No. 19-794

In The
Supreme Court of the United States

DANIEL MACIAS and MICHAEL FOSTER,

Petitioners,

v.

RAYMOND NICHOLS and DANIEL NICHOLS,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under long-standing Ninth Circuit and California law, where an officer encounters facts amounting to a purely civil contract dispute over the right to possess property, that dispute provides no probable cause to arrest a party for theft, because such purely civil disputes do not evince the requisite specific intent. Petitioners encountered such a dispute and arrested Respondents for grand theft. The Ninth Circuit, in two separate appeals, denied qualified immunity for Petitioners because (1) Petitioners lacked probable cause to arrest Respondents for grand theft, and (2) the law governing Respondents' Fourth Amendment rights was clearly established.

The questions presented are:

1. Whether the Ninth Circuit adhered to this Court's qualified immunity decisions in holding that Petitioners violated Respondents' clearly established Fourth Amendment rights under long-standing Circuit precedent.

2. Whether the Ninth Circuit's rule that purely civil contract disputes over the right to possess property cannot give rise to probable cause for the crime of theft.

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STATEMENT OF THE CASE

Respondents Raymond and Daniel Nichols are the adult children of Waly Nichols. In January 2013, after suffering a pitbull attack, Ms. Nichols was admitted to Community Care Rehabilitation Center ("CCRC") in Riverside, California for rehabilitative medical care. Pet. App. 5. As part of Waly Nichols's rehabilitation regimen, doctors prescribed a low air loss mattress for her to sleep on. Daniel, as Waly Nichols's patient representative, entered into a rental agreement with SuperCare Medical Supply ("SuperCare") to lease a low air loss mattress. Pet. App. 5-6; ER 52-59, 107-113. Under the terms of the rental agreement, Daniel and Waly Nichols were responsible for the mattress and were financially liable for any misuse, loss, damage, or theft. CCRC was not a party to the rental agreement. *See* ER 104-106. SuperCare delivered the mattress, along with an air pump, directly to the CCRC facility. Pet. App. 6. Daniel Nichols signed a receipt for the mattress and the pump. Pet. App. 5.

On March 9, 2013, Waly Nichols was discharged from CCRC. Her aftercare plan required that she continue to sleep on the low air loss mattress. In order to avoid delivery delays, Raymond called SuperCare and arranged for he and Daniel to transport the mattress themselves. Raymond also called Ms. Nichols's insurance provider, SCAN, and confirmed the arrangement. Raymond took detailed notes of his correspondence with SCAN and SuperCare representatives. Pet. App. 6.

When Raymond arrived at CCRC to pick up his mother and the mattress, a CCRC nurse, Stephanie Wysinger, told him that he could not take the mattress. *Id.* Raymond informed Wysinger that SuperCare and SCAN authorized him to transport the mattress to his mother's home. *Id.* Wysinger nonetheless threatened to call the police if he took the mattress. *Id.* Raymond informed Wysinger that he had copies of the SuperCare rental agreement and notes he made while corresponding with SuperCare and SCAN representatives. *Id.* Without any further objections from Wysinger, Raymond and Daniel deflated the mattress and took it, along with the air pump, out to Daniel's truck.[1] *Id.* Daniel drove the mattress to Waly Nichols's house. Pet. App. 7.

While the Nichols brothers removed the mattress, Wysinger called the Riverside Police Department ("RPD"). Pet. 3. She told the police that the Nicholses rented a mattress for their ailing mother's rehabilitative care and that they were taking it to their mother's home after her discharge from CCRC. Pet. 3-4. She also told them that Raymond said he had obtained permission to move the mattress from SuperCare and SCAN. Pet. 4. Even though Wysinger was not a party to the rental agreement, she objected

[1] Respondents dispute Petitioners' statement, Pet. 4, that "Wysinger asked Raymond to wait while she confirmed with SuperCare, but Raymond refused." Officer Macias arrested Raymond based solely on Wysinger's conclusory allegation that Respondents had "stolen an air mattress." *See* ER 77, 164.

to the Nicholses moving the mattress because she felt it was "unusual."[2] *Id.*

Raymond approached Wysinger's desk to clear up any remaining confusion. Pet. App. 7. As he waited for Wysinger to get off the phone, RPD Officer Daniel Macias, Petitioner in this action, approached Raymond and demanded the "stolen" mattress. *Id.* Raymond explained that the Nicholses rented the mattress for their mother, and that SuperCare had authorized them to transport the mattress. *Id.* Raymond offered to show the rental agreement. *Id.* Nevertheless, Officer Macias handcuffed Raymond, and searched his person. *Id.* RPD Officer Michael Foster, Petitioner in this action, arrived shortly thereafter. *Id.*

Raymond informed the Officers that Daniel had taken the mattress to his mother's home. Pet. App. 8. Raymond also informed them that the Nichols family had rented the mattress from SuperCare, and that CCRC was not a party to that contract. *Id.* Raymond offered to show the Officers the rental agreement and correspondence notes. *Id.* The Officers ignored Raymond. *Id.* Officer Foster said Raymond was being arrested for theft of the mattress and put him in a patrol vehicle. *Id.*

Daniel returned to CCRC with the mattress. *Id.* Daniel presented the Officers with the SuperCare

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[2] Respondents dispute Petitioners' suggestion, Pet. 4, that Wysinger told Officers "SuperCare [said] that the mattress should not be moved" *before* they arrested Respondents. *See* ER 69, 77, 88, 121, 126, 164.

rental agreement, explaining that it allowed him and Raymond to transport the mattress.[3] *Id.* The agreement was emblazoned with SuperCare's logo and prominently displayed both Daniel's signature and a serial number for the mattress. ER 52-59. The Officers briefly glanced at the rental agreement and then placed Daniel in handcuffs.[4] Pet. App. 8. The Nicholses were transported to the RPD Jail, where they remained until the following day.[5] *Id.*

The Riverside County District Attorney's Office declined to prosecute Raymond and Daniel. A RPD Detective reviewed the arrest and confirmed through SuperCare that Raymond and Daniel had a right to transport the mattress. Pet. App. 8; ER 104-106. The case was then closed, as the theft allegation was "unfounded." Pet. App. 8, 27; ER 106.

