No. _____

In The
Supreme Court of the United States

DANIEL MACIAS and MICHAEL FOSTER,

Petitioners,

vs.

RAYMOND NICHOLS and DANIEL NICHOLS,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A magistrate judge granted Riverside police officers qualified immunity on a § 1983 unlawful arrest claim, finding there was probable cause for the arrests. A divided Ninth Circuit panel reversed. The majority held that the officers lacked probable cause to believe that plaintiffs committed theft when they took a rental mattress from a rehabilitation center, because this was at most a dispute about what the rental contract allowed. The dissenting judge agreed with the magistrate that there *was* probable cause.

On remand, a district court judge found that the lack of probable cause was clearly established and denied qualified immunity. The Ninth Circuit affirmed in a two-paragraph memorandum. It held that the law was clearly established because three prior Ninth Circuit decisions found that disputes over a bill or the right to possess "are civil in nature and ordinarily do not give rise to probable cause to arrest."

The questions presented are:

1. Whether the Ninth Circuit departed from this Court's qualified immunity decisions by finding the officers violated a clearly-established right without acknowledging the governing standard, defining the right specifically, or identifying a case involving similar facts.

QUESTIONS PRESENTED—Continued

2. Whether the Ninth Circuit's rule that "civil disputes cannot give rise to probable cause" is overly broad, as the Eighth Circuit has suggested, and inconsistent with *District of Columbia v. Wesby*, ___ U.S. ___, 138 S. Ct. 577 (2018).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the Ninth Circuit, whose judgment is sought to be reviewed, are:

- Daniel Nichols and Raymond Nichols, plaintiffs and appellees below, and respondents here.
- Daniel Macias and Michael Foster, defendants and appellants below, and petitioners here.

The other defendants below—City of Riverside, Stephanie Wysinger, and Community Care Rehab Center, LLC—are not parties to this petition.

There are no publicly-held corporations involved in this proceeding.

RELATED PROCEEDINGS

- United States District Court, Central District of California, Case No. EDCV 14-00364-DTB, *Raymond Nichols and Daniel Nichols v. City of Riverside; Daniel Macias; Michael Foster; Stephanie Wysinger; and Community Care Rehab Center, LLC*; order denying summary judgment entered January 26, 2018.
- United States Court of Appeals for the Ninth Circuit, Case Nos. 15-55938 and 18-55135, *Raymond Nichols and Daniel Nichols v. City of Riverside; Daniel Macias; Michael Foster; Stephanie Wysinger; and Community Care Rehab Center, LLC*; judgments entered August 15, 2017 and August 22, 2019; order denying rehearing entered October 1, 2019.

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STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioners Daniel Macias and Michael Foster respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's memorandum opinion at issue in this petition is not officially reported. It appears at 775 F. App'x 845 and in petitioners' Appendix ("App.") at pages 1-3. The Ninth Circuit's October 1, 2019 order denying rehearing appears at Appendix pages 42-43. The district court's unreported order denying petitioners' motion for summary judgment based on qualified immunity appears at Appendix pages 4-17.

The prior Ninth Circuit decision in this case is not officially reported, but appears at 695 F. App'x 291 and at Appendix pages 18-23. The district court's original order granting summary judgment based on qualified immunity is not reported and appears at Appendix pages 24-41.

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit filed the judgment and memorandum opinion at issue in this petition on August 22, 2019. (App. 1-3.) It denied petitioners' timely rehearing petition on October 1, 2019. (App. 42-43.) This Court

has jurisdiction to review the Ninth Circuit's August 22, 2019 decision on writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondents brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondents allege petitioners violated their rights secured by the United States Constitution's Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Confronted With Conflicting Information About Whether Plaintiffs Took A $3,300 Mattress Without The Owner's Permission, Police Officers Arrest Plaintiffs For Theft.

In March 2013, officers Macias and Foster responded to a reported theft at a rehabilitation center in Riverside, California. (App. 6-7; 2 ER 160, 164.) Nurse Stephanie Wysinger told the officers the following:

- Daniel and Raymond Nichols rented a $3,300 low air-loss mattress from a medical equipment company (SuperCare) for their mother to use at the rehabilitation center. (App. 5-6; 2 ER 66, 84, 109.)
- Raymond told Wysinger that he and Daniel were taking the mattress home with their mother when she was discharged. (App. 6; 2 ER 67, 86, 160.) Wysinger objected—in her experience, it is "highly unusual" for a patient to transport a low

air-loss mattress. (App. 6-7; 2 ER 73, 160.) Raymond claimed that SuperCare and the insurance company told him to take it. (App. 6; 2 ER 73-74, 160.) Wysinger asked Raymond to wait while she confirmed with SuperCare, but Raymond refused. (2 ER 73-74, 160.) He and Daniel disassembled the mattress and loaded it into Daniel's truck. (App. 7; 2 ER 160-61.)

- Wysinger told Raymond and Daniel she would call the police if they left with the mattress. (App. 6; 2 ER 164.) Daniel nonetheless drove away with it, and Wysinger called the police. (2 ER 161, 164.)
- SuperCare told rehabilitation center employees that the mattress should not be moved—SuperCare would deliver a different mattress to plaintiffs' mother's house. (App. 7; 2 ER 160, 164.) The insurance company's story likewise did not match Raymond's: The insurance company told a rehabilitation center employee that it had nothing to do with the mattress. (2 ER 162.)

