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

REPLY BRIEF FOR THE PETITIONER

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Although this case and *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (per curiam), have in common the Ninth Circuit's rejection of a qualified immunity defense with a one-sentence analysis followed by a citation to a single, inapposite prior Ninth Circuit decision, there are also important differences that justify this Court's plenary review. The present case differs from *City of Escondido* because the prior Ninth Circuit decision on which the Ninth Circuit relied to deny qualified immunity in this case was later repudiated by this Court. Another difference is that this case arises not in an arrest setting, as did *City of Escondido*, but instead involves an excessive force claim by a pretrial detainee against a jail guard, a setting for which this Court only recently established the legal standard in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). A third distinctive feature of this case is that, in analyzing whether the excessive force claim is barred by qualified immunity, the Ninth Circuit characterized the pretrial detainee as "compliant" even though the detainee told the jail guard to "get your hands off me," when the guard put his hand on the detainee's shoulder, and "yelled for help" to 20 or more at-large inmates while the guard executed a forcible takedown and struggled to handcuff the detainee. Pet. 8.

ARGUMENT

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

Respondent does not dispute that this Court's decisions required the Ninth Circuit to consider the particular circumstances facing petitioner when he forcibly took down respondent and struck him once in the back. *See District of Columbia v. Wesby*, 138 S. Ct. 577 (2018). But respondent contends that the circumstances identified in the petition are in genuine dispute. Br. in Opp. 10–11. That contention lacks merit, as shown by comparing the circumstances described in the petition to respondent's submission.

- "Deputy Marquardt was one of only two officers, both unarmed, guarding 20 or more detainees who were out of their cells on 'out time.'" Pet. 16.

Respondent says the video shows three additional officers arriving *after* Mr. Fletcher was handcuffed and under the control of Deputies Marquardt and Losh. Br. in Opp. 5. Mr. Fletcher deposed, however, that there were *two* deputies on duty in Cellblock 8 when the events giving rise to this action occurred. ER 207 at 75:8–13.

- 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. Pet. 16.

Respondent argues that he was allowed to ask other inmates for cleaning supplies and so was not violating jail rules. Deputy Marquardt had no idea why Mr. Fletcher was coming from an area of the jail that did not provide dayroom/shower access (ER 204 at 27:5–8; 23–25; 28:1–6), since Mr. Fletcher had clothes in his hand—not cleaning supplies. ER 205 at 67:13; Video 2.

- "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.'" Pet. 16.

Respondent disputes that he was "argumentative." Br. in Opp. 3 n.3. But he does not dispute that he questioned the instruction to move into the cell and objected to Deputy Marquardt's asking him why he "had an attitude." ER 205 at 69:8–10; ER 206 at 71:2–7.

- "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.'" Pet. 16.

Respondent does not dispute these facts but reiterates his testimony that he did not "hear" or "recall" being told to face the cell wall (Br. in Opp. 4) and deposed he did not remember. ER 205 at 69:23–25.

- "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." Pet. 17.

Respondent admits that he "did scream for help" but asserts, "There is no evidence that he was urging *other inmates* . . . to assist him." Br. in Opp. 5 n.6. Yes there is: Mr. Fletcher deposed that he "was just yelling *trying to get everybody else's attention out there*. . . . I was yelling for help." ER 206 at 72:3–9 (emphasis added). This was while the 20 or more at-large inmates were watching the altercation. ER 205 at 68–69.

In addition to (unsuccessfully) disputing the petition's description of the circumstances that confronted Deputy Marquardt and that the Ninth Circuit failed to consider, respondent defends the Ninth Circuit's characterization of him as "compliant" throughout his encounter with Deputy Marquardt. Pet. App. 2. This defense, too, is unsuccessful because respondent does not dispute these two additional circumstances:

- After Deputy Marquardt had stopped in the second-floor hallway, and before he could question Mr. Fletcher, Mr. Fletcher walked up to within inches of Deputy Marquardt's face, an act that petitioner's expert attested, without contradiction, a reasonable deputy would perceive as a "potential pre-attack indicator." Pet. 5 n.2.[1]

[1] Especially in light of the video, this circumstance is not put into genuine dispute by Mr. Fletcher's blanket denials that he did anything to provoke Deputy Marquardt. ER 205 at 69:11–15; ER 206 at 72:5–6.