Raymond and Daniel sued Officers Macias and Foster under 42 U.S.C. section 1983 and the Fourth Amendment. Pet. App. 24-29; ER 205-237. The Officers moved for summary judgment on grounds that they had probable cause to arrest the Nicholses for grand theft. Pet. App. 24-41. The Officers also argued that

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[3] The Officers omitted any mention of the signed rental agreement from their police reports. *See* ER 67-69.

[4] Although Respondents "showed [Petitioners] the mattress rental" agreement, Respondents dispute Petitioners' suggestion that they attempted to read or interpret its terms. *Cf.* Pet. 5. Petitioners "ignored" the rental agreement. *See* ER 89-90.

[5] Respondents dispute Petitioners' suggestion, Pet. 4, that "Officer Foster called SuperCare to investigate further" *before* arresting Respondents. Foster made this call *after* arresting Respondents. *See* ER 69, 126.

they were entitled to qualified immunity because the law was not clearly established. *Id.* The Officers did not claim to have probable cause for any other substantive crime. *Id.* The Officers' moving papers made no mention of the Nicholses' rental contract with SuperCare.[6] A magistrate granted the Officers' motion.

The Ninth Circuit reversed because "the undisputed facts do not establish probable cause to believe that Raymond and Daniel had the requisite intent to commit grand theft." Pet. App. 18-22. The court noted that although "probable cause does not require . . . specific evidence of each element of the offense," Circuit precedent establishes that where "specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred." *Id.* at 19-20 (citing *Rodis v. City & Cty. of San Francisco*, 558 F.3d 964, 969 (9th Cir. 2009); *Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1076 (9th Cir. 2011)). The court further noted that "[i]n California, grand theft requires the *specific intent* to permanently deprive the owner of the use of property." *Id.* at 20 (citing *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1160 (9th Cir. 2009); *People v. Avery*, 27 Cal. 4th 49 (2002) (emphasis added)). "At most, there was a dispute about what the rental contract allowed." *Id.* at

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[6] This Court should note Petitioners' persistent lack of candor with respect to the SuperCare contract. Not only did Petitioners omit it from their police reports, they omitted it from their original summary judgment moving papers. *See* ER 67-69, 151-165.

20-21 (citing *Allen v. City of Portland*, 73 F.3d 232, 237-38 (9th Cir. 1995)).[7]

On remand to the district court for further consideration on qualified immunity's "clearly established" prong, the district court concluded that the Officers were not entitled to qualified immunity and denied their motion for summary judgment. Rejecting the Officers' argument that there was "arguable probable cause" of theft under "the totality of circumstances," the court found that "[t]he present facts fall squarely within the authority established by *Allen* [*v. City of Portland*, 73 F.3d 232 (1995)]." Pet. App. 10-13.

The Officers appealed, and the Ninth Circuit[8] affirmed: "The district court . . . properly held that Defendants were not entitled to immunity because the law was clearly established at the time of Plaintiffs' arrest in 2013." *Id.* at 3. The court noted that it had already "held 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." *Id.* at 2 (citing *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*

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[7] Judge Bea dissented because, "[i]n [his] view, the officers had probable cause to believe that Raymond and Daniel intended to steal the mattress." Pet. App. 22-23.

[8] The panel included Ninth Circuit Judges Susan Graber and Mary Schroeder, as well as Illinois District Judge Joan Lefkow. Pet. App. 2.

grounds by Act Up!/Portland v. Bagley, 988 F.2d 868, 872-873 (9th Cir. 1993)). "This was such a dispute," the court found. *Id.* The court noted that the Nicholses "told the police officers that they had rented the mattress," and further "produced the rental receipt and agreement for the officers' review." *Id.* at 3. Thus, at most the Officers faced a contract dispute about "whether the brothers could move that mattress" under the SuperCare agreement. *Id.*

REASONS FOR DENYING THE PETITION

I. Certiorari Should be Denied on the First Question Presented Because the Ninth Circuit Correctly Applied This Court's Qualified Immunity Precedent to the Fourth Amendment Issues in this Case.

A. Although Qualified Immunity Requires Law Defined to a High Degree of Specificity, it Does Not Require an "Unnecessarily High" Degree.

"To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent," meaning it must be "settled law" that is "dictated by 'controlling authority' or 'a robust consensus of cases of persuasive authority.'" *D.C. v. Wesby*, 138 S. Ct. 577, 591 (2018) (quoting *Hunter v. Bryant*, 502 U.S. 224, 228 (1991); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-742 (2011); *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). Courts should not "define clearly

established law at a high level of generality." *Id.* (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014)). The law should have a high "degree of specificity," such that "every reasonable official would" understand that it "prohibit[s] the officer's conduct in the particular circumstances before him." *Id.* (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015)); *Reichle v. Howards*, 566 U.S. 658, 664-666 (2012). "[T]he salient question . . . is whether the state of the law in [the year of the incident] gave [officers] fair warning that their alleged treatment of [the plaintiffs] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 740-741 (2002) (citing *United States v. Lanier*, 520 U.S. 259 (1997)).

A published case involving "fundamentally similar" or "materially similar" facts suffices as "clearly established" law. *See Hope*, 536 U.S. at 741; *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982). In the Fourth Amendment context, this generally requires a plaintiff to "identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." *Wesby*, 138 S. Ct. at 591 (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017)). Plaintiffs need not cite a case "directly on point" or show that "the very action in question has previously been held unlawful," but "in the light of pre-existing law the unlawfulness must be apparent" and "beyond debate." *Id.*; *al-Kidd*, 563 U.S. at 741; *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Law may be clearly established "despite notable factual distinctions . . . so long as the prior decisions gave reasonable warning that the conduct then at

issue violated constitutional rights." *Hope*, 536 U.S. at 740-741 (quoting *Lanier*, 520 U.S. at 269). This Court has "expressly rejected a requirement that previous cases be 'fundamentally similar,'" as such a "standard would . . . demand a degree of certainty [that is] unnecessarily high[.]" *Hope*, 536 U.S. at 741; *see Lanier*, 520 U.S. at 270. "To require something clearer than 'clearly established' would . . . call for something beyond 'fair warning.'" *Lanier*, 520 U.S. at 271.

B. The Ninth Circuit, Consistent With This Court's Precedent, Defined "Clearly Established" Law With a High Degree of Specificity.

