No. 19-76

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

While Respondent William Fletcher was in pretrial detention at the Ada County jail, Petitioner Deputy Martin Marquardt approached Fletcher and began interrogating him. Marquardt then instructed Fletcher to enter another detainee's cell, out of view of the jail's video cameras. Once inside the cell, Marquardt immediately grabbed Fletcher's arms and struck him in the leg, causing Fletcher to slam into the cell floor chest-first. Marquardt sat on Fletcher, handcuffed him, told him to "shut up," and punched him in the back near the spine. Fletcher sustained a chest contusion, bruised wrists, and other injuries as a result.

The district court denied Marquardt's motion for summary judgment on qualified immunity. The U.S. Court of Appeals for the Ninth Circuit affirmed on interlocutory appeal.

1. Whether the Court of Appeals correctly held that petitioner is not entitled to summary judgment on qualified immunity because "[t]he law is clearly established that a reasonable correctional officer cannot administer strong blows upon a compliant pretrial detainee."

2. Whether the Court of Appeals correctly based its determination regarding "clearly established" law on *Felix v. McCarthy*, 939 F.2d 699 (9th Cir. 1991).

3. Whether a right can be clearly established by circuit precedent.

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STATEMENT OF THE CASE

I. Introduction

This case involves a jail deputy's assault on an individual who was in pretrial detention. The material details of the assault are in genuine dispute, as the district court and the appellate court found. Although on the petition's telling of the facts, William Fletcher provoked Deputy Marquardt's assault by violating jail rules, ignoring instructions, physically resisting handcuffing, and creating a situation of escalating danger, that story depends entirely on Marquardt's own testimony and ignores contrary testimony from Fletcher. As the lower courts concluded, a jury viewing the facts in the light most favorable to Fletcher could discredit Marquardt's version of events and instead believe Fletcher's testimony. Fletcher testified that he did not violate any rules, complied with Marquardt's instructions, and did not resist when Marquardt restrained him in handcuffs. The first and second questions presented by the petition amount to requests for error correction that are, on Fletcher's view of the facts, meritless, and in any case do not warrant review by this Court.

Petitioner raises the third question presented, apparently sensing that the Court is interested in whether a legal point can be clearly established where there is discord among the courts of appeals on that point. But that issue was not raised or ruled upon below and is therefore waived. Even if it had not been waived, the question is not, in fact, raised by this case

because there is no material disagreement among the circuit courts that would affect the disposition.

II. Facts[1]

Between May and November of 2013, William Fletcher was a pretrial detainee in custody at the Ada County jail in Idaho. Excerpts of Record (ER) 203. Fletcher was housed in a cell located off of the jail's second-level tier, or hallway. ER 204, 207.

On August 7, 2013, during "out time," when inmates are permitted to leave their cells to shower, use the day room, retrieve supplies to clean their cells, and make phone calls, ER 204, 207, Fletcher walked down the second-level tier to another inmate's cell and, standing outside of that cell, asked to use cleaning supplies that the inmates shared.[2] ER 204, 205. Fletcher then moved back toward the stairs to use the downstairs showers. ER 208.

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[1] The facts are presented in the light most favorable to Fletcher, because this case is on interlocutory appeal from the denial of petitioner's motion for summary judgment.

[2] The petition claims that "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. . . . That area was accordingly off-limits to Mr. Fletcher under the jail's rules." Pet. 5. This fact is disputed, given Fletcher's testimony that inmates were permitted to obtain cleaning supplies from other inmates during out time. ER 204.

