marquardt recounted in his affidavit, "I told him to turn and face the wall of the cell, but he ignored my directions." ER 354. At Mr. Fletcher's deposition, he said that he did not recall being directed—or did not hear any direction—to face the wall.[3] Deputy Marquardt and Mr. Fletcher agree, however, that Deputy Marquardt grabbed Mr.

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[3] One of the relevant portions of Mr. Fletcher's deposition provides:

> "Q. So there was [sic] no instructions to face the wall, *that you recall*?
>
> "A. No."

App. 17; ER 206 (emphasis added). The other relevant portion provides:

> "Q. Did he give you any instructions when you went into the cell?
>
> "A. No. I didn't hear no instruction. I know he grabbed my shoulder. Tell me to go in the cell. Asked me why I had an attitude. And the next thing I know I was on the ground.
>
> "Q. Did he at some point tell you to turn and face the wall before you went to the ground?
>
> "A. Did I what?
>
> "Q. Were you at some point turned to face the wall?
>
> "A. I don't remember."

App. 16; ER 205.

Fletcher's shoulder to turn him toward the wall. ER 205, 354. Deputy Marquardt and Mr. Fletcher also agree that Mr. Fletcher then told Deputy Marquardt, "Get your hands off me." ER 208, 354.

The parties' accounts make clear that almost immediately after Mr. Fletcher told Deputy Marquardt to get his hands off Mr. Fletcher, Deputy Marquardt forcibly took Mr. Fletcher to the ground, with Mr. Fletcher landing on his chest. ER 206, 354. Both parties further agree that, as the takedown occurred, Mr. Fletcher was—to use his words—"yelling for help" to the other inmates. ER 206; *see also* ER 354.

The parties agree, as well, that Mr. Fletcher kept yelling for help as Deputy Marquardt tried to handcuff him. ER 206, 355. And they agree that, besides yelling to the other inmates for help, Mr. Fletcher yelled at Deputy Marquardt, "I'm going to sue you!" and "You're going to lose your job!" ER 208, 355. Deputy Marquardt attested that Mr. Fletcher resisted being handcuffed; ignored Deputy Marquardt's commands to stop resisting; and continued to resist after Deputy Marquardt "positioned [his] left arm under his neck and again told him to stop resisting." ER 355. Mr. Fletcher did not deny that he physically and verbally resisted being handcuffed. ER 206, 208.

Deputy Marquardt said in his affidavit that because of Mr. Fletcher's continued resistance to being handcuffed, "I delivered a single strike to his right side with my fist." ER 355. Mr. Fletcher deposed that Deputy Marquardt got one of Mr. Fletcher's hands in

handcuffs, "[a]nd when I said I was going to sue he struck me in the back and told me to shut up." ER 206. While Deputy Marquardt had been struggling to get Mr. Fletcher into handcuffs—he could not reach his radio—so he shouted to Deputy Losh for help. ER 206, 354–55, 360. Deputy Losh ran up the stairway to the upper tier and arrived just as Deputy Marquardt finished handcuffing Mr. Fletcher. ER 207, 355; ER 358 Videos 1 & 2. The two deputies got Mr. Fletcher on his feet and walked him backwards down the stairs to the first tier of the cellblock, to put him in a "holder cell." ER 355, 360; Videos 1 & 2. Deputy Marquardt attested that, while walking Mr. Fletcher to the holder cell, Deputy Marquardt held his right hand on the side of Mr. Fletcher's head to keep him from spitting. ER 355. Mr. Fletcher alleged, however, that Deputy Marquardt actually put his hand under Mr. Fletcher's neck, choking him. ER 136. Mr. Fletcher's account is "blatantly contradicted" by the Jail Surveillance Videos. *Cf. Scott v. Harris*, 550 U.S. 372, 380 (2007).

Deputy Marquardt did not see any injuries on Mr. Fletcher but called a nurse to check him out. ER 355. Nurse Lisa Farmer went to the holder cell to which Mr. Fletcher had been taken, and asked him twice if he had any injuries. Both times, Mr. Fletcher said, "I'm fine." ER 208–09, 212. By now, it was about 30 minutes after the encounter between Deputy Marquardt and Mr. Fletcher had begun. ER 212.

In addition to Nurse Farmer, four other medical professionals examined Mr. Fletcher over the next three weeks, on a total of five occasions, and submitted

affidavits in support of Deputy Marquardt's motion for summary judgment. ER 216–37. Although Mr. Fletcher complained of various pains, none of these medical professionals ever saw any objective signs of injury from the incident with Deputy Marquardt. ER 212, 217, 222, 227, 233-34. Based on Mr. Fletcher's subjective complaints, however, he was given Tylenol once (ER 227) and ibuprofen twice (ER 233-34). On one occasion he was offered Tylenol but refused it. ER 222.