After obtaining this information from Wysinger, the officers talked to Raymond. (App. 7-8; 2 ER 91, 161, 164.) Raymond said that he had a copy of the mattress lease, and that SuperCare and the insurance company had told him to take the mattress. (App. 8; 2 ER 89, 91.) Officer Foster called SuperCare to investigate further, but got a message that the office was closed. (2 ER 126, 162.)

The officers put Raymond in their patrol vehicle. (App. 8; 2 ER 160, 162.) Daniel then returned with the mattress at the behest of other family members. (App. 8; 2 ER 161.) Daniel showed Office Foster the mattress rental receipt, which stated that "CUSTOMER SHALL NOT, in any way, attempt to TRANSFER EQUIPMENT to a location other than the customer's address or residence as noted on this invoice, without explicit approval of SuperCare." (2 ER 47, 59, 92 (original capitalization).) The only customer address "noted on this invoice" was the rehabilitation center. (2 ER 52, 64 (same address on rental agreement and police report).) After looking at the rental receipt, Officer Foster arrested Daniel for theft. (App. 8; 2 ER 47, 92.)

Plaintiffs spent approximately one day in jail. (App. 8; 2 ER 92.) The charges were later dismissed. (App. 8; 2 ER 106.)

B. The District Court Grants The Officers Summary Judgment On Qualified Immunity Grounds, Finding Probable Cause For The Arrests.

Raymond and Daniel sued the officers, the City of Riverside, the rehabilitation center, and Wysinger. (App. 27.) They alleged a § 1983 claim for unlawful arrest, seeking more than $10 million in compensatory damages, more than $10 million in punitive damages, and attorney's fees. (2 ER 212-21, 229-30, 233.)

A magistrate judge, presiding with the parties' consent, granted summary judgment for the officers on

the § 1983 unlawful arrest claim. (App. 24, 41.)[1] The magistrate reasoned that the officers were entitled to qualified immunity because there was probable cause for the arrest. (App. 31-35.) In support of the probable cause finding, the magistrate noted Wysinger's account of events, the undisputed fact that Daniel drove off with the mattress, and the rental contract's warning that the customer was not to transfer rental equipment " 'without explicit approval of SuperCare,' " which "suggest[ed] that plaintiffs were aware that they had no right to remove the mattress and air pump." (App. 33-35.)

C. The First Appeal: The Ninth Circuit Finds No Probable Cause And Remands On Whether The Lack Of Probable Cause Was Clearly Established; Judge Bea Dissents, Finding Probable Cause.

A divided Ninth Circuit panel reversed summary judgment on plaintiffs' § 1983 unlawful arrest claim. (App. 18-23.) The majority held that, viewing the facts in the light most favorable to plaintiffs, there was no probable cause to arrest them for theft because "[a]t most, there was a dispute about what the rental contract allowed." (App. 19-21.) The majority remanded

[1] Plaintiffs also alleged a § 1983 claim for unlawful search and five state law claims. The magistrate granted the officers summary judgment based on qualified immunity on the unlawful search claim, and declined to exercise supplemental jurisdiction over the state law claims. Plaintiffs did not appeal the ruling on the unlawful search claim, and that aspect of the ruling is long-since final. (App. 19 n.1.)

with instructions for the district court to consider qualified immunity's second prong, whether the lack of probable cause was clearly established at the time of the incident. (App. 21-22.)

Judge Bea dissented. He agreed with the magistrate judge that there *was* probable cause, based on (1) Wysinger's report that plaintiffs "had taken the mattress without waiting for her to confirm that they had the rental company's permission to do so" and (2) the rental agreement prohibiting transfers to a location other than the address noted on the invoice without express authorization. (App. 22-23.) Judge Bea noted that the officers were entitled to discredit plaintiffs' claimed permission to move the mattress in light of Wysinger's contrary account, and that Daniel's decision to "return[] with the mattress *after* he learned that Raymond had been arrested has no bearing on whether the brothers had the specific intent to steal the mattress *at the time of the alleged theft*." (*Id.* (emphases added).)

D. On Remand, The District Court Finds That The Lack Of Probable Cause Was Clearly Established Because The Arrests Arose Out Of A Civil Dispute.

The case was reassigned on remand to a different judge who concluded that *Allen v. City of Portland*, 73 F.3d 232 (9th Cir. 1996) clearly established a lack of probable cause because this was a civil dispute. (App. 4-15.) The judge also found that Daniel's returning the

mattress after the officers arrested Raymond "directly rebuts" an intent to deprive the owner of the mattress permanently or for an extended time, as required for theft. (App. 14.) The officers appealed.

E. The Second Appeal: A Different Ninth Circuit Panel Affirms The "Clearly Established" Finding In A Memorandum Disposition.

The second appeal was heard by a different Ninth Circuit panel than the first.

At oral argument, Judge Graber expressed doubt about the prior panel's lack-of-probable-cause finding. She stated that although the finding was law of the case, "I'm not sure I would've reached that result. . . ." (Oral argument recording, available at https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000016092 (Oral Argument Recording) at 3:55-4:02.)