Before Fletcher reached the stairs, Deputy Marquardt stopped Fletcher and asked why Fletcher had been near someone else's cell. ER 205. Marquardt was "angry" and yelling, and Fletcher feared that "something bad was about to happen." ER 205. Fletcher responded that he had asked another detainee for the communal cleaning supplies. ER 205. In providing this response to Marquardt's question, Fletcher's demeanor was compliant, ER 205 at 67:3 ("I was just doing what I was told."); he did not raise his voice or his arms. ER 205, 206.[3]

Marquardt instructed Fletcher to move off of the tier, out of view of the jail's video cameras, into a cell that was not Fletcher's. ER 205. Fletcher complied. ER 204, 206; Video 1 at 17:08:24. Fletcher asked why Marquardt was instructing him to enter someone else's cell, against jail rules. ER 204, 206. Marquardt then asked Fletcher why he had an attitude and immediately knocked Fletcher to the ground by grabbing Fletcher's arms and kicking his legs out from under him. ER 205, 206. Unable to break his fall with his arms, Fletcher's chest hit the floor with such force that the wind was knocked out of him. ER 206, 377 ¶ D. Marquardt had not given Fletcher any additional instructions after they entered the cell, before taking

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[3] The petition claims that, at this point, Fletcher "became argumentative and was causing a disturbance." Pet. 5–6; *see also* Pet. 6 ("Mr. Fletcher did not deny in his deposition that he grew argumentative when Deputy Marquardt questioned him about being near Cell 841."). This fact is disputed by Fletcher's testimony that he was doing what he was told, and did not raise his voice or his arms.

Fletcher down. ER 205 at 69:14–16 ("Q. Did he give you any instructions when you went into the cell? A. No. I didn't hear no instruction."), 206 at 71:8–13 ("Q. So there was no instructions [sic] to face the wall, that you recall? A. No. Q. And did he attempt to face you towards the wall, that you recall? A. No.").[4]

Marquardt then sat on Fletcher's back, using his full body weight to pin Fletcher to the ground. ER 206. While sitting on Fletcher, Marquardt handcuffed one of Fletcher's wrists. ER 206. Fletcher said that he would sue Marquardt for "putting his hands" on Fletcher "unlawfully." ER 206.

Marquardt told Fletcher to "shut up" and punched Fletcher in the back near Fletcher's spine with his fist or a hard object. ER 206, 377 ¶ D. Marquardt finished handcuffing Fletcher after delivering the blow. ER 206. Fletcher did not resist Marquardt's attempt to handcuff him. ER 206 at 73:15–19 ("Q. Did you try to get up at all? A. No. I wasn't moving. I couldn't move. He was

[4] The petition claims that "Deputy Marquardt recounted in his affidavit, 'I told him to turn and face the wall of the cell, but he ignored my directions.'" Pet. 7. Again, this fact is disputed by Fletcher's testimony.

on my back. Q. Where were your hands? A. He had my hands."); *see also* Video 1 at 17:08:35–46.[5, 6]

Marquardt called another sheriff's deputy, Deputy Losh, to the cell. ER 206. Three other deputies also appeared on the scene almost immediately.[7] *See* Video 1 at 17:09:31; Video 2 at 17:09:33. Marquardt and Losh picked Fletcher up off of the floor and led him down the stairs. ER 207. Once Marquardt, Losh, and Fletcher reached the bottom of the stairs, Marquardt turned

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[5] The petition claims that "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.'. . . . Mr. Fletcher did not deny that he physically and verbally resisted being handcuffed." Pet. 8; *see also id.* ("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.' "). Again, Marquardt's testimony that Fletcher resisted restraint is contradicted by Fletcher's. And the petition's characterization of Fletcher's testimony is inaccurate, given that Fletcher testified that he did not try to get up, he was not moving while he was being handcuffed, and petitioner had control of Fletcher's hands.

[6] The petition incorrectly claims that "[b]oth parties further agree that, as the takedown occurred, Mr. Fletcher was—to use his words—'yelling for help' to the other inmates." Pet. 8. Although Fletcher did scream for help when Marquardt slammed him to the ground and struck him in the back, there is no evidence in the record regarding to *whom* (if anyone) Fletcher was directing his screams. There is no evidence that he was urging *other inmates*—as opposed to jail personnel—to assist him, as the petition claims.

[7] The petition claims that "Deputy Marquardt was one of only two officers" in the vicinity. Pet. 16. This fact is in dispute given the record evidence that three more officers appeared on the scene almost immediately after petitioner took down Fletcher.

Fletcher backwards and placed him in a control hold that restricted Fletcher's airway. ER 207. Although Fletcher told the deputies that he was struggling to breathe, Marquardt did not loosen his hold. ER 207. Marquardt used the hold to move Fletcher backward until they reached a holding cell, where Marquardt removed the handcuffs. ER 207.