2. Proceedings Below

A. District Court

On February 2, 2015, Mr. Fletcher filed a pro se complaint under 42 U.S.C. § 1983 against Deputy Marquardt, Deputy Losh, and Ada County in the United States District Court for the District of Idaho. ER 384–402. The District Court issued an Initial Review Order under 28 U.S.C. §§ 1915 and 1915A ruling that the complaint failed to state a claim upon which relief could be granted. App. 3; ER 43–58. As permitted by the Order, Mr. Fletcher filed an amended complaint in April 2015. *Id*. Even though the amended complaint did not comply with the Order, the district court issued a second Review Order allowing Mr. Fletcher to proceed on claims against Deputies Marquardt and Losh for deprivation of food and excessive force. App. 4. In January 2016, the court granted a partial motion to dismiss, leaving only the excessive force claim against Deputy Marquardt. *Id*. Deputy Marquardt moved for summary judgment on grounds of qualified immunity

citing *Kingsley*. ER 178-87. The district court denied summary judgment in an unpublished memorandum decision and order dated September 27, 2017. App. 3–29.

The district court did not identify any specific material fact as to which there was a genuine dispute. Instead, the court more generally said:

- "The parties' accounts of the incident diverge in nearly every respect." App. 12.
- "Deputy Marquardt recounts his confrontation with Mr. Fletcher quite differently" from Mr. Fletcher. App. 23.
- Besides Deputy Marquardt's and Mr. Fletcher's accounts, "There are no other first-hand descriptions . . . which would help resolve the discrepancy between the parties' above-referenced statements." App. 26.
- The case "reflect[s] a classic 'he-said-he-said' situation of opposing narratives." App. 27.
- "[D]isputed material facts . . . necessarily exist when trying to understand what took place between Mr. Fletcher and Deputy Marquardt. . . ." App. 28.

The court concluded, "Construing such disputed facts in Mr. Fletcher's favor, . . . a jury could believe that Deputy Marquardt used excessive force in violation of a constitutional right that was clearly established." *Id*. The court did not identify the constitutional right that

it considered to be clearly established. *See* App. 28; *cf*. App. 10–12 (generally discussing excessive force claims).

Deputy Marquardt appealed the denial of summary judgment under 28 U.S.C. § 1291. *See*, *e.g.*, *Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014) ("pretrial orders denying qualified immunity generally fall within the collateral order doctrine"); *Behrens v. Pelletier*, 516 U.S. 299, 312–13 (1996) (explaining that immediate appeal of order denying summary judgment is available, even if district court finds material issues of fact in dispute, to review whether "certain conduct attributed to petitioner (which was controverted) constituted a violation of clearly established law").

B. Court of Appeals

The Ninth Circuit affirmed. App. 1–2.

The Ninth Circuit held that the district court "did not err in finding the record presented genuine issues of material fact on whether the force Marquardt purposefully used against Fletcher was objectively unreasonable." App. 2. The Ninth Circuit thought there were two such factual issues. App. 2. One issue, in its view, was "whether Marquardt gave Fletcher instructions before striking him." App. 2. The Ninth Circuit did not explain whether it meant the leg strike by which Deputy Marquardt took down Mr. Fletcher, the strike that Deputy Marquardt delivered to Mr. Fletcher's back during handcuffing, or both. It seems most likely, though, that the Ninth Circuit meant the leg strike,

since Mr. Fletcher had denied remembering or hearing Deputy Marquardt instruct him, immediately before the leg strike, to face the cell wall.[4] The other issue that the Ninth Circuit believed was in dispute was "Fletcher's subjective complaints of pain." App. 2.

The Ninth Circuit further held that the district court "did not err in denying Marquardt's motion for summary judgment based on qualified immunity." App. 2. The Ninth Circuit thought that, "[v]iewing the evidence in the light most favorable to Fletcher, Fletcher was compliant and did not provoke Marquardt." App. 2. The court concluded that "[t]he law is clearly established that a reasonable correctional officer cannot administer strong blows upon a compliant pretrial detainee without violating the detainee's right . . . to be free from objectively unreasonable force purposely used against him." The Ninth Circuit cited one prior decision to support this conclusion, *Felix v. McCarthy*, 939 F.2d 699 (9th Cir. 1991). App. 2.

Deputy Marquardt petitioned for rehearing on, among other grounds, that the panel's decision conflicted with this Court's qualified immunity precedent. App. 40–44. The Ninth Circuit denied rehearing. App. 30.

[4] Mr. Fletcher did not deny that after the takedown he ignored Deputy Marquardt's commands to stop resisting being handcuffed. ER 355.

REASONS FOR GRANTING THE PETITION

The decision below conflicts with *City of Escondido*, 139 S. Ct. 500, and other decisions of this Court on qualified immunity in two ways. First, despite this Court's "repeated[]" instruction, the Ninth Circuit identified the "clearly established" law at too high a level of generality. *Id*. at 503. Second, the Ninth Circuit erred by discerning clearly established law from a single prior decision involving starkly different facts from those of this case. *Id*.; *District of Columbia v. Wesby*, 138 S. Ct. 577, 591 (2018). The Ninth Circuit's barebones analysis is thus flawed in the same ways that led this Court to grant further review and summarily reverse the Ninth Circuit's decision in *City of Escondido*.

Further review is warranted in this case for another reason: By relying solely on its own inapposite precedent as the source of "clearly established" law, the Ninth Circuit's decision presents an important issue that this Court has recognized without resolving. That issue is whether "a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals." *Taylor*, 135 S. Ct. at 2045. The 1991 circuit precedent on which the Ninth Circuit relied here was the subject of a circuit split that this Court granted review to resolve in *Kingsley*, 135 S. Ct. 2466, and in 2015 decided adversely to the Ninth Circuit's position.