Judge Graber also expressed doubt about the bright line plaintiffs attempted to draw between civil and criminal matters: "I know *Allen* [73 F.3d 232] says if it's civil, you don't have probable cause. But I'm not sure what distinguishes civil from criminal in this context. If you have a rental car and you keep it beyond the time, you know, that's certainly a rental dispute and if it's two days, maybe it becomes criminal. I mean, I don't know where to draw that line and I don't know where the cases draw the line." (*Id.* at 4:17-4:42.) She added, "What troubles me about this whole area is that renting something or having a contract dispute seems to me not to preclude also probable cause for some

criminal intent with respect to the subject matter of the contract." (*Id.* at 10:45-11:04; *see also id.* at 10:18-10:22 (Judge Graber: "The fact that you have rented something doesn't mean you can't also steal it.").)

Despite Judge Graber's doubts about a bright-line rule, the panel unanimously affirmed the denial of qualified immunity in a two-paragraph memorandum. (App. 2-3.) The memorandum did not cite any of this Court's decisions on the "clearly established" standard. Instead, citing a 2011 Ninth Circuit decision, it identified the question as "whether it was reasonable for Defendants to believe that there was probable cause so as to receive immunity from Plaintiffs' claims." (App. 2.) The entirety of the panel's answer was:

> We have held that the existence of a dispute over the amount of a bill or the right to possess are civil in nature and ordinarily do not give rise to probable cause to arrest. *Stevens v. Rose*, 298 F.3d 880, 883-84 (9th Cir. 2002); *Allen v. City of Portland*, 73 F.3d 232, 237 (9th Cir. 1996); *Kennedy v. L.A. Police Dep't*, 901 F.2d 702, 706 (9th Cir. 1990), *overruled on other grounds by Act Up!/Portland v. Bagley*, 988 F.2d 868, 872-73 (9th Cir. 1993). This was such a dispute. As noted, the officers lacked probable cause. Raymond and Daniel told the police officers that they had rented the mattress, and they produced the rental receipt and agreement for the officers' review. The only dispute was whether the brothers could move that mattress before delivery of a new one. The district court therefore properly

> held that Defendants were not entitled to immunity because the law was clearly established at the time of Plaintiffs' arrest in 2013.

(App. 2-3.)

The Ninth Circuit denied panel and en banc rehearing. (App. 42-43.)

REASONS FOR GRANTING THE PETITION

This Court has made clear that "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148, 1153 (2018) (per curiam). The specificity requirement is especially rigorous in Fourth Amendment probable cause cases: Because probable cause "cannot be 'reduced to a neat set of legal rules,'" officers are entitled to qualified immunity unless a prior rule "*obviously* resolve[d] 'whether "the circumstances with which [the particular officer] was confronted . . . constituted probable cause."'" *District of Columbia v. Wesby*, ___ U.S. ___, 138 S. Ct. 577, 590 (2018) (emphasis added, ellipsis in *Wesby*). To meet this standard, a court denying qualified immunity must "'identify a case'" holding that an "'officer *acting under similar circumstances*'" violated the Fourth Amendment. *Id.* (emphasis added).

The Court has repeatedly reversed the Ninth Circuit for departing from these principles—that is, for defining the right at issue too generally, and for finding the right "clearly established" without identifying a

factually similar case. *E.g.*, *City of Escondido v. Emmons*, ___ U.S. ___, 139 S. Ct. 500, 503 (2019) (per curiam); *Kisela*, 138 S. Ct. at 1152; *City and County of San Francisco v. Sheehan*, ___ U.S. ___, 135 S. Ct. 1765, 1775-76 (2015); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).

Yet, the Ninth Circuit's recalcitrance continues. The opinion below did not cite a single qualified immunity decision from this Court, nor did it acknowledge the prevailing standard—i.e., the need for prior cases that obviously resolved probable cause *in the particular circumstances here.* Instead, the opinion framed the inquiry only as whether it was "reasonable" for officers to believe there was probable cause. (App. 2-3.) The opinion took that formulation from a 2011 Ninth Circuit opinion, ignoring that the 2011 opinion predated *Kisela, Wesby, Emmons*, and this Court's other recent decisions imposing a higher bar and a more rigorous standard.

The Ninth Circuit's failure to acknowledge and adhere to this Court's qualified immunity jurisprudence is a recurring problem. Indeed, four Ninth Circuit judges recently dissented from the denial of en banc rehearing in another qualified immunity case, observing that "the panel was required to identify 'existing precedent' that '"squarely governs" the specific facts at issue,'" but that the panel "did not even recite that demanding standard, much less apply it." *Slater v. Deasey*, Nos. 17-56708, 17-56751, ___ F.3d ___, 2019 WL 6487175, *7 (9th Cir. Dec. 3, 2019) (dissent from denial of rehearing en banc). As that dissent summed

up, "the panel continues this court's troubling pattern of ignoring the Supreme Court's controlling precedent concerning qualified immunity in Fourth Amendment cases." *Id.* at *1. The same is true here.