- Mr. Fletcher was verbally resistant throughout the encounter, beginning when he questioned Deputy Marquardt's instruction that he move into a cell and including when he yelled for help, and threatened to sue Deputy Marquardt, while being taken down and handcuffed. Because this verbal resistance occurred while 20 or more at-large inmates watched, Deputy Marquardt reasonably perceived it as a situation of escalating danger. As he attested, "Inmates often act tough in front of other inmates . . . [and] [a]llowing an inmate to argue shows weakness." Pet. 6 (quoting ER 354).

The Ninth Circuit's determination that respondent was "compliant" under the circumstances Deputy Marquardt faced puts correctional officers and inmates in that circuit at considerable risk.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT ON THE REQUIRED SOURCES OF "CLEARLY ESTABLISHED LAW" FOR QUALIFIED IMMUNITY PURPOSES.

Respondent argues that the Ninth Circuit properly relied exclusively on *Felix v. McCarthy*, 939 F.2d 699 (9th Cir. 1991). Br. in Opp. 13–14. *Felix*, however, involved an officer whose conduct was intentionally humiliating and was found by the court to be "offensive to human dignity." *Id.* at 702 (internal quotation marks omitted). No such conduct was involved here. Thus reliance on *Felix* could not create a basis to deny qualified immunity.

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

Respondent does not dispute that this Court has reserved the question whether circuit precedent can "clearly establish" the law for qualified immunity purposes. *See* Br. in Opp. 15, 17. Nor does respondent contest the question's importance. *Id.* at 23. Instead, respondent argues that the question of what sources can clearly establish law should not be resolved in this case for two reasons. Neither withstands scrutiny.

A. The Sources-of-Clearly-Established-Law Question Is Properly Before this Court.

Respondent argues that the sources-of-clearly-established-law question ("the sources question") was not raised or ruled upon below. Br. in Opp. 16–17. That argument fails under *United States v. Williams*, 504 U.S. 36 (1992).

The Court in *Williams* addressed whether a federal district court may dismiss an otherwise valid indictment because of the government's failure to present exculpatory evidence to the grand jury as required by circuit precedent. *Id.* at 37–38. Before doing so, however, the Court addressed whether certiorari was properly granted. The Court explained that its "traditional rule" requires a question presented to the Court to have been *either* "pressed *or* passed upon below." *Id.* at 41 (emphasis added; internal quotation

marks omitted). The Court concluded that the Tenth Circuit had "passed upon" the exculpatory evidence question in that case by applying its precedent requiring the government to provide such evidence to the grand jury, even though the United States did not challenge the Tenth Circuit precedent in that case. *Id.* at 43–44.

So too here. Ninth Circuit precedent holds that that court's own decisions can be a source of "clearly established" law for qualified immunity purposes. Pet. 28 (citing *Carrillo v. Cnty. of Los Angeles*, 798 F.3d 1210, 1222–23 (9th Cir. 2015)). The Ninth Circuit applied that precedent in this case, and by doing so "passed upon" the sources question in the same way that in *Williams* the Tenth Circuit "passed upon" the exculpatory evidence question. Under *Williams*, therefore, the sources question is properly before this Court.

Respondent asserts that petitioner "conceded" in the Ninth Circuit below that its precedent allows it to derive clearly established law from its prior decisions. Br. in Opp. 16. But similarly in *Williams*, the United States "conceded" in the Tenth Circuit that Tenth Circuit precedent required the government to present exculpatory evidence to the grand jury. *Williams*, 504 U.S. at 44. The concession did not prevent the Court from addressing the exculpatory evidence question in *Williams*, and it does not prevent the Court from addressing the sources question here.[2]

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[2] True, in holding that the exculpatory evidence question was properly before it, the *Williams* Court relied on a

B. To Identify "Clearly Established" Law, the Ninth Circuit Below Improperly Relied on Circuit Precedent That Conflicted with Decisions in Other Circuits and That Has Been Rejected by this Court.