This case provides an excellent vehicle for this Court to confirm that circuit precedent cannot "clearly establish" the law for qualified immunity purposes when it conflicts with precedent in other circuits. This

case presents the same legal and factual setting for which this Court's decision in *Kingsley* recently established the proper standard: an excessive force claim by a pretrial detainee. The Ninth Circuit's failure to apply that standard in this case undermines the safety of correctional officers and pretrial detainees by characterizing Respondent as "compliant" despite conduct that endangered Petitioner and Respondent's fellow inmates.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT BY FAILING TO CONSIDER THE PARTICULAR CIRCUMSTANCES WHEN ANALYZING QUALIFIED IMMUNITY.

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (internal quotation marks omitted). This Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *Id*. (internal quotation marks omitted; ellipsis supplied by Court in *Mullenix*). Instead, courts must determine "whether the violative nature of *particular* conduct is clearly established." *Id*. (internal quotation marks omitted; emphasis supplied by Court in *Mullenix*). A particularized analysis is especially important in cases involving claims of excessive force, "an area of the law in which the result depends very much on the facts of

each case." *City of Escondido*, 139 S. Ct. at 503 (internal quotation marks omitted). To ensure that the defendant official has "fair notice," *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam), the law must "clearly prohibit the officer's conduct in the particular circumstances before him." *Wesby*, 138 S. Ct. at 590.

The particular circumstances confronting Deputy Marquardt, understood in the light most favorable to Mr. Fletcher, show a situation in which a correctional officer's effort to enforce jail rules led to a situation of escalating danger:

- Deputy Marquardt was one of only two officers, both unarmed, guarding 20 or more detainees who were out of their cells on "out time." ER 208, 353, 360.
- When Deputy Marquardt began questioning Mr. Fletcher about his apparent violations of jail rules, those at-large inmates stopped what they were doing to watch. ER 205, 208.
- Rather than simply comply with Deputy Marquardt's instruction to move into a cell, Mr. Fletcher questioned it and started arguing with Deputy Marquardt about whether Mr. Fletcher "had an attitude." ER 205, 206; *see also* ER 353.
- When Deputy Marquardt grabbed Mr. Fletcher's shoulder to turn him toward the wall of the cell, Mr. Fletcher told Deputy Marquardt "Get your hands off me." ER 208, 354.

- As Deputy Marquardt physically took Mr. Fletcher to the ground, Mr. Fletcher was "yelling for help" to the other at-large inmates and continued yelling as Deputy Marquardt tried to handcuff him. ER 206, 354–55.

The question is whether every reasonable correctional officer facing these circumstances would know it was unlawful to take down Mr. Fletcher and hit him once in the back to stop his resistance to handcuffing. *Cf.*, *e.g.*, *Wesby*, 138 S. Ct. at 589–90. The question should have answered itself.

But the Ninth Circuit did not ask that question. The Ninth Circuit asked instead whether it was clearly established that a correctional officer could lawfully "administer strong blows upon a compliant pretrial detainee." App. 2. The court did not analyze the events that led to the takedown and the single blow to Mr. Fletcher's back. And the best that can be said for the Ninth Circuit's characterization of Mr. Fletcher as "compliant" is that it lacks the contextual awareness required by this Court's decisions.

Indeed, the Ninth Circuit's analysis is plainly inadequate under this Court's precedent. Here, as in *City of Escondido*, the Ninth Circuit's analysis consisted of one sentence. *See* 139 S. Ct. at 502; App. 2. The Ninth Circuit's one-sentence analysis also closely resembles that found inadequate by this Court in *Mullenix*. There, "the Fifth Circuit held that Mullenix violated the clearly established rule that a police officer may not use deadly force against a fleeing felon who does

not pose a sufficient threat of harm to the other officer or others." 136 S. Ct. at 309 (internal quotation marks omitted). The Court held that the Fifth Circuit's description was almost identical in its generality to one that it had rejected as inadequate in an earlier case. *Id*. (discussing *Brosseau v. Haugen*, 543 U.S. 194 (2004)). The Fifth Circuit's description in *Mullenix*, however, was actually *more* detailed than that of the Ninth Circuit below. At least the Fifth Circuit's description took into account (though it mischaracterized) the threat posed to the defendant officer. Here, in contrast, the Ninth Circuit took no account of the threat posed to Deputy Marquardt when he confronted Mr. Fletcher about his apparent violation of the jail's rules in front of 20 or more at-large inmates.

When the relevant circumstances are considered, "[t]his is far from an obvious case in which any competent [correctional] officer would have known" that the officer's conduct was illegal. *Kisela*, 138 S. Ct. at 1153. The court below came to a contrary conclusion only by ignoring this Court's repeated instruction not to analyze "clearly established" law at a high level of generality.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON THE REQUIRED SOURCES OF "CLEARLY ESTABLISHED LAW" FOR QUALIFIED IMMUNITY ANALYSIS.