Petitioners' first asserted ground for certiorari is based on the premise that the decision below "fail[s] to acknowledge and adhere to this Court's qualified immunity jurisprudence." *See* Pet. 11-12, 18-26. The Petition also attacks the "substance of the Ninth Circuit's analysis." *Id.* Thus, Petitioners object to a perceived "misapplication" of this Court's qualified immunity precedent. *Cf.* U.S. Sup. Ct. R. 10. In any event, the record in this case demonstrates that the Ninth Circuit faithfully adhered to this Court's qualified immunity precedents.

1. The Ninth Circuit Correctly Applied Substantive Law in Determining That Petitioners Lacked Probable Cause to Arrest Respondents for "Grand Theft."

In evaluating whether Petitioners lacked probable cause to arrest Respondents under a totality of the circumstances,[9] the Ninth Circuit relied on a narrow but well-established line of precedent governing warrantless arrests for "specific intent" crimes.[10] Pet. App. 19-20 (citing *Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1076 (9th Cir. 2011); *Rodis v. City & Cty. of San Francisco*, 558 F.3d 964, 969 (9th Cir. 2009)). These decisions hold that "when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred." *Gasho v. U.S.*, 39 F.3d 1420, 1428 (9th Cir. 1994), *cert. denied*, 515 U.S. 1144 (1995) (citing *Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702, 705 (9th Cir. 1989)). Because the only crime alleged against Respondents was grand theft under California law, the court focused on whether Petitioners had "probable cause to believe that

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[9] Though the Ninth Circuit did not use the phrase "totality of the circumstances," its substantive analysis indeed evaluated all of the undisputed "facts and circumstances within [Petitioners'] knowledge." *See* Pet. App. 19-21.

[10] *See*, *e.g.*, *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994), *cert. denied*, 515 U.S. 1144 (1995); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1499 (9th Cir. 1996); *Blankenhorn v. City of Orange*, 485 F.3d 463, 472 (9th Cir. 2007); *Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1077 (9th Cir. 2011); *Rodis v. City & Cty. of San Francisco*, 558 F.3d 964, 970 (9th Cir. 2009).

Raymond and Daniel had the requisite intent to commit grand theft." *See* Pet. App. 20.

Next, the court applied an even narrower subset of "specific intent" cases pertaining to the crime of theft. *See* Pet. App. 20-21 (citing *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1160 (9th Cir. 2009); *People v. Avery*, 27 Cal. 4th 49, 54-55 (2002); *Allen v. City of Portland*, 73 F.3d 232, 237-238 (9th Cir. 1996)). Under California law, "[a]n essential element of any theft crime is the specific intent to permanently deprive the owner of his or her property." *People v. Williams*, 176 Cal.App.4th 1521, 1526-1527 (2009) (citing *Avery*, 27 Cal. 4th at 54-55). A "good faith belief by the defendant that the property taken is his own has long been accepted as a complete defense to theft-related crimes." *Id. See also People v. Tufunga*, 21 Cal. 4th 935, 938 (1999). "In light of this legal standard," and applying it to the "facts . . . known to the officer at the time of the arrest," the court held that "the undisputed facts do not establish probable cause to believe that Raymond and Daniel had the requisite intent to commit grand theft." Pet. App. 19-20. "At most, there was a dispute about what the rental contract allowed," which by itself cannot amount to probable cause under *Allen*, 73 F.3d at 237-238. Pet. App. 20-21.

The court rejected Petitioners' purported reliance on Wysinger's conclusory allegation that Respondents "were not authorized to remove the mattress from the

center,"[11] because it was undisputed that Respondents presented Petitioners with a physical copy of "the rental agreement, and explained that they had the rental company's permission to remove the mattress." *Id.* Moreover, the text of the rental agreement "does not make plain that the brothers were not permitted to transport the mattress." Pet. App. 21, n.2.

Thus, the court "vacate[d] the summary judgment and remand[ed] for further proceedings on the issue of qualified immunity." Pet. App. 19, 21-22. Petitioners did not seek panel rehearing or rehearing en banc. Nor did Petitioners seek review in this Court. Nothing in the record supports Petitioners' attack on the "substance of the Ninth Circuit's analysis." *See* Pet. 11-12, 18-26.

In sum, the Ninth Circuit correctly determined that Petitioners lacked probable cause to arrest Respondents for grand theft under California law. This Court should leave that determination undisturbed.

2. The Ninth Circuit Correctly Determined that the Law Was Clearly Established Under Ninth Circuit and California Precedents.

The court below, in determining "clearly established" law, relied on a narrow and highly particularized subset of section 1983 precedent

[11] Petitioners dispute this alleged fact. Wysinger simply reported that Respondents had "stolen an air mattress." ER 164 ¶ 2.

governing warrantless arrests for specific intent crimes based upon purely civil disputes over the right to possess property. Pet. App. 1-3, 18-22. "Controlling authority" in this area includes *Allen v. City of Portland*, 73 F.3d 232 (9th Cir. 1996), *Stevens v. Rose*, 298 F.3d 880 (9th Cir. 2002), *Kennedy v. L.A. Police Dep't*, 901 F.2d 702 (9th Cir. 1990), and *Peng v. Mei Chin Penghu*, 335 F.3d 970 (9th Cir. 2003).[12] Together, *Allen*, *Kennedy*, and *Stevens* "clearly established" that where "the facts of [a] case amount to a contract dispute," and the officer "knew that the dispute was civil, not criminal," an officer has "no probable cause to arrest [a] plaintiff" for the "specific intent [crime] of grand theft" under California law, because such civil disputes do not evince the requisite "specific intent to permanently deprive." *Allen*, 73 F.3d at 237-238 (citing *Kennedy*, 901 F.2d at 706); *Stevens*, 298 F.3d at 884.

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

In *Kennedy*, the Ninth Circuit held that "an ordinary disagreement between two roommates" over "possession of . . . property" held "as security for a debt" did not furnish probable cause to arrest for the California crime of "grand theft" because it offered "no reasonable basis from which anyone could [infer] . . . the specific intent permanently to deprive." *Kennedy*, 887 F.2d at 922-924, 934. The *Kennedy* plaintiff

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[12] Although the panel below did not cite *Peng*, it was cited to them. Both Judges Graber and Schroeder sat on the *Peng* panel as well. *See Peng*, 335 F.3d at 970.

retained her roommate's "property as security for money [the roommate] owed" after the roommate attempted to vacate their apartment "without prior warning." *Id.* at 922. The roommate then called police, who, like Petitioners here, "arrested [the plaintiff] for grand theft" under California law. *Id.* The plaintiff sued the officers under the Fourth Amendment and 42 U.S.C. section 1983. In upholding the district court's denial of the officers' motion for directed verdict, the Ninth Circuit recognized "that an element of the crime of grand theft is the *specific intent permanently to deprive* an owner of her property," and that "there was no reasonable basis from which anyone could believe that [the plaintiff] had the *specific intent permanently to deprive* [the roommate] of her property." *Id.* at 923-924 (emphases added).