The *substance* of the Ninth Circuit's analysis in this case is also problematic. The panel denied qualified immunity based on three prior cases that it summarized as establishing a rule that disputes over "the amount of a bill or the right to possess" do not give rise to probable cause for theft. (App. 2.) That reliance on a general, bright-line rule contravened *Wesby*'s admonishment that probable cause "cannot be 'reduced to a neat set of legal rules.'" 138 S. Ct. at 590. And the Ninth Circuit's failure to address the *facts* of the prior cases it relied on, and how those facts compare to the facts here, contravened the oft-repeated requirements that courts must define the right with particularity and identify a case involving *similar circumstances.*

The requisite analysis would have compelled granting qualified immunity, because none of the cases that the Ninth Circuit cited had facts similar to those here—none defined what constitutes a civil dispute or involved conflicting stories requiring a credibility determination. Review therefore is necessary to secure adherence to this Court's qualified immunity standards, and to confirm the wide latitude officers have in assessing probable cause.

Review is also necessary for another, independent reason: to resolve a conflict among the federal circuits on whether "civil disputes" can give rise to probable

cause and, if civil disputes cannot give rise to probable cause (the Ninth Circuit rule), to clarify the murky issue of what constitutes a civil dispute, and when a civil dispute crosses over into probable cause for arrest.

The panel relied on Ninth Circuit decisions broadly holding that civil disputes cannot give rise to probable cause. (App. 2.) But the Seventh and Eighth Circuits have rejected a blanket rule that civil disputes do not give rise to probable cause, and the Eighth Circuit has expressly questioned the basis for one of the decisions that the panel relied on here. *See Zappa v. Gonzalez*, 819 F.3d 1002, 1005 (7th Cir. 2016); *Royster v. Nichols*, 698 F.3d 681, 690 n.11 (8th Cir. 2012).

The Ninth Circuit's broad rule that civil disputes cannot give rise to probable cause is particularly ripe for review in light of *Wesby*. *Wesby* cautioned that probable cause is a "'fluid concept,'" an "imprecise," fact-specific inquiry "that is 'not readily, or even usefully, reduced to a neat set of legal rules.'" 138 S. Ct. at 586, 590. Review would allow the Court to bring the circuit courts into conformity with those principles. Review would also provide guidance for law enforcement officers throughout the country on what constitutes a "civil dispute" and when a dispute over property or possession may constitute probable cause for theft—a question that routinely confronts officers who are called to resolve such disputes, and that this Court has not yet addressed.

I. Review Is Necessary To Compel Compliance With *Wesby* And This Court's Other Recent Decisions Entitling Officers To Qualified Immunity Absent Case Law Finding A Fourth Amendment Violation In Similar Circumstances.

A. This Court Has Repeatedly Recognized The Importance Of Qualified Immunity To Assure That Officers Are Not Subjected To The Burden Of Litigation And Threat Of Liability.

An officer is entitled to qualified immunity for conduct that "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. ___, 136 S. Ct. 305, 308 (2015) (per curiam). While this standard "'do[es] not require a [prior] case directly on point,'" "'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Id*. In short, immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Id*.

This Court has recognized that qualified immunity is important to society as a whole. *Sheehan*, 135 S. Ct. at 1774 n.3; *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 551 (2017) (per curiam). It assures that officers, when confronted with uncertain circumstances, may freely exercise their judgment in the public interest, without undue fear of entanglement in litigation and the threat of potential liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[W]here an official's duties legitimately require action in which clearly

established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.' ").

As the Court observed in *Harlow*, failing to apply qualified immunity inflicts "social costs," which "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," as well as "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " 457 U.S. at 814; *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866-67 (2017) (qualified immunity's "clearly established" requirement maintains "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties").

Qualified immunity's importance has led this Court to reverse multiple lower court denials of qualified immunity in Fourth Amendment cases in recent years. *See*, *e.g.*, *Sheehan*, 135 S. Ct. at 1774 n.3 (collecting cases for the proposition that "the Court often corrects lower courts when they wrongly subject individual officers to liability"). In doing so, the Court emphasized that such cases, which are highly fact-dependent, require courts to closely analyze existing case law to determine whether the law was clearly established *in the particular circumstances* confronting the officers.

For example, last term in *Wesby*, the Court held that officers had probable cause to arrest partygoers in a usually-vacant house for trespassing. 138 S. Ct. at 586-89. Even though that holding resolved the case, the Court continued on to explain how the circuit court's "clearly established" analysis was flawed, because "the D.C. Circuit's analysis, if followed elsewhere, would 'undermine the values qualified immunity seeks to promote.'" *Id.* at 589. The Court explained that probable cause "'turn[s] on the assessment of probabilities in particular factual contexts' and cannot be 'reduced to a neat set of legal rules.'" *Id.* at 590. It held that the officers would have been entitled to qualified immunity even if probable cause was lacking, because the circuit court had not identified a controlling prior decision that made the lack of probable cause obvious. *Id.* at 590-93.