The Ninth Circuit below erred not only by failing to consider the particular circumstances confronting Deputy Marquardt but also by relying on one inapposite Ninth Circuit decision as the source of clearly established law. "To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent." *Wesby*, 138 S. Ct. at 589–90 (internal quotation marks and citations omitted). To supply that foundation, the Court has repeatedly "stressed the need to 'identify a case where an officer acting under similar circumstances was held to have violated'" a constitutional right. *City of Escondido*, 139 S. Ct. at 504 (quoting *Wesby*, 138 S. Ct. at 582, and *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam)).[5] And the Court has repeatedly reversed lower court decisions purporting to identify clearly established law by citing a single prior decision with starkly different facts. *City of Escondido*, 139 S. Ct. at 502; *Wesby*, 138 S. Ct. at 581; *Carroll*, 135 S. Ct. at 350. The one case identified by the Ninth Circuit, *Felix*, 939 F.2d 699, involved dramatically different circumstances from those of this case, and the Ninth Circuit's reliance

[5] *Cf. Hope v. Pelzer*, 536 U.S. 730, 753 (2002) ("Certain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address materially similar conduct.") (internal quotation marks omitted).

on that case accordingly conflicts with this Court's precedent.

Felix involved a San Quentin prison guard who "deliberately spat on the floor" that Felix, a lone inmate, was mopping and ordered him to clean it up. *Id.* at 700. When Felix refused, the guard handcuffed him and pushed him into a wall. *Id.* Then the guard took him to the sergeant's office while "verbally assault[ing] Felix with insults and threaten[ing] to take Felix's job away." *Id*. The guard told the sergeant that Felix was refusing to work. *Id.* When Felix disputed the guard's account, the guard "threw the handcuffed prisoner . . . into the wall . . . seven to nine feet away." *Id.* Felix not only suffered physical and emotional injuries but also quit his job out of fear of the guards. *Id*. at 701.

The differences between *Felix* and this case "leap from the page." *Kisela*, 138 S. Ct. at 1154 (quoting *Sheehan*, 135 S. Ct. at 1776). Deputy Marquardt is not alleged to have done anything as provocative and humiliating as spitting on the floor and telling Mr. Fletcher to clean it up. Deputy Marquardt just asked Mr. Fletcher what he was doing near Cell 841, in apparent violation of the jail's rules. ER 205, 206. In further contrast to the guard in *Felix*, Deputy Marquardt did not use unjustified physical force. Deputy Marquardt executed the physical takedown of Mr. Fletcher and, after the takedown, struck Mr. Fletcher once to stop his resistance to being handcuffed. ER 319, 354–55. Both measures were taken in accordance with standard training (ER 319–20) and in the objectively reasonable belief that they were appropriate responses

to a situation of escalating danger. The court in *Felix* distinguished the case before it from ones in which "the prisoners were either violating prison rules or the guards were acting on a reasonable . . . belief that the prisoner posed a security threat." 939 F.2d at 702. This case involved both circumstances found to be absent in *Felix*.

And so, "even if a controlling circuit precedent could constitute clearly established federal law in these circumstances, it does not do so here." *Sheehan*, 135 S. Ct. at 1776 (internal quotation marks and citation omitted). The facts and law of *Felix* are too different to "move [this] case beyond the otherwise 'hazy border between excessive and acceptable force'" so as to put every reasonable correctional officer who read the *Felix* decision on notice that the use of force in the present case would be unlawful. *Kisela*, 138 S. Ct. at 1153 (quoting *Mullenix*, 136 S. Ct. at 312). The *Felix* decision thus did not give Deputy Marquardt the "fair notice" required by this Court's precedent. *E.g.*, *Kisela*, 138 S. Ct. at 1152; *Mullenix*, 136 S. Ct. at 314; *Sheehan*, 135 S. Ct. at 1777.

III. FURTHER REVIEW IS WARRANTED TO RESOLVE WHETHER CIRCUIT PRECEDENT CAN "CLEARLY ESTABLISH" THE LAW FOR QUALIFIED IMMUNITY PURPOSES.

As discussed above, the Ninth Circuit relied solely on one 1991 Ninth Circuit decision as the source of

clearly established law for conduct that occurred in 2013. That precedent, however, squarely conflicted in relevant part with precedent in other circuits, a square conflict that this Court recognized and resolved in 2015. This case thus presents an important question that this Court has flagged but not resolved: whether "a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals." *Taylor*, 135 S. Ct. at 2045. Further review is warranted here to answer "no" to that question, and to the related question, which this Court has also reserved, whether, even in the absence of disagreement, circuit precedent alone can "constitute clearly established federal law." *Sheehan*, 135 S. Ct. at 1776; *Carroll*, 135 S. Ct. at 350; *Reichle*, 566 U.S. at 665–66.

The decision on which the Ninth Circuit relied below, *Felix*, concerned an excessive force claim asserted by a post-conviction inmate. 939 F.2d at 700. The Ninth Circuit in *Felix* applied an Eighth Amendment standard to the claim. *Id*. at 702. When the present case arose in August 2013, the Ninth Circuit applied a standard modeled on the Eighth Amendment to excessive force claims asserted by pretrial inmates under the Due Process Clause. *See Young v. Wolfe*, 478 F. Appx. 354, 356 (9th Cir. 2012). In contrast, other circuits applied a standard modeled on the Fourth Amendment to pretrial detainees' excessive force claims. *See Kingsley*, 135 S. Ct. at 2472 (citing *Young*, *supra*, as evidence of "disagreement among the Circuits" on this issue). This Court granted certiorari in *Kingsley* to resolve this conflict among the circuits and,

contrary to the Ninth Circuit, adopted a standard modeled on the Fourth Amendment. *Id.* at 2473–76.