Kennedy laid the foundation for the Ninth Circuit's rule that, "[b]y its definition, probable cause can only exist in relation to criminal conduct." *Allen*, 73 F.3d at 237-238 (citing *Kennedy*, 901 F.2d at 706). It also laid the foundation for the Circuit's rule that "when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred." *Gasho v. U.S.*, 39 F.3d 1420, 1428 (9th Cir. 1994) (citing *Kennedy*, 901 F.2d at 705).

It is of no consequence that *Kennedy* predated "the California Supreme Court's later decision [in] . . . *People v. Avery*, 27 Cal. 4th 49, 56 (2002)," because *Avery* did not alter the rule that probable cause for theft requires "specific intent" to "permanently deprive

an owner of his or her property." *Cf.* Pet. 25. In fact, *Avery* reaffirmed this requirement, and both the Ninth Circuit and district court below cited *Avery* for this very rule. *See* Pet. App. 11, 14, 20. In any event, nothing in *Avery* suggests that officers may intervene in a "contract dispute," or any other civil dispute, by arresting a party to it. California law suggests quite the opposite. *See People v. Beggs*, 178 Cal. 79, 84 (1918); *People v. Ashley*, 42 Cal. 2d 246, 265 (1954).

- *Allen v. City of Portland*

In *Allen*, the Ninth Circuit held that an officer had "no probable cause to arrest [a] plaintiff" for theft because "the facts of [the] case amount[ed] to a contract dispute," and thus did not evince the requisite "specific intent to permanently deprive." *Allen*, 73 F.3d at 237-238 (citing *Kennedy*, 901 F.2d at 706). There, like Wysinger in this case, a restaurant manager "called 911 and reported a theft," then identified the plaintiff to an officer. *Id.* at 234. The officer subsequently learned that the plaintiff "offered a coupon to pay for the meal," but "the restaurant claimed the coupon was invalid." *Id.* at 238. Like the rental agreement in this case, the "dispute over the validity of a discount coupon was a contract dispute," which is "civil in nature." *Id.* Nevertheless, like Petitioners in this case, the officer in *Allen* sided with the restaurant manager and arrested the plaintiff for theft. *Id.* The Ninth Circuit ultimately held that the "contract dispute" did not furnish "any information which would support that [plaintiff] had any criminal

intent," and thus "cannot give rise to probable cause" to arrest for theft. *Id.*

Petitioners attempt to distinguish *Allen* because the contract dispute in that case was "a coupon dispute" rather than a dispute over a written "rental agreement." *See* Pet. 21-23. That distinction is of no moment here, because the issue in this case is whether Petitioners realized they confronted a "contract dispute," and they indisputably did. *See* Pet. 6.

Petitioners also incorrectly assert that *Allen* "involved no credibility issue." *Compare* Pet. 23, *with Allen*, 73 F.3d at 233-235. Notwithstanding that assertion, the instant case does not turn on a "credibility issue," because Respondents "showed [Petitioners] the lease agreement that identified Daniel and Ms. Nichols as the lessees of the mattress." *See* Pet. App. 15, 34. Presenting Petitioners with a physical copy of the rental agreement "changed the nature of the dispute from one solely about credibility to a civil dispute regarding contract performance and interpretation." *Id.* "[A]n officer may not ignore exculpatory evidence that would 'negate a finding of probable cause,'" or act "deaf and blind" when presented with documents "any prudent person would have taken into account." *See Henderson for Epstein v. Mohave Cty., Ariz.*, 54 F.3d 592, 593-595 (9th Cir. 1995); *Yousefian v. City of Glendale*, 779 F.3d 1010, 1014 (9th Cir. 2015) (quoting *Broam v. Bogan*, 320 F.3d 1023, 1032 (9th Cir. 2003)).

- *Stevens v. Rose*

In *Stevens*, the Ninth Circuit squarely addressed the issue of "whether a police officer is entitled to qualified immunity, as a matter of law, for seizing an individual based on a civil dispute." *Stevens*, 298 F.3d at 881. *Stevens*'s analysis "relate[d] solely to [the defendant's] qualified immunity defense with respect to the alleged Fourth Amendment violation," as it was undisputed that "no safety issue was at play," and the officer "knew that the dispute was civil, not criminal." *Id*. The court, relying on *Allen*, as well as decisions of the Fifth, Seventh, and Eighth Circuits, held that the officer's "good faith" reliance on a district attorney's advice "[did] not overcome the rule that civil disputes do not give officers probable cause to arrest." *Id.* at 883 (citing *Allen*, 73 F.3d at 237; *Wooley v. City of Baton Rouge*, 211 F.3d 913, 925-927 (5th Cir. 2000); *Peterson v. City of Plymouth*, 60 F.3d 469, 476-477 (8th Cir. 1995); *Moore v. Marketplace Rest.*, 754 F.2d 1336, 1345-1347 (7th Cir. 1985)).

Stevens is significant in that it held it is "clearly established law that civil disputes do not provide probable cause to arrest."[13] *Id.* at 884 (citing *Allen*, 73 F.3d at 237). In other words, it is clearly established after *Stevens* that this rule of law is clearly established.

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[13] The Ninth Circuit later clarified that the *Stevens* rule pertains to "purely civil" disputes. *Peng v. Mei Chin Penghu*, 335 F.3d 970, 977 (9th Cir. 2003).

Together, *Allen*, *Kennedy*, and *Stevens* define the "contours" of the law to a high "degree of specificity" such that "every reasonable official would interpret [them] to establish" that the Fourth Amendment prohibits arresting a plaintiff for grand theft under California law solely on the basis of a civil "contract dispute" over the "right to possess" an item of personal property. *Cf. Wesby*, 138 S. Ct. at 591; *Mullenix*, 136 S. Ct. at 309; *Reichle*, 566 U.S. at 664-666. That principle is "settled law" in the Ninth Circuit, and it is "beyond debate." *Cf. Wesby*, 138 S. Ct. at 591; *Hunter*, 502 U.S. at 228; *al-Kidd*, 563 U.S. at 741. Petitioners here confronted "such a dispute." Pet. App. 2. "At most, there was a dispute about what the rental contract allowed." Pet. App. 20-21.