Marquardt's actions caused Fletcher to suffer a chest contusion, bruised wrists, chest pain, back pain, and migraine headaches, as well as paranoia and emotional distress. ER 208, 233.[8] Although Fletcher declined to see a nurse immediately following the incident because he was too upset, ER 208, he asked for medical assistance late that same night, complaining of a headache and chest and back pain. ER 209, 222, 225, 227, 230–31. Fletcher sought further medical assistance over the following days. *See* ER 220, 222, 225, 227, 230–31, 233–34. He was determined to have suffered a chest wall contusion, ER 233, 236, and was treated for back, wrist, and chest pain. *See* ER 220, 222, 225, 227, 230–31, 233–34.

III. Proceedings below

A. District Court

On February 2, 2015, Fletcher filed a *pro se* suit under 42 U.S.C. § 1983. ER 384–402. He alleged constitutional claims for excessive force against Deputy

[8] The petition claims that Fletcher suffered "no visible injuries." Pet. 1, 2. This fact is in dispute in light of the record evidence that Fletcher had a chest contusion and bruising on his wrists.

Marquardt and Deputy Losh. ER 376–83. The district court dismissed Losh. ER 28–29. Marquardt moved for summary judgment, arguing that he was entitled to qualified immunity. ER 175–362.

The district court denied the motion. Pet. App. 3–29. In its order, the court first correctly noted that "[t]he evidence must be viewed in the light most favorable to the non-moving party," and that the court "must not make credibility findings." *Id.* at 6. It then found that "the parties' accounts of the incident diverge in nearly every respect," *id.* at 12, resulting in "a classic 'he-said-he-said' situation of opposing narratives incapable of resolution as a matter of law, especially when the evidence must be viewed in Mr. Fletcher's favor as the non-moving party." *Id.* at 27. The court reasoned that the facts were similar to the facts in a case in which an officer was denied qualified immunity because there was a dispute as to whether the plaintiff "was physically resisting the officers[]." *Id.* (citing *McDowell v. Jefferson Cty.*, 2017 WL 241319, at *5 (D. Idaho Jan. 18, 2017)).

The court concluded that "summary judgment [wa]s inappropriate" because, "[c]onstruing [the] disputed facts in Mr. Fletcher's favor, as must be done in this motion context, a jury could believe that Deputy Marquardt used excessive force in violation of a constitutional right that was clearly established." Pet. App. 28. Having determined that "material and disputed issues of fact . . . preclude the entry of summary judgment in Deputy Marquardt's favor," the district court ruled for Fletcher and denied the motion. *Id.* at 29.

Marquardt filed an interlocutory appeal. ER 59–60.

B. Court of Appeals

The Ninth Circuit affirmed in an unpublished memorandum decision. Pet. App. 1–2. The court concluded, first, that "[t]he 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." Pet. App. 2. The record presented "material dispute[s] of fact" on the issues of (1) "whether Marquardt gave Fletcher instructions before striking him,"[9] and (2) "Fletcher's subjective complaints of pain from the blows." Pet. App. 2. The court advised petitioner that "[t]hese disputes cannot be reconciled by simply adopting Marquardt's contentions," as petitioner had urged the court to do. Pet. App. 2.

Citing *Felix v. McCarthy*, 939 F.2d 699 (9th Cir. 1991), the panel then determined that "[t]he law is clearly established that a reasonable correctional

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[9] Petitioner misreads the appellate court's decision and the record when he contends that "[i]t seems most likely . . . that the Ninth Circuit meant [only] the leg strike" because "Fletcher did not deny that after the takedown he ignored Deputy Marquardt's commands to stop resisting being handcuffed." Pet. 12–13 & n.4. The Ninth Circuit was referring to both strikes—the leg strike and the punch in the spine—because Fletcher *did* deny Marquardt's allegations that he was resisting handcuffs. ER 206 at 73:15–25 ("Q. Did you try to get up at all? A. No. I wasn't moving. I couldn't move. He was on my back. Q. Where were your hands? A. He had my hands."); *see also* Video 1 at 17:08:35–46.