The upshot is that *Felix* did not represent the law, much less "clearly established" law, when this case arose in August 2013. At that time, it had not been "established" that *Felix*'s Eighth Amendment standard applied to excessive force claims by pretrial inmates; that was the subject of the circuit split that prompted the grant of certiorari in *Kingsley*. And the Court's 2015 decision in *Kingsley* established that the true law was—and always had been—contrary to that applied by the Ninth Circuit. *Cf. Danforth v. Minnesota*, 552 U.S. 264, 271 (2008) ("[T]he source of a 'new' rule is the Constitution itself, not any judicial power to create new rules. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule.").

The present case thus vividly illustrates why circuit precedent cannot be the source of "clearly established" law when it disagrees with the law in other circuits. And although this Court has seemingly reserved the issue, its decisions strongly suggest that, indeed, circuit precedent cannot clearly establish the law when it conflicts with that of other lower courts. The relevant decisions include *Pearson v. Callahan*, 555 U.S. 223 (2009), and *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam).

In *Pearson*, the Tenth Circuit held that the defendants' conduct violated law that was clearly established by (1) general principles of Fourth Amendment law enunciated by this Court; and (2) Tenth Circuit

precedent that bore some factual resemblance to the case before it. *See Callahan v. Millard Cnty.*, 494 F.3d 891, 898–99 (10th Cir. 2007) (discussing decisions from other circuits recognizing an exception to the Fourth Amendment but disregarding them because "[t]he creation of an additional exception by another circuit would not make the right defined by our holdings any less clear"), *rev'd sub nom. Pearson v. Callahan*, 555 U.S. 223 (2009). This Court reversed the Tenth Circuit, holding that the defendants were entitled to qualified immunity in light of decisions from other federal circuits and from two state supreme courts. *Pearson*, 555 U.S. at 244–45. Thus, Tenth Circuit precedent could not carry the day in light of conflicting precedent from other circuits (and state courts).

In *Stanton*, this Court rejected an approach by the Ninth Circuit similar to the Tenth Circuit's in *Pearson*. There, the Ninth Circuit held that a police officer violated clearly established law when he entered the plaintiff's fenced yard in hot pursuit of someone suspected of a misdemeanor. *Stanton*, 571 U.S. at 5. The Ninth Circuit consulted this Court's precedent and its own to determine whether the law was clearly established. *See Sims v. Stanton*, 706 F.3d 954, 964 (9th Cir. 2012) (en banc), *rev'd*, 571 U.S. 3. This Court reversed, holding that the Ninth Circuit had misread this Court's precedent, and observing that "federal and state courts nationwide are sharply divided on the question" as to which the Ninth Circuit had found the law "clearly established." *Stanton*, 571 U.S. at 5–10. The Court found Ninth Circuit precedent less clear

than the Ninth Circuit believed, but in any event the Court rejected reliance on circuit precedent partly because, as in *Pearson*, it conflicted with decisions in other circuits. *Id.* at 10.

This Court's rejection in *Pearson* and *Stanton* of lower courts' reliance on precedent of their own that conflicted with that of other lower courts reflects a fundamental principle of qualified immunity law: For a right to be clearly established, "existing precedent must have placed the lawfulness of the particular [action] *beyond debate*." *City of Escondido*, 139 S. Ct. at 504 (emphasis added) (quoting *Wesby*, 138 S. Ct. at 589). *Accord*, *e.g.*, *Kisela*, 138 S. Ct. at 1152; *White v. Pauly*, 137 S. Ct. at 551. When decisions in other circuits or state appellate courts conflict with the circuit precedent that supposedly clearly establishes the law, the matter is not "beyond debate." In that situation, circuit precedent cannot "clearly establish" the law. *Cf. Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

We would argue that even controlling circuit precedent that *accords* with that of other lower courts cannot clearly establish the law, nor can a "robust consensus" of lower court precedent. We recognize that the Court suggested otherwise in *Wesby* when it said that a rule has a "sufficiently clear foundation" if it "is dictated by 'controlling authority' or 'a robust "consensus of cases of persuasive authority."'" 138 S. Ct. at 589–90 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741–42

(2011)) (quoting *Wilson*, 526 U.S. at 617). The Court's opinion in *al-Kidd* contained a similar suggestion. 563 U.S. at 741–42. But in neither case was it necessary for the Court to decide whether something more than a "controlling authority" or "robust consensus" is required to clearly establish the law. *See Wesby*, 138 S. Ct. at 591 ("[N]either the panel majority [below] nor the [plaintiffs] have identified a single precedent—much less a controlling case or robust consensus of cases—finding a [constitutional] violation under similar circumstances."); *al-Kidd*, 563 U.S. at 741–42 (holding that plaintiff did not identify any controlling authority and fell "far short" of identifying "a robust consensus of cases of persuasive authority") (internal quotation marks omitted). In three other cases, moreover, the Court has treated this as an open question. *Taylor*, 135 S. Ct. at 2044; *Sheehan*, 135 S. Ct. at 1779; *Reichle*, 566 U.S. at 665–66; *see also Plumhoff*, 572 U.S. at 780 (requiring plaintiff "*at a minimum*" to show that the right was established by "controlling authority" or "robust consensus" of lower court precedent) (emphasis added).