The only remaining question for purposes of the "clearly established" prong is whether *Allen*, *Kennedy*, and *Stevens* gave Petitioners "fair warning" that their conduct was unlawful in the situation and particular circumstances that they faced. *See Wesby*, 138 S. Ct. at 591; *Plumhoff*, 572 U.S. at 779; *Hope*, 536 U.S. at 740-741; *Lanier*, 520 U.S. at 269-271; *Mullenix*, 136 S. Ct. at 309. Put differently, the question is whether, under the circumstances, Petitioners "knew that the dispute was civil, not criminal," because it "amount[ed] to a contract dispute." *See Allen*, 73 F.3d at 237-238; *Stevens*, 298 F.3d at 884. The answer is a resounding "yes." "Wysinger told the officers [that] . . . Daniel and Raymond Nichols rented [the] . . . mattress from" SuperCare. Pet. 3. Respondents "showed [Petitioners] the mattress rental receipt" and agreement, which was

signed by Daniel and emblazoned with the SuperCare logo. Pet. 5; Pet. App. 2-3; ER 52-59. Petitioners surely realized the significance of Respondents' contract with SuperCare—perhaps the single most material fact in this case—because that fact was conspicuously omitted from their police reports, ER 67-69, and their summary judgment moving papers, ER 151-165.

Petitioners were also on notice of their unlawful conduct in light of California law. *See Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979) ("Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law"). California courts have long held "specific intent" is an essential element of theft and have repeatedly reaffirmed the "claim-of-right defense" as a "complete defense to theft-related crimes." *Avery*, 27 Cal. 4th at 54-55; *Tufunga*, 21 Cal. 4th at 938; *Williams*, 176 Cal.App.4th at 1526-1527. The California Supreme Court has also recognized that the "law does not contemplate the use of criminal process as a means of collecting a debt." *People v. Beggs*, 178 Cal. 79, 84 (1918) (en banc). These cases are supported by the state constitution, which provides that "[a] person may not be imprisoned in a *civil action* for debt or tort." Cal. Const. art. I, § 10 (emphasis added); *see also* Cal. Civ. Proc. Code § 501.

Thus, under any of the various glosses this Court has placed on qualified immunity, the result is the same: Petitioners violated clearly established law. "[E]very reasonable official" in Petitioners' position would have known that "the facts of this case amount to a contract dispute," because Petitioners were

explicitly told so and were even presented with a copy of the contract. *See Allen*, 73 F.3d at 237-238; *Kennedy*, 901 F.2d at 706; *Stevens*, 298 F.3d at 884. In arresting Respondents, Petitioners were at best "plainly incompetent," and at worst "knowingly violate[d] the law." *See Malley v. Briggs*, 475 U.S. 335, 341 (1986). Petitioners cannot demand "something clearer than 'clearly established'" law. *See Hope*, 536 U.S. at 741; *Lanier*, 520 U.S. at 270-271. *Cf. Wesby*, 138 S. Ct. at 590; *Plumhoff*, 134 S. Ct. at 2023; *al-Kidd*, 563 U.S. at 742. To accede to Petitioners' demand would give "license to lawless conduct." *See Harlow*, 457 U.S. at 819.

In light of the facts and relevant law, the Ninth Circuit correctly concluded that Petitioners "were not entitled to immunity because the law was clearly established at the time of [Respondents]' arrest in 2013." Pet. App. 2-3 (citing *Allen*, 73 F.3d at 237; *Kennedy*, 901 F.2d at 706; *Stevens*, 298 F.3d at 883-884).

3. This Court's Recent Decisions in *Wesby*, *Emmons*, *Kisela*, and *White* Do Not Control the Outcome of This Case.

This Court's decision in *Wesby* does not control this case. *See D.C. v. Wesby*, 138 S. Ct. 577 (2018). In *Wesby*, the D.C. Circuit was unable to identify "a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment

violation 'under similar circumstances.'" *Wesby*, 138 S. Ct. at 591 (quoting *White*, 137 S. Ct. at 552). Instead, the D.C. Circuit "relied on a single decision" involving a jury instruction in a criminal case and "concluded . . . that the officers must have known that 'uncontroverted evidence of an invitation to enter the premises would vitiate probable cause for unlawful entry.'" *Id.* (citing *Wesby v. D.C.*, 765 F.3d 13, 26-27 (D.C. Cir. 2014)). By contrast, the Ninth Circuit here relied on three binding Circuit precedents—*Kennedy*, *Allen*, and *Stevens*—all finding Fourth Amendment violations under similar circumstances, and all in the context of 42 U.S.C. section 1983. Pet. App. 1-3, 18-22. Moreover, the "specific intent" crime of grand theft at issue in this case is unlike the "general intent" crime of unlawful entry at issue in *Wesby*. *See Wesby*, 765 F.3d at 19-20.

This Court's decision in *Emmons* does not control because the Ninth Circuit here did not "define[] the clearly established right at a high level of generality[.]" *Cf. City of Escondido v. Emmons*, 139 S. Ct. 500 (2019). In *Emmons*, "the Court of Appeals defined the clearly established right at a high level of generality by saying only that the 'right to be free of excessive force' was clearly established." *Emmons*, 139 S. Ct. at 503 (quoting *Emmons v. City of Escondido*, 716 F.App'x 724, 726 (9th Cir. 2018)). By contrast, the Ninth Circuit here relied on highly particularized binding case law in which it held that such contract "dispute[s] over . . . the right to possess are civil in nature and ordinarily do not give rise to probable cause to arrest" under the

Fourth Amendment. *See* Pet. App. 2 (citing *Stevens*, 298 F.3d at 883-884; *Allen*, 73 F.3d at 237; *Kennedy*, 901 F.2d at 706).

This Court's decision in *Kisela* does not control because the Circuit precedent relied upon here is substantially different. *Cf. Kisela v. Hughes*, 138 S. Ct. 1148 (2018). In *Kisela*, the Court of Appeals defined "clearly established" law using Circuit precedent that "was decided after the [2010] shooting at issue," and thus "could not have given fair notice" to the officer "because a reasonable officer is not required to foresee judicial decisions that do not yet exist." *Kisela*, 138 S. Ct. at 1154. In addition, "the most analogous Circuit precedent" in *Kisela* found that the officers' actions "did not violate the Fourth Amendment." *Id.* at 1153. By contrast, *Kennedy*, *Allen*, and *Stevens* all predated the 2013 events in this case. More importantly, each of these cases found a Fourth Amendment violation under similar circumstances.