As the petition explained, the Ninth Circuit improperly derived "clearly established law" from Ninth Circuit precedent that (1) conflicted with decisions in other circuits and (2) has been repudiated by this Court. Pet. 21–23. Respondent disputes the existence of any such conflict and defends the Ninth Circuit's reliance on repudiated precedent to deny petitioner's qualified immunity defense. Br. in Opp. 18–20.

In respondent's view, any conflict among the circuits over the legal standard for excessive force claims by pretrial detainees was "illusory." Br. in Opp. 18. But this Court rejected that view when it granted certiorari in *Kingsley*. The Court granted certiorari "[i]n light of

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circumstance that has no analog here: The United States had—in an earlier but then-recent Tenth Circuit case—objected to its obligation under circuit precedent to present exculpatory evidence. *See* 504 U.S. at 44. That circumstance showed that it would have been pointless for the United States to renew the objection in *Williams*. *See id*. Similarly, here it would have been pointless for petitioner to challenge the Ninth Circuit's longstanding, steadfast adherence to the view that any decisions of any court anywhere can be a source of "clearly established law." *See*, *e.g.*, *Hines v. Youseff*, 914 F.3d 1218, 1230 (9th Cir. 2019) (citing decision from 2002 in stating that even "unpublished district court opinions" can inform analysis of whether law is "clearly established"), *pet. for cert. filed sub nom. Smith v. Schwarzenegger*, No. 18-1590 (filed Jun. 24, 2019).

disagreement among the Circuits" about whether a pretrial detainee asserting an excessive force claim had to satisfy a subjective or only an objective standard. *Kingsley*, 135 S. Ct. at 2471. And the Court cited a Ninth Circuit decision from 2012 as evidence of the disagreement. *Id.* at 2472 (citing *Young v. Wolfe*, 478 F. Appx. 354, 356 (9th Cir. 2012)). Thus, there was disagreement among the circuits when the present case arose in August 2013.

The Court in *Kingsley* resolved the disagreement by rejecting the Ninth Circuit's position. The Ninth Circuit had adopted the *subjective* standard, as the Ninth Circuit below confirmed when it relied on *Felix*, 939 F.2d 699, a case applying the subjective standard to an excessive force claim. *See* Pet. 22. The Court in *Kingsley*, however, adopted the *objective* standard. 135 S. Ct. at 2470, 2473–76. The Court's 2015 decision in *Kingsley* thus established that the Ninth Circuit law applied below to deny petitioner qualified immunity was not only *not* "clearly established"; it was wrong.

Respondent argues it does not matter that Ninth Circuit law was wrong; the error would not have misled petitioner and other corrections officers about their constitutional duties to pretrial detainees. *See* Br. in Opp. 18. Although those duties rest on the Due Process Clause, respondent contends that the officers would have known they should consult case law on the Eighth Amendment. *See id*. at 18–19. That is because, respondent explains, "the entire corpus of Eighth Amendment excessive-force law also elucidates the

contours of the rights of pretrial detainees under the Fourteenth Amendment." Br. in Opp. 23. And respondent seems to think that, in consulting the Eighth Amendment corpus, correctional officers would have understood that under the doctrine of substantive due process "pretrial detainees are afforded more protection against force than are post-conviction inmates" under the Eighth Amendment. Br. in Opp. 18.

This reasoning attributes to corrections officers greater legal acuity than the Ninth Circuit possessed. In the precedent repudiated by this Court in *Kingsley*, the Ninth Circuit *equated* the constitutional duties owed under the Due Process Clause to those owed under the Eighth Amendment. *See Young*, 478 F. Appx. at *2. The more fundamental flaw in respondent's reasoning, however, is that it requires corrections officers to be legal scholars (and to disregard circuit precedent in appropriate cases) in order to determine their "clearly established" legal duties. And so respondent's reasoning fundamentally conflicts with this Court's insistence that officials should have "fair notice" of the law before it is relied upon to hold them personally liable. *See*, *e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam).