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." Pet. App. 2. Reasoning that the evidence "[v]iew[ed] . . . in the light most favorable to Fletcher" showed that "Fletcher was compliant and did not provoke Marquardt," the appellate court concluded that the district court was correct to deny Marquardt's motion for summary judgment based on qualified immunity. Pet. App. 2.

Marquardt petitioned for rehearing; the panel unanimously voted to deny that petition. Pet. App. 30. Marquardt petitioned for *en banc* rehearing; the Ninth Circuit denied *en banc* rehearing, after no judge requested a vote for *en banc* consideration. Pet. App. 30.

REASONS FOR DENYING THE PETITION

I. Certiorari Should Be Denied On The First And Second Questions Presented.

Viewing the record evidence in the light most favorable to Fletcher, the first and second questions presented are pleas for error correction that do not warrant review by this Court and are meritless.

A. The First And Second Questions Presented Are Premised On A Mischaracterization Of The Summary Judgment Record.

Petitioner complains that the Ninth Circuit's decision did not expressly mention five "circumstances" that petitioner claims he faced prior to and during his assault on Fletcher. Pet. 16–17 (citing *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019)). Petitioner contends that this alleged oversight was error because it "took no account of the threat posed to Deputy Marquardt when he confronted Mr. Fletcher." Pet. 18.

Not so. Nearly all of the "circumstances" petitioner identifies are disputed. Because petitioner seeks summary judgment, the Court of Appeals could not adopt petitioner's disputed version of the facts. *See*, *e.g.*, *City and Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1769 (2015). Indeed, the Ninth Circuit acknowledged that petitioner "contends" that Fletcher "was argumentative," was "noncompliant with instructions," and "actively resisted"—the key "circumstances" that petitioner now complains were overlooked by the lower court. Pet. App. 2. But that court correctly concluded that disputes of fact about such circumstances exist and "cannot be reconciled by simply adopting Marquardt's contentions." *Id.* Of the "circumstances" that petitioner says the lower court "did not analyze," Pet. 17, the following are in dispute:

- Whether Fletcher complied with Marquardt's instruction to move into a cell.

- Whether Fletcher was "resistan[t] to handcuffing." *See supra* p. 5 and note 5.
- Whether Fletcher had violated any jail rules. *See supra* p. 3 and note 2.
- Whether Marquardt was one of only two officers in the vicinity of the assault. *See supra* p. 6 and note 7.
- Whether Fletcher started arguing with Marquardt about whether Fletcher had an attitude. *See supra* p. 4.
- Whether Fletcher was yelling for help to the other inmates. *See supra* note 6.

Additionally, several of the "circumstances" now identified by petitioner as material were not so identified in his briefing below. Specifically, only before this Court does petitioner claim it matters that "at-large inmates stopped what they were doing to watch," or that Fletcher asked petitioner why he was instructing Fletcher to move into another detainee's cell. Pet. 16; *see* Appellant's Opening Brief at 6–7, *Fletcher v. Marquardt*, 753 F. App'x 449 (9th Cir. 2019) (No. 17-35862), ECF No. 18 (failing to mention that other inmates were watching the interaction), *id*. at 15 (describing purported "threat" to petitioner, without mentioning that other inmates were watching or that Fletcher asked why they were entering another detainee's cell).

The Ninth Circuit's analysis was proper. A trial is necessary to resolve these disputes.

B. The First And Second Questions Merely Seek Correction Of An Allegedly Erroneous Decision.

Petitioner claims the Ninth Circuit erred by relying on *Felix v. McCarthy*, 939 F.2d 699 (9th Cir. 1991), as "clearly established law" because, according to petitioner, that case involved "starkly different facts" from this one. Pet. 19.