Even more recently, in *Emmons*, the Court summarily reversed another denial of qualified immunity because the Ninth Circuit defined the right at issue too generally and failed to identify any case involving similar facts that would put the officers on notice that their conduct could give rise to liability. There, an officer sought to enter a residence to check on reported domestic abuse. 139 S. Ct. at 501. The plaintiff exited the residence, ignoring the officer's command not to close the door, and attempted to run past the officer, who took him to the ground. *Id.* at 502. In denying qualified immunity, the Ninth Circuit said: "'The right to be free of excessive force was clearly established at the time of the events in question.'" *Id.*

This Court noted that such a generalized statement of the law was improper, and that the case at hand involved active resistance to an officer whereas the sole case the Ninth Circuit cited involved individuals using passive resistance. *Id*. at 503-04. The Court emphasized that the Ninth Circuit's failure to explain how a decision involving active resistance clearly controlled a case involving passive resistance was "a problem under our precedents" including *Wesby*. *Id.* at 504.

Other recent decisions underline this need for factual specificity. In *Kisela*, the Court summarily reversed the denial of qualified immunity for an officer who shot and wounded a woman hacking a tree with a kitchen knife and acting erratically; the Court emphasized the highly fact-specific nature of Fourth Amendment cases and the need to identify precedent that "'squarely governs' the specific facts at issue." 138 S. Ct. at 1153. Likewise, in *White v. Pauly*, the Court reversed the denial of qualified immunity for an officer who arrived belatedly at an evolving firefight, finding he could reasonably rely on other officers' actions in determining it was necessary to shoot the suspect. 137 S. Ct. at 550-51. The Court observed that the unusual circumstances of the case should have alerted the lower court to the fact that the law in this situation was not clearly established. *Id*. at 552.

As we now show, the same concerns that have led the Court to repeatedly grant review to reaffirm the need to define clearly established law with a high degree of specificity similarly justify this Court's intervention in this case.

B. The Ninth Circuit Did Not Acknowledge This Court's Qualified Immunity Standards Or Apply Them; Instead, It Invoked The Type Of General Rule That This Court Rejected In *Wesby*.

As noted, this Court explained just last term that because of probable cause's "imprecise nature," officers are entitled to qualified immunity unless an existing rule "*obviously* resolve[s]" whether the "*particular*" circumstances at hand constituted probable cause. *Wesby*, 138 S. Ct. at 590 (emphases added). To meet that standard, a court must identify a case holding that an officer "'acting under similar circumstances'" violated the Fourth Amendment. *Id.*

The opinion below does not mention *Wesby*. (App. 2-3.) In fact, it does not cite a single qualified immunity decision from this Court. (*Id.*) Nor does it otherwise acknowledge the rigorous standards repeated throughout this Court's recent decisions. Instead, citing a 2011 Ninth Circuit decision, the panel described the inquiry only as "whether it was reasonable for Defendants to believe there was probable cause . . . ." (App. 2 (citing *Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1078 (9th Cir. 2011)).) The decision gives no explanation for relying on a 2011 circuit opinion instead of on the *ten* more recent decisions in which this Court has prescribed a more rigorous analysis and reversed denials of qualified immunity. *See Slater*, 2019 WL 6487175, at *6 (collecting reversals).

In this respect, the decision reflects a recurring problem that has not abated even after a string of summary reversals and admonishments from this Court. The decision here came just eight months after this Court summarily reversed another Ninth Circuit decision for failing to adhere to this Court's qualified immunity standards. *See Emmons*, 139 S. Ct. at 504 (remanding "for the Court of Appeals to conduct the analysis required by our precedents"). Yet, the panel committed the same errors that led to that reversal.

And, after the decision in this case, the Ninth Circuit denied qualified immunity in yet another case without citing any of the relevant precedents, leading four Ninth Circuit judges to dissent from the denial of en banc rehearing. *See Slater*, 2019 WL 6487175. In a criticism that applies equally to our case, the *Slater* dissent criticized the *Slater* panel for "failing to apply—and in some respects even to mention—the controlling standards that govern the qualified immunity inquiry." *Id.* at *5; *see also id.* at *1 (criticizing panel for "continu[ing] this court's troubling pattern of ignoring the Supreme Court's controlling precedent").

The *Slater* dissent noted that the *Slater* panel did not cite any of this Court's recent qualified immunity decisions, and that it relied instead on a 2003 Ninth Circuit decision that described the standard as whether "it would be clear to a reasonable officer that his conduct was unlawful." *Id.* at *5. That is essentially the same (erroneous) standard that the panel used in our case. The *Slater* dissent also noted that the panel's reliance on a 2003 Ninth Circuit decision for the

"clearly established" standard was clear error, given that since 2003, this Court has reversed the Ninth Circuit's denial of qualified immunity eight times, and other circuits' denials six times. *Id.* at *6. The error is equally clear here: Ten of the reversals cited in *Slater* also post-date the 2011 Ninth Circuit decision that the panel in our case relied on. *Id.*

Moreover, as in *Slater*, the Ninth Circuit did not just fail to recite the correct standard—it also failed to apply it. Under *Wesby*, officers are entitled to qualified immunity unless a lack of probable cause was "*obvious*[]" in the "*particular*" circumstances at hand, meaning that the court must identify a case holding that officers "'acting under similar circumstances'" violated the Fourth Amendment. *Wesby*, 138 S. Ct. at 590 (emphases added). There were several warning flags here that controlling cases do not "obviously" resolve probable cause.