This Court's decision in *White v. Pauly* does not control because the Ninth Circuit here did not define "clearly established law" at a "high level of generality." *Cf. White v. Pauly*, 137 S. Ct. 548 (2017). In *White*, the Tenth Circuit "relied on [cases] which . . . lay out excessive-force principles at only a general level." *White*, 137 S. Ct. at 552. By contrast, the Ninth Circuit here relied on *Kennedy*, *Allen*, and *Stevens*—a very fact-specific line of Fourth Amendment cases all involving arrests under materially similar circumstances. *See* Pet. App. 1-3, 18-22.

Finally, *Emmons*, *Kisela*, and *White* are factually inapposite, as all involved Fourth Amendment claims of "excessive force." Unlike the case at bar, they involved "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *See Graham v. Connor*, 490 U.S. 386, 397 (1989). Petitioners faced no such urgency.

C. Petitioners' Assertion That the Ninth Circuit "Did Not Acknowledge This Court's Qualified Immunity Standards" is Without Merit.

Petitioners argue that "[t]he Ninth Circuit did not acknowledge this Court's qualified immunity standards" because its "decision does not even cite *Wesby*, much less address its admonishment that probable cause is not susceptible to neat legal rules." Pet. 26. But Petitioners fail to address the fact that the Ninth Circuit's decision below was a memorandum disposition rather than a published opinion.

The drafting of a published opinion "is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants." *Hart v. Massanari*, 266 F.3d 1155, 1176-1179 (9th Cir. 2001). "When properly done, it is an exacting and extremely time-consuming task." *Hart*, 266 F.3d at 1176-1179. For that reason, "few, if any, appellate courts . . . write precedential opinions in every case that comes before them. The Supreme Court certainly does not." *Id.* By

contrast, "[a]n unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision." *Id.* "That a case is decided without a precedential opinion does not mean it is not fully considered, or that the disposition does not reflect a reasoned analysis of the issues presented." *Id.* Rather, it "reflect[s] . . . the organization and structure of the federal courts and certain policy judgments about the effective administration of justice." *See id.* at 1173.

The Ninth Circuit's memorandum disposition below reflects its judgment that this case was "not appropriate for publication" because it did not "Establish[], alter[], modif[y] or clarif[y] a rule of federal law," or "Involve[] a legal or factual issue of unique interest or substantial public importance." *See* 9th Cir. L.R. 36-2(a), (d). It does not mean the facts of this case were "not fully considered, or that the disposition does not reflect a reasoned analysis of the issues presented." *Cf. Hart*, 266 F.3d at 1176-1179. As the record below demonstrates, both parties briefed the courts below on the facts and law of this case multiple times, including dedicated "briefs on . . . qualified immunity." *See* Pet. App. 1-21. The Ninth Circuit was not required to regurgitate a lengthy qualified immunity standard. Nor was it required to cite *Wesby* in particular.

Accordingly, Petitioners' assertion that the Ninth Circuit below "did not acknowledge this Court's qualified immunity standards" is without merit.

II. Certiorari Should be Denied on the Second Question Presented Because There is No Genuine Conflict of Authority on a Profoundly Important Issue of Federal Law.

A. The Ninth Circuit Does Not Have an Overly Broad Blanket Rule That Civil Disputes Cannot Amount to Probable Cause.

The Ninth Circuit does not have a "broad," "bright-line," or "blanket rule that civil disputes do not give rise to probable cause." *Cf.* Pet. 13, 22, 30. Rather, in determining probable cause, the Ninth Circuit asks whether, "under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the suspect] had committed a crime." *Peng v. Mei Chin Penghu*, 335 F.3d 970, 976 (9th Cir. 2003) (quoting *United States v. Buckner*, 179 F.3d 834, 837 (9th Cir. 1999) (alterations in original)).

In the context of arrests for specific intent crimes, the Ninth Circuit has held that, "[b]y its definition, probable cause can only exist in relation to criminal conduct," and that "civil disputes cannot give rise to probable cause." *See Allen*, 73 F.3d at 237. The Ninth Circuit has also held that it is "clearly established law that civil disputes do not provide probable cause to arrest." *Stevens*, 298 F.3d at 884.

But the Ninth Circuit in *Peng* also clarified that this rule pertains to "purely civil" disputes. *Peng v. Mei*

Chin Penghu, 335 F.3d 970, 977 (9th Cir. 2003). The panel in *Peng*, which included both Judges Graber and Schroeder, held that officers had probable cause to arrest a plaintiff for robbery under California law, even though the plaintiff characterized the events as "a civil dispute over ownership of land title documents." *Peng*, 335 F.3d at 976. The panel reasoned that because "the dispatch in this case was for a domestic dispute," and witnesses alleged that "Peng obtained the documents by threat of force," the case was "distinguishable from most of the extortion cases, in which there is not a realistic risk of violence." *Id.* at 977-978. The panel explained:

> Peng correctly notes that this court has been very suspicious of efforts to involve the police and the power of arrest in collecting debts and enforcing purely civil obligations. Such actions take on the appearance of extortion. The reasonable effort to prevent the use of the police to collect disputed debts should not, however, cause us to inhibit the police in preventing violence.

Peng, 335 F.3d at 977 (footnote omitted).

Clearly, the Ninth Circuit has no "blanket rule that civil disputes do not give rise to probable cause" if the same court, with almost the exact same panel, was unwilling to extend the alleged "blanket rule" to a "*civil dispute* over ownership of land title documents." *Peng*, 335 F.3d at 976 (emphasis added). *Cf.* Pet. 13. Clearly, the court has not forsaken the "prevailing standard" for a "general, bright-line rule" if it evaluates probable

cause "under the totality of the circumstances known to the arresting officers." *Id. Cf.* Pet. 11-12. As *Peng* demonstrates, officers confronting a "civil dispute" need not ignore independent evidence of crime. *See Peng*, 335 F.3d 970, 976-977. However, if an officer knows or has notice that a dispute is "purely civil," then that dispute by itself "cannot give rise to probable cause." *See Allen*, 73 F.3d at 237.