This Court's own practice demonstrates that, aside from the text of the Constitution and federal statutes, only this Court's precedent can clearly establish federal law. A common—if not the most common—reason this Court grants further review is to establish the law clearly by resolving disagreements among lower courts. *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 243 (10th ed. 2017). And this Court often decides cases contrary to "controlling authority" in

all or most federal circuits. *See*, *e.g.*, *American Legion v. Am. Humanist Ass'n*, ___ S. Ct. ___, ___, 2019 WL 2527471, at *33 (June 20, 2019) (Ginsburg, J., dissenting) (stating that majority's decision was contrary to that of "[e]very Court of Appeals to confront the question"); *Carpenter v. United States*, 138 S. Ct. 2206, 2227 (2018) (Kennedy, J., dissenting) (same); *id.* at 2236 (Thomas, J., dissenting); *see also Pereira v. Sessions*, 138 S. Ct. 2105, 2128 (2018) (Alito, J., dissenting) (disputing statutory interpretation that majority found "obvious," and stating "what the Court finds so obvious somehow managed to elude every Court of Appeals to consider the question save one"); *Beckles v. United States*, 137 S. Ct. 886, 902 (2017) (Sotomayor, concurring in the judgment) ("The majority . . . upends the law of nearly every Court of Appeals to have considered this question.") (footnote omitted). "Indeed, it has become something of a dissenter's tactic to point out that the Court has decided a question differently than every court of appeals to have considered it." *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 471 (2008) (Thomas, J., dissenting). Under these circumstances, it is simply untenable to hold that circuit precedent can clearly establish law. *See Spady v. Bethlehem Area Sch. Dist.*, 800 F.3d 633, 635–36 (3d Cir. 2015) ("In order for a right to be clearly established there must be applicable precedent from the Supreme Court.").

This is an appropriate case in which to decide whether controlling circuit precedent can clearly establish the law for purposes of qualified immunity. For one thing, the Ninth Circuit's reliance below on a

single case from that circuit for clearly established law is not an aberration. To the contrary, the Ninth Circuit takes the position that "if the right is clearly established by decision authority of the Supreme Court *or* of this Circuit, our inquiry should come to an end." *Carillo v. Cnty. of Los Angeles*, 798 F.3d 1210, 1222–23 (9th Cir. 2015) (emphasis added) (internal quotation marks omitted). For another thing, there can be no question that this case presents the sort of "disagreement in the courts of appeals" to which this Court referred in *Taylor*, 135 S. Ct. at 2045, since this Court acknowledged the disagreement in *Kingsley*, 135 S. Ct. at 2472. Finally, as discussed below, further review enables correction of a decision by the Ninth Circuit that, by treating Respondent's conduct as "compliant" (App. 2), endangers guards and inmates in the Ninth Circuit.

IV. THE QUESTIONS PRESENTED HAVE EXCEPTIONAL IMPORTANCE.

A. The Conflict between the Decision Below and this Court's Qualified Immunity Precedent Has Exceptional Importance.

This Court has regularly decided cases in which defendants invoke qualified immunity against claims of excessive force asserted under the Fourth Amendment.[6] This case presents the qualified immunity issue

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[6] *E.g.*, *City of Escondido*, 139 S. Ct. 500; *Kisela*, 138 S. Ct. 1148; *Wesby*, 138 S. Ct. 577; *Pauly*, 137 S. Ct. 548; *Mullenix*, 136 S. Ct. 305; *Sheehan*, 135 S. Ct. 1765; *Carroll*, 574 U.S. 13; *Plumhoff*, 572 U.S. 765; *Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam); *see also Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (per

in a different but equally important context: namely, a claim of excessive force asserted under the Due Process Clause by a pretrial detainee. The Court addressed that context in *Kingsley*, adopting a standard of objective reasonableness like that governing excessive force claims under the Fourth Amendment. 135 S. Ct. at 2473–75. Yet excessive force claims under the Fourth Amendment, often asserted by arrestees, typically present quite different circumstances from excessive force claims asserted under the Due Process Clause by pretrial detainees. The Ninth Circuit's decision below shows the need for guidance in the latter context.

This Court said in *Kingsley* that one circumstance potentially bearing on "the reasonableness or unreasonableness of the force used" is "whether the plaintiff was actively resisting." 135 S. Ct. at 2473. The Court cited *Graham v. Connor*, a Fourth Amendment case in which the Court identified, among other circumstances relevant to assessing excessive-force claims, "whether [the plaintiff] [wa]s actively resisting *arrest*." 490 U.S. 386, 396 (1989) (emphasis added). But "active resistance" can take different forms, and justify different responses, in the different settings of arrest and pretrial detention. Physical force that would be objectively unreasonable if applied to someone resisting arrest might be reasonable if applied to a similarly resistant pretrial detainee.

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curiam) (qualified immunity asserted against claims under Fourth and Fifth Amendments).