First, two judges concluded earlier in this case that there *was* probable cause for arrest *on the specific facts here*. (App. 22-23 (Bea, J., dissenting), 31-35 (Bristow, M.J., reversed in prior appeal).) Additionally, a third judge (a member of the panel that issued the decision at issue here) commented that she was "not sure" she would have found a lack of probable cause in the first place. (Oral Argument Recording at 3:55-4:02.) Although these judges' views did not carry the day, there is no basis for concluding that they were plainly incompetent. *Ashcroft v. al-Kidd*, 563 U.S. at 743 (qualified immunity protects all but the "'plainly incompetent'" or those who "'knowingly violate the

law' "). Police officers cannot be expected to know more about the law than judges. *Barts v. Joyner*, 865 F.2d 1187, 1193 (11th Cir. 1989).

Second, *Wesby* cautioned that probable cause is "imprecise" and fact-specific, and that it cannot be " 'reduced to a neat set of legal rules.' " 138 S. Ct. at 590. Yet the panel did just that: It found that the rights violation was clearly established because "civil" disputes "ordinarily do not give rise to probable cause to arrest." (App. 2.) That broad proposition glosses over the importance of context and a complete factual picture, the kinds of things that *Wesby* emphasized as critical to the probable cause analysis.

Third, the broad rule that the panel relied on is murky. As Judge Graber observed at oral argument, "I know *Allen* says if it's civil, you don't have probable cause. But I'm not sure what distinguishes civil from criminal in this context." (Oral Argument Recording at 4:17-4:25.) She added, "I don't know where to draw the line and I don't know where the cases draw the line." (*Id.* at 4:38-4:42; *see id.* at 9:43-10:22, 10:45-11:04.)

None of the three decisions the Ninth Circuit cited would have cut through this uncertainty and made a lack of probable cause here "obvious[]" to "*every* reasonable official." *Wesby*, 138 S. Ct. at 590; *Mullenix*, 136 S. Ct. at 308 (emphasis added).

- *Allen v. City of Portland*

Allen stemmed from a dispute between a restaurant and its patron. The restaurant declined to apply a

half-off coupon to a family's $25 meal. 73 F.3d at 234. After the husband left $15 and walked out, police arrested the wife for theft. *Id*. The Ninth Circuit held that there was no probable cause for the arrest in part because "civil disputes cannot give rise to probable cause." *Id*. at 237-38.

Allen did not define what constitutes a "civil dispute." Its broad statement was also flatly wrong. Some civil disputes *do* give rise to probable cause to arrest for theft. For example, under the law of California, where this case arose, failing to pay rent for an apartment can be theft, *People v. Bell*, 197 Cal. App. 4th 822, 828 (2011), even though the landlord could also sue in civil court to enforce the rental agreement. *See also* Cal. Penal Code § 1377 (allowing a civil compromise "[w]hen the person injured by an act constituting a misdemeanor has a remedy by a civil action"). And as Judge Graber commented at oral argument, "The fact that you have rented something doesn't mean you can't also steal it." (Oral Argument Recording at 10:19-10:22.)

Moreover, *Allen*'s broad pronouncement about civil disputes cannot clearly establish a lack of probable cause in all cases involving a dispute over a bill or possession of property. As discussed above, the qualified immunity standard requires courts to identify a case holding that an officer *acting under similar circumstances* violated the Fourth Amendment. *Emmons*, 139 S. Ct. at 504; *Wesby*, 138 S. Ct. at 586, 590; *Kisela*, 138 S. Ct. at 1152; *White*, 137 S. Ct. at 552; *Mullenix*, 136 S. Ct. at 308.

Allen did not involve similar enough circumstances to make the lack of probable cause here obvious to every reasonable official. The officers here were told that Daniel drove off with a $3,300 mattress after Nurse Wysinger asked him and Raymond to wait while she checked with the mattress owner and even after Wysinger said she would call the police if he left with it. (App. 6-7; 2 ER 160-61, 164.) The rental agreement said that the mattress could not be moved without explicit permission. (App. 11, 22; 2 ER 59.) And although Raymond claimed to have permission, Wysinger cast doubt on that claim when she reported that the mattress owner told her that the mattress was not to be moved. (App. 7, 22; 2 ER 161-62.) The officers were entitled to conclude that Raymond was lying, that he and Daniel had taken the mattress knowing they had no right to do so, and that they had intended to keep it indefinitely. *Wesby*, 138 S. Ct. at 592 (innocent explanations "do not have any automatic, probable-cause-vitiating effect"), 588 (suspect's "lying and evasive behavior gave the officers reason to discredit everything she had told them"). *Allen*'s analysis of a coupon dispute that involved no credibility issue does not obviously control this situation.[2]

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[2] The Ninth Circuit opinion glossed over this credibility issue when it asserted that "[t]he only dispute was whether the brothers could move the mattress before delivery of a new one." (App. 3.) SuperCare may have told the rehabilitation center that it would deliver a different mattress to plaintiffs' mother's house. (App. 7.) But that does not make the only dispute one of timing—as noted above, a reasonable officer could have concluded that Raymond was lying about having permission to move the

- *Stevens v. Rose*

Stevens arose out of two people's discussion with a prosecutor about who owned a car. 298 F.3d 880, 882 (9th Cir. 2002). The prosecutor told Stevens (one of the putative owners) to leave, and then sent a police officer after him to see if he had the car keys. *Id.* The officer asked Stevens to talk to him without explaining why. *Id.* When Stevens fled, the officer beat, pepper-sprayed, and handcuffed him. *Id*. The Ninth Circuit denied the officer qualified immunity on Stevens's ensuing Fourth Amendment excessive force claim. *Id*. at 885.