To that end, the proposition that "probable cause [to arrest] can only exist in relation to criminal conduct" is so elementary in Fourth Amendment jurisprudence that it cannot reasonably be questioned. *See Allen*, 73 F.3d at 237; *accord Ker v. State of Cal.*, 374 U.S. 23, 37 (1963); *Beck v. State of Ohio*, 379 U.S. 89, 95 (1964); *Wong Sun v. United States*, 371 U.S. 471, 482 (1963); *Dunaway v. New York*, 442 U.S. 200, 212 (1979); *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). Although it is true that some criminal conduct begets civil liability,[14] it does not follow that probable cause can exist in relation to *purely* civil disputes. Purely civil conduct is "[b]y its definition" non-criminal and cannot by itself form the basis of probable cause to arrest under the Fourth Amendment. *See Allen*, 73 F.3d at 237; U.S. Const. amend. IV.

Nevertheless, Petitioners invite this Court down the philosophical rabbit hole, "to clarify the murky issue of what constitutes a civil dispute, and when a

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[14] Battery, for example, is both a crime and an intentional tort. *See Bartosh v. Banning*, 251 Cal.App.2d 378, 385 (1967); Cal. Civ. Proc. Code § 32.

civil dispute crosses over into probable cause for arrest." Pet. 13. Thankfully, the Court need not traverse this metaphysical quagmire, because wherever one draws the "line between civil and criminal," the asserted breach of contract here clearly falls on the civil side. *See Madonna v. State*, 151 Cal.App.2d 836, 840 (1957) ("A suit for breach of contract is a civil action").

Moreover, the "line between civil and criminal" already exists by default. Unlike civilly actionable conduct, "all crimes are statutory and there are no common law crimes." *See In re Brown*, 9 Cal. 3d 612, 624 (1973); *People v. Gonzalez*, 60 Cal. 4th 533, 537 (2014); *United States v. Hudson*, 11 U.S. 32, 32 (1812); *Wright v. Henkel*, 190 U.S. 40, 59 (1903); *Donnelley v. United States*, 276 U.S. 505, 511 (1928); *Viereck v. United States*, 318 U.S. 236, 241 (1943). In California, the legislature has expressly declared "[n]o act or omission . . . is criminal or punishable, except as prescribed or authorized by this Code[.]" *See* Cal. Pen. Code § 6. It follows that conduct not expressly made "criminal" is, at most, a "civil" matter. *See* Cal. Civ. Proc. Code § 24 (specifying "two kinds" of actions). *A fortiori*, a "purely civil" matter is, by definition, not "criminal."

Lest there be any confusion about the difference between "criminal" and "civil" matters, California defines them both by statute. *See* Cal. Pen. Code § 15 (defining a "crime or public offense"); Cal. Civ. Proc. Code § 30 (defining a "civil action"). *See also* Cal. Civ. Code § 1549 *et seq*. (defining a "contract"); *Robinson v.*

Magee, 9 Cal. 81, 83 (1858) (defining a "contract" under California law).

Accordingly, in the full context of California and Ninth Circuit law, the Ninth Circuit's rule that "purely civil" contract disputes over the right to possess property "cannot give rise to probable cause" for the crime of theft is not "overly broad."

B. The Law of the Ninth Circuit is in Accord with the Law of Other Circuits.

Petitioners assert that there is a "split among the circuit courts on the Fourth Amendment issue of whether civil disputes can give rise to probable cause to arrest." Pet. 26. As evidence of this alleged "circuit split," Petitioners cite *Zappa v. Gonzalez*, 819 F.3d 1002 (7th Cir. 2016) and *Royster v. Nichols*, 698 F.3d 681, 690 (8th Cir. 2012). However, these cases do not constitute "dueling lines of authority." *Cf.* Pet. 30. As explained below, the Ninth Circuit's rule is in accord with the law of its sister Circuits.

1. The Eighth Circuit.

As the Ninth Circuit in *Allen* observed, "the Seventh and Eighth Circuits, have recognized that probable cause can only exist in relation to criminal conduct." *Allen*, 73 F.3d at 237 (citing *Peterson v. City of Plymouth*, 60 F.3d 469 (8th Cir. 1995); *Moore v. Marketplace Restaurant*, 754 F.2d 1336 (7th Cir. 1985); *Thomas v. Sams*, 734 F.2d 185 (5th Cir. 1984)). The

Ninth Circuit in *Stevens* again relied on *Peterson*, 60 F.3d at 469 and *Moore*, 754 F.2d at 1336. *See Stevens*, 298 F.3d at 883-884.

In *Peterson I*, an officer arrested landlord Peterson for theft of his vacating tenants' snowblower, even though Peterson displayed a "reasonable and actual belief that it was abandoned." *See Peterson v. City of Plymouth*, 945 F.2d 1416, 1417-1421 (8th Cir. 1991) ("*Peterson I*") (quoting *State v. Gage*, 272 Minn. 106, 136 (1965)). Peterson sued the officer after theft charges "were dismissed for lack of probable cause." *Id.* at 1418-1419. In reversing summary judgment against Peterson, the Eighth Circuit held that the officer lacked probable cause because "[t]he facts of this case clearly demonstrate that the dispute over the snowblower was one properly resolved in the civil, not criminal, courts." *Id.* at 1421. The court found a "complete absence of evidence that Peterson had any criminal intent to commit theft," because the officer "knew that Peterson claimed entitlement to the snowblower as abandoned property," and also "knew the essential facts supporting Peterson's claim." *Id.* at 1420-1421.

Four years later, in *Peterson II*, the Eighth Circuit reaffirmed this "claim of right" principle in the context of a motion for judgment as a matter of law: "Knowledge of Peterson's reasonable and actual claim of right put Officer Ridgley on notice that the dispute was a civil matter not involving criminal intent." *Peterson v. City of Plymouth*, 60 F.3d 469, 477 (8th Cir. 1995) ("*Peterson II*").