1. Even if true (and it is not, for reasons addressed below), this would not be a reason to grant certiorari. The Court of Appeals engaged in the proper legal analysis. It considered, first, whether the record evidence if construed in Fletcher's favor could show that his Fourteenth Amendment rights had been violated, and second, whether the law in place at the time of the relevant events clearly established that such evidence could support a constitutional violation. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) (the two steps in the qualified-immunity analysis are (1) "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right" and (2) was the "right . . . clearly established"). The Court of Appeals also applied the proper Fourteenth Amendment standard, the right "to be free from objectively unreasonable force purposely used against him." Pet. App. 2; *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) ("[A] pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable."). Petitioner alleges a "misapplication of a properly stated rule of law," which does not support a grant of certiorari. *See* Sup. Ct. R. 10.

2. In any event, *Felix* is not materially distinguishable from the present case. *See Saucier*, 533 U.S. at 202 (authority is clearly established law unless the conduct constituting a constitutional violation is "distinguishable in a fair way from the facts presented in the case at hand").

First, petitioner contends that he did not do "anything as provocative and humiliating as spitting on the floor and telling Mr. Fletcher to clean it up." Pet. 20. The spitting, however, was not material to the court's decision in *Felix*, other than to substantiate that the force had no purpose. *See* 939 F.2d at 701 (holding that the force was unconstitutional because it "falls within the description of 'strong blows . . . for no purpose' "). Nor would it go to any of the *Kingsley* factors. Consistent with *Kingsley*'s holding that the excessive-force standard applicable to pretrial detainees requires no inquiry into the officer's subjective state of mind, the *Kingsley* factors focus only on the force used and the justification for it, not on an intent to humiliate or degrade. *See* 135 S. Ct. at 2473 (factors relevant to a determination of excessive force are "the relationship between the need for the use of force and the amount of force used"; "the extent of the plaintiff's injury"; "any effort made by the officer to temper or to limit the amount of force"; "the severity of the security problem at issue"; "the threat reasonably perceived by the officer"; and "whether the plaintiff was actively resisting"); *Graham v. Connor*, 490 U.S. 386, 397 (1989) (courts determine whether actions are "objectively reasonable" without considering "underlying intent or motivation"). Whether a guard engages in "provocative"

and "humiliating" behavior before using force is therefore not a basis upon which a court could conclude that the facts of *Felix* presented a constitutional violation while the facts of this case do not.

Second, petitioner contends that this case is different from *Felix* because petitioner's use of force was not "unjustified." Pet. 20. This argument again fails for the reason that it rests on a mischaracterization of the record evidence. *See supra* Part I.A. On Fletcher's view of the facts, there was no situation of escalating danger: there was no resistance to being handcuffed, there was no violation of jail rules, and there was no security threat. In the words of the Court of Appeals, the record disputes in this case "cannot be reconciled by simply adopting Marquardt's contentions" on these issues. Pet. App. 2. When the evidence is viewed most favorably to Fletcher, petitioner's force was unjustified.

3. Petitioner's argument that the lower court's decision contravenes *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019), and *Mullenix v. Luna*, 136 S. Ct. 305 (2015), is also meritless. Petitioner's assertions that this case is like *City of Escondido* because "the Ninth Circuit's analysis consisted of one sentence" is factually false. Pet. 17. The decision is several paragraphs long. *See* Pet. App. 1–2.

Petitioner is also wrong that this case is like *Mullenix* because the lower court defined established law without taking into "account . . . 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." Pet. 18. *Mullenix* advised that a statement of law is too general when it does not account for the situation that the officer confronted. 136 S. Ct. at 309. Here, construing the record evidence in Fletcher's favor, petitioner confronted a situation of a "compliant detainee," Pet. App. 2, not one of any danger and not one involving a violation of jail rules. *See supra* Part I.A. The lower court therefore properly accounted for the situation confronted by petitioner.

II. Certiorari Should Be Denied On The Third Question Presented.

Petitioner attempts to take advantage of the fact that this Court has expressed interest in the question of whether a right can be clearly established for purposes of qualified immunity despite disagreement in the courts of appeals. *See*, *e.g.*, *Taylor v. Barkes*, 135 S. Ct. 2042, 2045 (2015) ("[a]ssuming for the sake of argument that a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals"). This case, however, is an exceptionally poor vehicle for review of that question. For one, petitioner failed to preserve it. And, in any event, there is no disagreement in the courts of appeals that would affect the outcome of the present case.