Stevens does not "obviously" resolve probable cause here, *Wesby*, 138 S. Ct. at 590, for several reasons. Among other things: (1) *Stevens* did not involve an arrest for theft—the arrest was for resisting an officer. 298 F.3d at 882. (2) *Stevens*' facts—a person running away from an officer who wanted to talk to him, and with no credibility determination confronting the arresting officer—are far from the facts here. And (3) *Stevens*' parroting of *Allen*'s assertion that "'civil disputes cannot give rise to probable cause,'" 298 F.3d at 883, is the sort of "neat" legal rule that does not provide sufficient guidance on probable cause in any specific case. *Wesby*, 138 S. Ct. at 590.

- *Kennedy v. L.A. Police Dep't*

In *Kennedy*, police arrested a woman for theft because she took her roommate's belongings as security

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mattress and that he knew he was taking the mattress without the owner's consent.

for unpaid rent. 901 F.2d 702, 704 (9th Cir. 1989). Nothing indicated that the officers thought the woman was holding the property for any other purpose. *Id*. at 706. *Kennedy* concluded that "there was no reasonable basis from which anyone could believe that [woman] had the specific intent permanently to deprive [her roommate] of her property." *Id*.

Kennedy's focus on permanent deprivation is questionable in light of the California Supreme Court's later decision that some temporary takings constitute theft. *People v. Avery*, 27 Cal. 4th 49, 56 (2002). The panel's assumption that every reasonable official would have understood *Kennedy* as establishing a broad rule about civil disputes and probable cause is also dubious, given that other judges have not interpreted it that way. Specifically, before the incident here, a published Eighth Circuit decision had said that *Kennedy* "did not hold, as appellants suggest, that civil disputes negate the elements of criminal intent." *Anderson v. Cass Cnty., Mo*., 367 F.3d 741, 746 n.4 (8th Cir. 2004). Police officers on the ground cannot be expected to know more about interpreting the law than appellate judges.

Nor do *Kennedy*'s facts obviously resolve probable cause here—namely, where Daniel drove away with the mattress instead of waiting a few minutes for Wysinger to confirm that he had permission to take it, and where Wysinger reported that the mattress owner said that the mattress was not to be moved, supporting a reasonable inference that Daniel and Raymond had lied about having permission to take it.

Kennedy therefore does not clearly establish a lack of probable cause. *Cf. Emmons*, 139 S. Ct. at 503-04 (prior decision involving a passively-resisting suspect did not clearly establish that officer could not take to the ground and handcuff a suspect who defied an instruction not to close a door, and who tried to brush past the officer).

The bottom line: The Ninth Circuit did not acknowledge this Court's qualified immunity standards, much less apply them. The panel did not identify any prior decision finding a Fourth Amendment violation under circumstances similar to those here, several judges have concluded that there *was* probable cause here or suggested that it is a close question, and the Ninth Circuit's decision does not even cite *Wesby*, much less address its admonishment that probable cause is not susceptible to neat legal rules. Against that background, the Ninth Circuit's denial of qualified immunity requires this Court's review to ensure adherence to *Wesby* and this Court's other recent decisions.

II. Review Is Necessary To Resolve A Circuit Split On Whether Civil Disputes Can Give Rise To Probable Cause For Arrest And, If The Answer Is No, To Clarify The Rule's Contours.

Review is also necessary to resolve a split among the circuit courts on the Fourth Amendment issue of whether civil disputes can give rise to probable cause to arrest—and, if it is true that civil disputes cannot

give rise to probable cause, to clarify what falls within the "civil disputes" category. The Court has never addressed this issue.

The decision at issue here relied on three Ninth Circuit decisions that it summarized as holding that "a dispute over the amount of a bill or the right to possess are civil in nature and ordinarily do not give rise to probable cause to arrest." (App. 2 (citing *Allen*, 73 F.3d at 237; *Stevens*, 298 F.3d at 883-84; and *Kennedy*, 90 F.2d at 706).) *Allen* states the rule even more starkly: "By its definition, probable cause can only exist in relation to criminal conduct. It follows that civil disputes cannot give rise to probable cause." 73 F.3d at 237.

As this case demonstrates, the Ninth Circuit applies *Allen*'s broad rule as negating probable cause when one party claims to hold a contractual right to property and another party contests the claim of right. (App. 2; *see also*, *e.g.*, App. 12 (district court concluding that it was bound by *Allen*'s pronouncement that "'civil disputes cannot give rise to probable cause'"); *Watts v. City of Newport Beach*, No. 18-55833, ___ F. App'x ___, 2019 WL 5546094 (9th Cir. Oct. 28, 2019) (relying on *Allen* and *Stevens* in denying qualified immunity to officers who arrested taxi passenger for theft by false pretenses after her credit card was declined and she had no other form of payment); *Gallagher v. City of Winlock*, 287 F. App'x 568, 573 (9th Cir. 2008) (relying on *Allen* and *Stevens* in denying qualified immunity to officers who arrested plaintiffs for residential burglary, where plaintiffs claimed to be current tenants of the residence but another person claimed he was the

current tenant and that plaintiffs were ex-tenants who entered without his permission).