This case illustrates the point. The Ninth Circuit described Mr. Fletcher as "compliant" although it is unclear how it came to this conclusion. We assume for purposes of this petition (without conceding) that the Ninth Circuit apparently believed that Mr. Fletcher did not offer *physical* resistance before Deputy Marquardt forcibly took him to the ground and hit him in the back. *See* App. 2. But both Mr. Fletcher and Deputy Marquardt agreed that Mr. Fletcher was *verbally* resisting Deputy Marquardt when, right before the takedown, Mr. Fletcher told Deputy Marquardt "Get your hands off me." ER 208, 354. The parties also agree that, after the takedown and before Deputy Marquardt hit Mr. Fletcher in the back, Mr. Fletcher was, to use his words, "yelling" to the other inmates "for help" against Deputy Marquardt. ER 206; *see also* ER 354.

Deputy Marquardt reasonably perceived Mr. Fletcher's verbal resistance as creating a situation of escalating danger. As he explained, "Allowing an inmate to argue shows weakness, threatening loss of control and increasing the risk that the situation will escalate." ER 354. That risk was heightened by Deputy Marquardt's being unarmed; watched by all of the 20 or more inmates who were out of their cells on "out time"; and backed-up by only one other unarmed guard who, at the time of the incident, was on a different tier of the cell block. These circumstances justified physical force that accorded with Deputy Marquardt's training, whether or not the same degree of physical force would be justified in an arrest situation. *Cf. Tolan v. Cotton*, 572 U.S. 650, 653 (2014) (stating that Tolan was shot

by police officers after exclaiming to police officers, "[G]et your fucking hands off my mom"; and reversing summary judgment in favor of defendant officer).

In addition to often being factually distinct, the situations of arrest and pretrial detention are legally distinct in two ways. First, a pretrial detainee "simply does not possess the full range of freedoms of an unincarcerated individual." *Bell v. Wolfish*, 441 U.S. 520, 546 (1979). Second, and relatedly, the detainee's freedoms are restricted by "the legitimate goals and policies of the penal institution." *Id*. A goal of overarching importance for correctional facilities is the safety of guards and inmates. *Id.* at 546–47. Correctional officers are injured by assaults and violent acts at a much higher rate than the general population.[7] Inmates, too, are endangered when guards allow inmate violence to occur.[8] *See also* ER 203. The danger is even higher in jails than in prisons, as this Court has recognized.

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[7] Srinivas Konda, Hope Tiesman, Audrey Reichard & Dan Hartley, *U.S. Correctional Officers Killed or Injured on the Job*, 75 Correct Today 122 (2013) ("Of all U.S. workers, correctional officers have one of the highest rates of non-fatal, work-related injuries," with a large portion "due to assaults and violent acts."). At least 113 correctional officers were killed on the job between 1999 and 2008. *Id.*, Table 1.

[8] *See* Hung-En Sung, *Nonfatal Violence-Related and Accident-Related Injuries Among Jail Inmates in the United States*, 90 Prison J. 353 (2010); *see also* Laura M. Maruschak, U.S. Dep't of Justice Bureau of Justice Statistics, *Medical Problems of Prisoners*, NCJ 221740, Table 6 (2008) (reporting that 15.9% of state inmates reporting fight-related injuries since admission), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=1097 (visited June 30, 2019).

Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 336 (2012) ("Jails can be even more dangerous than prisons because officials there know so little about the people they admit at the outset."); *id.* at 334 ("People detained for minor offenses can turn out to be the most devious and dangerous criminals."); *see also* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1686–87 (2003) (explaining why "jails are more dangerous than prisons").[9]

In sum, far from acting excessively or in violation of clearly established rights, Deputy Marquardt acted responsibly when he took down the verbally resistant Mr. Fletcher and hit him once to stop his resistance to handcuffing. The Ninth Circuit erred by treating Mr. Fletcher's verbal resistance as "complian[ce]." App. 2. Jails are dangerous enough places without the seeming encouragement given by the decision below to verbal resistance—including entreaties for intervention by fellow inmates—to guards' efforts to enforce jail rules.

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[9] A major factor contributing to the dangerous conditions is the large portion of inmates, including pretrial detainees, who suffer serious mental illness. *See*, *e.g.*, Henry J. Steadman, Fred C. Osher, Pamela Clark Robbins, Brian Case, and Steven Samuels, *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 Psychiatric Servs. 761 (2009); Linda A. Teplin, *Psychiatric and Substance Abuse Disorders among Male Urban Jail Detainees*, 84 Am. J. Pub. Health 290 (1994). *See generally Human Rights at Home: Mental Illness in U.S. Prisons and Jails: Hearing Before the Subcomm. in Human Rights and the Law of the S. Comm. on the Judiciary*, 111th Cong. (2009).

B. The Question Whether Controlling Circuit Precedent Can Clearly Establish the Law Has Exceptional Importance.

The doctrine of qualified immunity furnishes a crucial defense in suits against state and local officials under 42 U.S.C. § 1983 and in suits against federal officials under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *See Wilson*, 526 U.S. at 609 (stating that "the qualified immunity analysis is identical under either cause of action"). The defense may be asserted by a wide variety of executive-branch officials[10] against a wide range of constitutional and statutory claims.[11] In all of these settings, the doctrine serves a vital function "by balanc[ing] two

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[10] *E.g.*, *Hernandez v. Mesa*, 137 S. Ct. 2003, 2004 (2017) (per curiam) (Border Patrol agent); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1851 (2017) (three high-level officials in the U.S. Department of Justice and wardens at federal correctional facilities); *Wood v. Moss*, 572 U.S. 744, 747 (2014) (Secret Service agents); *Lane v. Franks*, 573 U.S. 228, 233–34 (2014) (president of statewide program for underprivileged youth); *Filarsky v. Delia*, 566 U.S. 377, 380 (2012) (attorney retained by a city). *See generally Procunier v. Navarette*, 434 U.S. 555, 561 (1978) (noting that qualified immunity "is available to a state Governor, a president of a state university, and officers and members of a state National Guard [as well as] local board members . . . the superintendent of a state hospital . . . [and] policemen").