A. Petitioner Seeks Review On A Question That Was Not Raised Or Ruled Upon Below.

Although petitioner urges this Court to grant review to resolve whether a circuit precedent can "clearly establish" the law for qualified immunity purposes where other circuits are in disagreement on the law, Pet. 21–28, petitioner never argued to either of the lower courts that they may not rely upon Ninth Circuit precedent and instead were required to look only to this Court's precedent, or, at minimum, circuit precedent that does not conflict with precedent in other circuits. Appellant's Opening Brief at 4, *Fletcher v. Marquardt*, 753 F. App'x 449 (9th Cir. 2019) (No. 17-35862), ECF No. 18. Petitioner did not even raise the issue in his petition for rehearing by the Ninth Circuit *en banc*. *See generally* Pet. App. 31–47. The arguments are altogether new arguments, made for the first time before this Court.

In fact, petitioner conceded in his opening brief to the Ninth Circuit that the "inquiry" regarding "clearly established" law "begins 'by looking to binding precedent . . . of the Supreme Court *or this Circuit*. If there is not any binding precedent from the Supreme Court or the Ninth Circuit, then the court looks to state courts, other circuits, and district courts.' " Appellant's Opening Brief at 20 n.13, *Fletcher v. Marquardt*, 753 F. App'x 449 (9th Cir. 2019) (No. 17-35862), ECF No. 18 (internal citations omitted; emphasis added).

Because petitioner did not urge the lower courts to look only to Supreme Court or uniform circuit precedent in order to determine "clearly established law"—and indeed, invited the Ninth Circuit to rely on its own binding precedent—the argument is waived. This Court "do[es] not entertain arguments that were not raised below . . . because '[i]t is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance.'" *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1009 (2017) (quoting *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1653 (2016)).

B. There Is No Material Circuit Conflict, And Therefore This Case Would Not Be A Proper Vehicle For Review Of The Third Question, Even If It Had Been Raised.

This case does not raise petitioner's third question: courts of appeals do not disagree on any material legal point.

1. According to the petition, *Felix v. McCarthy*, 939 F.2d 699 (9th Cir. 1991), "did not represent the law, much less 'clearly established' law, when this case arose in August 2013," because at that time "it had not been 'established' that *Felix*'s Eighth Amendment standard applied to excessive force claims by pretrial inmates." Pet. 23. For that reason, according to the petition, "[t]he present case . . . vividly illustrates why circuit precedent cannot be the source of 'clearly

established' law when it disagrees with the law in other circuits." *Id.*

The purported circuit disagreement is illusory. This Court and the circuits uniformly hold—and have since at least 1979—that pretrial detainees are afforded more protection against force than are post-conviction inmates. *See Bell v. Wolfish*, 441 U.S. 520, 536–37 & n.16 (1979); *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (due process protections are "at least as great" as those afforded by the Eighth Amendment). It is therefore easier to show that a particular use of force was excessive under the Fourteenth Amendment standard than it is to show the same force was excessive under the Eighth Amendment standard. It follows that *Felix* and other authorities holding that force violates the Eighth Amendment provide "clearly established law" for an excessive-force case brought by a pretrial detainee under the Fourteenth Amendment. In other words, because "the due process rights of a pretrial detainee are 'at least as great as the Eighth Amendment protections available to a convicted prisoner,'" Eighth Amendment cases put officers on notice of the contours of the rights of pretrial detainees. *See Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1067 (9th Cir. 2016) (quoting *City of Revere*, 463 U.S. at 244); *King v. Kramer*, 680 F.3d 1013, 1017–18 (7th Cir. 2012) (in a Fourteenth Amendment case brought by a pretrial detainee, the court may "refer to cases brought under either" the Fourteenth or the Eighth Amendments because "[d]etainees are entitled to no less protection than prisoners whose treatment must meet the

standards of the Eighth Amendment"); *A.M. ex rel. J.M.K. v. Luzerne Cty. Juvenile Det. Ctr.*, 372 F.3d 572, 587 n.4 (3d Cir. 2004) (relying on an Eighth Amendment case to discern "the contours of a state's due process obligations to detainees," because "detainees are entitled to no less protection than a convicted prisoner"); *Wever v. Lincoln Cty.*, 388 F.3d 601, 605–06 & n.6 (8th Cir. 2004) (relying on an Eighth Amendment case as a source of "clearly established" law under the Fourteenth Amendment, because "it is well established that pretrial detainees . . . are accorded . . . protections 'at least as great' as those the Eighth Amendment affords a convicted prisoner") (internal quotation marks omitted).