Further review is needed to relieve corrections officers of the legal scholarship requirement that respondent and the Ninth Circuit's view of "clearly established" law would impose upon them, and to clarify that circuit precedent cannot "clearly establish" the

law for qualified immunity purposes, at least when, as here, it conflicts with precedent in other circuits.[3]

IV. THE QUESTIONS PRESENTED HAVE EXCEPTIONAL IMPORTANCE.

Although respondent does not contest the importance of the sources question, he asserts there is no need to address it in the present factual setting, which involves excessive force claims by a pretrial detainee. That is unnecessary, respondent argues, because "the Court has generated an extensive body of precedent concerning excessive force claims brought by convicted prisoners under the Eighth Amendment." Br. in Opp. 23. Elsewhere, however, respondent takes pains to *distinguish* the rights of pretrial detainees from those of convicted criminals. *Id.* at 18–19. Moreover, respondent's argument ignores that this Court in *Kingsley* expressly reserved the question whether the legal standard for excessive force claims by pretrial detainees should differ from the legal standard for excessive force claims by convicted prisoners. 135 S. Ct. at 2476. Finally, quite apart from whether the legal standard should differ depending on whether an excessive force claimant is a pretrial detainee or convicted

[3] Contrary to respondent's understanding, petitioner vigorously disputes that other circuits would endorse the "key legal standard" purportedly applied below to deny petitioner qualified immunity. Br. in Opp. 21. Respondent cites no decisions that would support treating the use of force here as clearly "unprovoked or unjustified" or respondent's conduct as clearly "compliant." *Id.*

prisoner, Eighth Amendment case law provides limited guidance because of differences in the legal status and factual circumstances surrounding these two groups of claimants, as this Court has recognized. *See Kingsley*, 135 S. Ct. at 2475 (distinguishing legal status of pretrial detainees from that of convicted prisoners); *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 336 (2012) ("Jails can be even more dangerous than prisons. . . .").

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

None of the supposed vehicle problems that respondent identifies is real.

Contrary to respondent's submission, this Court has jurisdiction. *See* Br. in Opp. 23–24. Section 1254(1) of Title 28 gives this Court jurisdiction over "[c]ases in the courts of appeals." 28 U.S.C. § 1254(1); *see*, *e.g.*, *United States v. Nixon*, 418 U.S. 683, 690 (1974). This case was properly "in" the Ninth Circuit under 28 U.S.C. § 1291 because the district court's "denial of summary judgment necessarily determined that certain conduct attributed to petitioner (which was controverted) constituted a violation of clearly established law." *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). Petitioner appealed that denial on the grounds—which he continues to maintain—that he is entitled to qualified immunity as a matter of law.

In the current posture of this case, therefore, the relevant facts are indeed undisputed, as the petition

explained (at 35). Respondent's contention to the contrary (Br. in Opp. 24) rests on his retroactive attempt to manufacture supposed disputes of material fact, none of which were identified by the courts below. But in any event, "[d]enial of summary judgment often includes a determination that there are controverted issues of material fact"; that does not prevent a defendant official from appealing "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

Respondent's last argument against further review is that the decision below is unpublished. Br. in Opp. 24. If that were dispositive, more than 93% of the Ninth Circuit's opinions for the period ending September 30, 2018, would have been immunized from further review. Administrative Office of the United States Courts, *Judicial Business 2018*, Tbl. B-12. The unpublished nature of the decision below warrants particularly little weight considering the Ninth Circuit's view that even its unpublished decisions are relevant to qualified immunity analysis. *See*, *e.g.*, *Hines v. Youseff*, 914 F.3d 1218, 1230 (9th Cir. 2019).

CONCLUSION

The petition for a writ of certiorari should be granted.

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