[11] *E.g.*, *Sause v. Bauer*, 138 S. Ct. 2561, 2562 (2018) (per curiam) (Free Exercise Clause and Fourth Amendment); *Ziglar*, 137 S. Ct. at 1853–54 (various constitutional claims and criminal conspiracy claim under 42 U.S.C. § 1985(3)); *Taylor*, 135 S. Ct. at 2044 (Eighth Amendment Cruel and Unusual Punishment Clause); *Lane*, 573 U.S. at 231 (First Amendment Free Speech Clause); *Forrester v. White*, 484 U.S. 538, 540-41 (1988) (Equal Protection Clause).

important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231; *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). In light of the doctrine's importance, the Court regularly grants certiorari to review important issues concerning its scope and proper analysis.

This case presents those issues in a setting—that of an excessive-force claim by a pretrial inmate—for which this Court established the applicable standard only in the recent 2015 *Kingsley* case. 136 S. Ct. at 2472–76. Furthermore, this case poses the specific question, applicable in all settings, of whether controlling circuit precedent can clearly establish the law. This sources-of-law question is often outcome-determinative.

Again, this case illustrates the point. When this case arose in August 2013, the law on the standard governing excessive-force claims by pretrial inmates had not yet been clearly established by this Court. Although Petitioner contends that he cannot be held liable under either of the competing standards, the standard matters and the conflict among the circuits on the proper standard likely was producing different outcomes in different circuits. If this Court holds, as Petitioner argues, that federal law can be clearly established only by the text of the Constitution and federal statutes and the decisions of this Court, that holding will enable "clearly established law" to be

uniform throughout the country. That uniformity is impossible under the Ninth Circuit's approach, which allows "clearly established law" to vary in different parts of the country.

Finally, as a practical matter, the sources-of-law issue controls whether diligent officials acting in good faith can safely rely on constitutional and statutory text and this Court's precedent to determine their responsibilities under federal law, or must instead scour and scrutinize lower court precedent as if they were legal scholars.

V. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR FURTHER REVIEW.

This is a factually straightforward case in which no legal barriers hinder further review.

The facts make this a highly suitable vehicle. They are simple and in relevant part undisputed: A jail guard confronted an inmate about an apparent violation of the jail's rules; forcibly took down the inmate when he became verbally resistant; and hit the inmate once in the back to end his resistance to handcuffing. The facts are not only simple but common. We dare say that confrontations of this sort between guards and inmates occur many times every day in the United States. It would be useful for this Court to confirm that no clearly established law categorically bars the use of minimal physical force against dangerously disruptive inmates. Confirmation would support the safety of

guards and inmates who live in one of the biggest circuits in the United States.[12]

This case is in a proper posture for further review. The judgment below is final. *See Plumhoff*, 572 U.S. at 772; *Behrens*, 516 U.S. at 312–13. Moreover, the qualified immunity issues were fully aired below, including in the petition for rehearing. App. 40–44.

[12] In 2017, city and county jails had a population of about 482,000 pretrial detainees. Zhen Zeng, U.S. Dep't of Justice, Bureau of Justice Statistics, *Jail Inmates in 2017*, NCJ 251744, at 1 (Apr. 2019) (reporting that city and county jails had a total population of 745,200, with a correctional officer to inmate ratio of 4.2 to 1, and about 482,000 "confined inmates . . . awaiting court action on a current charge"), https://www.bjs.gov/index.cfm?ty=tp&tid=12 (visited June 13, 2019). California alone is reported to have had about 50,000 "inmates awaiting trial or sentencing" in 2014. Sonya Tafoya, Public Policy Institute of California, *Pretrial Detention and Jail Capacity in California* (Apr. 2015), https://www.ppic.org/publication/pretrial-detention-and-jail-capacity-in-california/ (visited June 13, 2019). These numbers do not capture the much larger number of people who flow through these jails. The flow-through number is better captured by the number of jail admissions, which stood at 10.6 million people in 2017, who spent an average of about 25 days in jail. *Jail Inmates in 2017*, *supra*, at p. 2, Table 1, p. 8, Table 8. City and county jails employed about 180,000 correctional officers in 2017 to guard this large and constantly changing flow of people. *Jail Inmates in 2017*, *supra*, at p. 9, Table 10. Federal correctional facilities housed an additional population of more than 76,000 pretrial detainees in 2010. Thomas H. Cohen, U.S. Dep't of Justice, Bureau of Justice Statistics, *Special Report: Pretrial Detention and Misconduct in Federal District Courts, 1995-2010*, NCJ 239673, at 3 (Feb. 2013), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4595 (visited June 13, 2019).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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