The Ninth Circuit therefore properly relied on *Felix* to decide the present case. *Felix*, a 1991 case, clearly established that using unprovoked force on a compliant inmate violates the Eighth Amendment and therefore also violates the Fourteenth Amendment. Petitioner has not shown that any circuit court would disagree that Eighth Amendment excessive-force precedent can be relied upon in Fourteenth Amendment excessive-force cases. Petitioner has not identified a disagreement among the circuits on "clearly established law."

2. If petitioner intends to argue that the pre-*Kingsley* circuit split on the standard applicable to excessive-force claims brought by pretrial detainees categorically renders all pre-*Kingsley* precedent not "clearly established" law, that position is untenable. For one thing, it is illogical. Why should Eighth Amendment cases like *Felix* no longer be a source of

"clearly established" law for pretrial detainees after *Kingsley*, when *Kingsley* did not change the fact (and indeed, made clearer) that force found to be excessive under the Eighth Amendment is necessarily excessive under the Fourteenth Amendment? Whether acting before or after *Kingsley* was decided, an officer would be on notice that conduct violating the Eighth Amendment violates the Fourteenth Amendment. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (right is clearly established if it is "sufficiently clear that a reasonable official would understand that what he is doing violates that right") (internal quotation marks omitted).

Moreover, the effect of such a holding would be that *no* force against a pretrial detainee, no matter how unreasonable, would be actionable if it occurred before 2015 (when *Kingsley* was decided). Guards would be entitled to qualified immunity in every case, because categorically no "clearly established" law would be available in the context of pretrial detainee excessive-force cases. Carried to its logical conclusion, such coarse reasoning would result in the elimination, for "clearly established law" purposes, of all case law decided before each Supreme Court ruling clarifying an excessive-force standard, because, as it turned out in light of the Supreme Court's decision, the case law was not as "clear[]" before the decision as it is following the decision. None of this is what the Court intends when it suggests that a legal rule may not be clearly established if some circuit courts have adopted it, while others have conflicting rules.

3. Critically, petitioner does *not* claim that any circuit authority is in disagreement with the key legal standard that the appellate court relied upon to decide this case: "a reasonable correctional officer cannot administer strong blows upon a compliant pretrial detainee without violating the detainee's right under the Fourteenth Amendment's Due Process Clause." *See* Pet. App. 2.

Nor could he. This Court and the circuit courts uniformly hold that unprovoked or unjustified force on an unresisting inmate is excessive. *See*, *e.g.*, *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010) (inmate stated an excessive-force claim, where he alleged that prison guards beat him "gratuitously" and "without any provocation") (per curiam) (internal alteration omitted); *Caffey v. Maue*, 679 F. App'x 487, 492 (7th Cir. 2017) (use of " 'unnecessary' " and "gratuitous[]" force where inmate poses no "security threat" violates the Eighth Amendment); *Coley v. Lucas Cty.*, 799 F.3d 530, 539 (6th Cir. 2015) (guard inflicted "gratuitous force" in violation of the Fourteenth Amendment when, "without provocation," he "shoved [a] fully restrained" pretrial detainee who was not "caus[ing] a disruption"); *Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012) (guard who "uses more force than is necessary and by doing so produces gratuitous pain or injury" violates pretrial detainee's constitutional rights); *Hendrickson v. Cooper*, 589 F.3d 887, 889 (8th Cir. 2009) (a guard violates the constitution when he "attacks a prisoner for no good reason"); *Johnson v. Blaukat*, 453 F.3d 1108, 1112–13 (8th Cir. 2006) (holding that "correctional officers" are

barred "from imposing unnecessary . . . pain on inmates"; causing pain "when an inmate is being compliant can provide a basis for an Eighth Amendment claim"); *Skrtich v. Thornton*, 280 F.3d 1295, 1304 (11th Cir. 2002) ("The law of excessive force in this country is that a prisoner cannot be subjected to gratuitous . . . force that has no object but to inflict pain.").[10]

Petitioner has identified no conflicting precedent out of any circuit. A ruling by this Court that lower courts may only draw on Supreme Court precedent or uniform multi-circuit precedent to determine what law is clearly established would make no difference in this case.