By contrast, the Eighth Circuit has rejected a blanket rule that civil disputes cannot give rise to probable cause, and has dismissed the Ninth Circuit rule as overbroad. *See Royster*, 698 F.3d at 690 n.11. *Royster* held there was probable cause to arrest a man for theft of restaurant services after the restaurant manager reported that he had not paid his bill. *Id.* at 690. *Royster* rejected an argument that under *Allen* and an Eighth Circuit decision cited in *Allen* (*Peterson v. City of Plymouth*, 60 F.3d 469, 476-77 (8th Cir. 1995)), the non-payment amounted to a civil dispute that could not create probable cause to arrest. 698 F.3d at 690 n.11. *Royster* explained that "although *Allen* cited *Peterson* in support of its conclusion 'that a civil dispute cannot give rise to probable cause to arrest,'" the Eighth Circuit does not view *Peterson* as "'stand[ing] for the blanket proposition that civil disputes always negate the elements of criminal intent.'" *Id.* A blanket rule would be inappropriate, because "'[a] probable cause determination is fundamentally a fact-specific inquiry.'" *Id.*; *see also Anderson*, 367 F.3d at 745 n.4 (Eighth Circuit distinguishing *Kennedy*, 901 F.2d 702, which the Ninth Circuit here cited for its blanket rule—and observing that *Kennedy* "did not hold, as the appellants suggest, that civil disputes negate the elements of criminal intent").

The Seventh Circuit has likewise rejected a blanket rule that civil disputes cannot give rise to probable cause for arrest. *See Zappa v. Gonzalez*, 819 F.3d at

1005 (where parties disputed whether plaintiff received the motorcycle he paid for, "the fact that the situation seems to have escalated far too quickly into allegations of criminal misbehavior, rather than a civil dispute over a mistaken delivery, does not undermine Officer Gonzalez's probable cause"). As the Seventh Circuit aptly put it, "[c]ivil law and criminal law are not hermetically sealed off from one another." *Id.*; *see also Bryant v. Ramos*, No. 15-1568-PP, 2017 WL 568314, at *4-5 (E.D. Wis. Feb. 13, 2017) (rejecting argument that a dispute over a restaurant bill was a "civil dispute" that could not give rise to probable cause; "The question of whether a situation is civil or criminal depends on context and intent, and intent is a very fact-bound inquiry"). The Second Circuit has recognized this crossover, too. *Kent v. Thomas*, 464 F. App'x 23, 26 (2d Cir. 2012) ("the fact that this case could also be characterized as a contract dispute did not preclude defendants from believing that Kent's actions satisfied the elements of larceny"; "defendants could reasonably have concluded that Kent had used the pretext of the contract—valid or not—to take considerably more 'sawtimber' lumber than the contract authorized").

The Seventh and Eighth Circuits' fact-specific approach aligns with this Court's observation that probable cause is "imprecise" and "'turn[s] on the assessment of probabilities in particular factual contexts.'" *Wesby*, 138 S. Ct. at 590. The Ninth Circuit's rule, by contrast, runs afoul of this Court's mandate that probable cause "cannot be 'reduced to a neat set of

legal rules.'" *Id.* Yet, absent this Court's intervention, the Ninth Circuit's rule will continue to drive decisions within the Ninth Circuit. (*See*, *e.g.*, App. 12 (district court: "While Defendants assert the *Allen* statement is overbroad, by pointing to an Eighth Circuit case, Defendants did not provide, and the Court could not find, a Ninth Circuit case similarly curbing *Allen*. Accordingly, the controlling authority in this Circuit remains *Allen*.").) The dueling lines of authority also create confusion for law enforcement officers and courts in other circuits that have not yet taken a position on this issue. Review is necessary to resolve the split.

Moreover, if the Ninth Circuit's blanket rule is to stand, review is necessary to clarify the contours of the rule. As this case, *Allen*, *Stevens*, and *Wesby* demonstrate, people often call law enforcement officers to resolve disputes about possession and ownership. Under the Ninth Circuit's rule, law enforcement officers responding to those calls cannot rely on the usual, fact-specific probable cause analysis. Instead, they have to determine whether the dispute might be categorized as "civil." As Judge Graber observed at oral argument, this is not an easy task: "I'm not sure what distinguishes civil from criminal in this context. If you have a rental car and you keep it beyond the time, you know, that's certainly a rental dispute and if it's two days, maybe it becomes criminal. I mean, I don't know where to draw that line and I don't know where the cases draw the line." (Oral Argument Recording at 4:21-4:42.) If a Ninth Circuit judge does not know where the line is, officers cannot be expected to either. This Court

has never addressed the issue. Its guidance would be invaluable for officers confronting what is currently a murky rule.

CONCLUSION

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

Respectfully submitted,

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