III. This Case Raises No Issue Of Great Importance.

1. Petitioner argues that the Court should grant review because, although the Court regularly decides excessive-force cases brought by arrestees in the Fourth Amendment context, those cases often present different circumstances than do excessive-force cases brought by incarcerated individuals. Pet. 28–29. This

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[10] *See also Sam v. Richard*, 887 F.3d 710, 714 (5th Cir. 2018) ("pushing, kneeing, and slapping" a "compliant suspect . . . who is neither fleeing nor resisting is excessive"); *Meyers v. Baltimore Cty.*, 713 F.3d 723, 735 (4th Cir. 2013) ("The use of any 'unnecessary, gratuitous, and disproportionate force' . . . precludes an officer from receiving qualified immunity if the subject is unarmed and secured."); *Tracy v. Freshwater*, 623 F.3d 90, 99 (2d Cir. 2010) (force may not be used "gratuitously against an arrestee who is complying with police commands or otherwise poses no immediate threat to the arresting officer").

point ignores that the Court has generated an extensive body of precedent concerning excessive-force claims brought by convicted prisoners under the Eighth Amendment. Because the entire corpus of Eighth Amendment excessive-force law also elucidates the contours of the rights of pretrial detainees under the Fourteenth Amendment, petitioner is incorrect that there is a significant "need for guidance" in the context of "excessive force claims asserted under the Due Process Clause by pretrial detainees." Pet. 29.

2. The issue of whether "controlling circuit precedent can clearly establish the law" may or may not be important—it appears that petitioner has brought it up specifically because the Court has expressed interest in the topic. Regardless, it is not raised by this case. *See supra* Part II.A, B.

IV. This Case Is Not A Good Vehicle For Review.

1. This case presents a jurisdictional problem. *Johnson v. Jones* held that a "defendant[] cannot immediately appeal" a denial of qualified immunity that "resolved a fact-related dispute about . . . whether or not evidence in the pretrial record was sufficient to show a genuine issue of fact for trial." 515 U.S. 304, 307 (1995). That is what petitioner has, in fact, done. The district court ruled: "material and disputed issues of fact . . . preclude the entry of summary judgment." Pet. App. 29. The appellate court ruled: "[t]he district court did not err in finding the record presented genuine issues of material fact." Pet. App. 2. Petitioner attempts

to evade the jurisdictional issue by ignoring the disputes in the record, relying on his own version of the facts, and attempting to raise legal issues that arise from that version of the facts. The Court should recognize that petitioner's approach functionally challenges the lower courts' findings that the record evidence shows genuine disputes of fact, and should reject the petition on that basis.

2. As explained repeatedly, the facts of this case are not "in relevant part undisputed," as petitioner claims. Pet. 35; *see*, *e.g.*, *supra* Part I.A. Petitioner has taken that indefensible position at every stage of these proceedings and, at every stage, the courts have rejected it.

3. Petitioner's contention that the "judgment below is final" is also wrong. Pet. 36. This case is on interlocutory appeal from the denial of petitioner's motion for summary judgment. It is proceeding to trial in the district court,[11] where the issues presented would obviously become moot were the jury to find against Fletcher.

4. The case is also a poor vehicle for review because the lower court's ruling is unpublished and therefore will not have any precedential value within the circuit.

[11] Petitioner did not seek a stay of the Ninth Circuit's mandate, which issued on April 24, 2019. Mandate at 1, *Fletcher v. Marquardt*, 753 F. App'x 449 (9th Cir. 2019) (No. 17-35862), ECF No. 49.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted

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