The Eighth Circuit in *Anderson* relied on *Peterson II* in reaffirming the uncontroversial proposition that "[p]robable cause can only exist in relation to criminal conduct." *Anderson v. Cass Cty., Mo.*, 367 F.3d 741, 745 (8th Cir. 2004). However, the *Anderson* court rejected the argument that circuit precedent, such as *Peterson II*, stood for "the blanket proposition that civil disputes always negate the elements of criminal intent." *Anderson*, 367 F.3d at 745-746. The court held that deputy sheriffs had probable cause to arrest plaintiff bail bondsmen for assault of a bailee, even though "bond revocation is a civil action." *Id.* at 744-746. "[U]nlike in *Peterson,*" witnesses alleged that the bondsmen "forced their way into [the bailee's] home" and "slapped her several times"—all which was "contrary to the [bondsmens]' description of events." *Id.* The victim's "face and neck were red and swollen," which "supported her allegations." *Id.* at 746.

The Eighth Circuit in *Royster* held there was probable cause to arrest a plaintiff who "ordered 15 Gray Goose vodka drinks, totaling $156.00 with tax," then repeatedly "refused to pay [his] tab" after he had been asked to leave for making "an inappropriate comment." *Royster*, 698 F.3d at 684, 689-690. Contrary to Petitioners' assertion, *Royster* did not "question[] the basis" for *Allen* or any other "decision[] that the panel relied on here." Pet. 13, 28. Instead, the court distinguished *Allen*, *Stevens*, and *Peterson II*, on the ground that "none of these cases cited a specific ordinance—such as in the present case—prohibiting theft of restaurant services." *Royster*, 698 F.3d at 690

n.11. Indeed, the criminal statute at issue in *Royster* specified that "[leaving] the . . . restaurant . . . with the intent not to pay for property or services" is admissible "on the issue of the requisite knowledge of belief of the alleged stealer." *Id.* at 689-690.

Thus, Eighth Circuit jurisprudence is not in conflict with Ninth Circuit jurisprudence. The Ninth Circuit's rule that "[b]y its definition, probable cause can only exist in relation to criminal conduct" is identical to the Eighth Circuit's rule that "[p]robable cause can only exist in relation to criminal conduct." *Allen*, 73 F.3d at 237; *Stevens*, 298 F.3d at 884, *accord Anderson*, 367 F.3d at 745. Ninth Circuit law holding that a dispute which is purely "civil in nature, cannot give rise to probable cause" of "specific intent to permanently deprive," is in accord with Eighth Circuit law holding that a "reasonable and actual claim of right put[s] [officers] on notice that the dispute was a civil matter not involving criminal intent" to commit theft. *Allen*, 73 F.3d at 238; *Kennedy*, 901 F.2d at 706; *Peng*, 335 F.3d at 977, *accord Peterson*, 60 F.3d at 477; *Peterson*, 945 F.2d at 1419-1421.

2. The Seventh Circuit.

The Ninth Circuit in both *Allen* and *Stevens* relied in part on the Seventh Circuit's decision in *Moore v. Marketplace Restaurant*, 754 F.2d 1336 (7th Cir. 1985). *See Allen*, 73 F.3d at 237; *Stevens*, 298 F.3d at 883-884.

In *Moore*, the Seventh Circuit decided that officers had no probable cause to arrest where the facts,

resolved in plaintiff's favor, amounted to "a dispute over the amount owed on a restaurant bill" that "could almost be characterized as a dispute over whether a breach of contract occurred." *Moore*, 754 F.2d at 1345-1346. The court noted that the arrestees "were not fleeing from the scene," there was no "threat to the officers' safety," or a "serious crime committed." *Id.* The officers conducted almost no investigation and "[t]he entire episode may have been avoided if the officer[s] . . . had used reasonable judgment and conducted a proper investigation[.]" *Id.*

In *Zappa*, the Seventh Circuit held that an officer had probable cause for grand theft under Illinois law because, after reviewing evidence and conducting a thorough investigation, he "learned that [plaintiffs] had driven off in [a] 2004 motorcycle, while the price they paid and all the information on the paperwork revealed that this was not their vehicle." *See Zappa*, 819 F.3d at 1005. The plaintiffs in *Zappa* mistakenly drove off with a 2004 Harley Davidson motorcycle instead of the 1997 model they had purchased, even though "the bill of sale listed the VIN, the year, and the mileage for the 1997 motorcycle." *Zappa*, 819 F.3d at 1003. The plaintiffs refused to return the motorcycle. *Id.* at 1003-1004. The court explained that "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 [the officer]'s probable cause." *Id.*

Zappa does not conflict with Ninth Circuit precedent or the Seventh Circuit's earlier decision in

Moore. *Zappa*'s dicta that "[c]ivil law and criminal law are not hermetically sealed off from one another" is not contrary to the Ninth Circuit's rule that "probable cause can only exist in relation to criminal conduct." *See Peng*, 335 F.3d at 976-977; *Allen*, 73 F.3d at 237-238. *Zappa* is in accord with the Ninth Circuit's decision in *Conner v. Heiman*, 672 F.3d 1126 (9th Cir. 2012). In *Connor*, the Ninth Circuit held that officers had probable cause to arrest for "theft under Nevada law" where the arrestee refused to return an overpayment he received from a casino, even though the overpayment arguably constituted "a civil debt." *Conner*, 672 F.3d at 1130-1132.

Thus, there is no "split among the circuit courts on the Fourth Amendment issue of whether civil disputes can give rise to probable cause to arrest." Pet. 26. All of the "dueling lines of authority" cited in the petition can be harmonized with Ninth Circuit precedent or are factually distinguishable. *Cf*. Pet. 30.

III. Alternatively, This Court Should Consider Whether a Published Circuit Opinion With Materially Similar Facts Can Clearly Establish the Law For Purposes of Qualified Immunity.

This Court may affirm a lower court's judgment "on any ground supported by the record," including "alternative grounds" that "were not reached below." *Bennett v. Spear*, 520 U.S. 154, 166-167 (1997) (citing *Ponte v. Real*, 471 U.S. 491, 500 (1985) and *Matsushita*

Elec. Industrial Co. v. Epstein, 516 U.S. 367, 379, n.5 (1996)). "So long as a respondent does not 'seek to modify the judgment below,'" a respondent may urge the Court to affirm it on "alternative ground[s]," and may do so "without filing a cross-appeal or cross-petition[.]" *Union Pac. R. Co. v. Bhd. of Locomotive Engineers & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 80 (2009) (quoting *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982)).

The Ninth Circuit below decided that the law was "clearly established" on the basis of published circuit precedent. Pet. App. 1-3, 18-22. However, this Court's recent decisions suggest that it has not squarely "decided what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity." *Wesby*, 138 S. Ct. at 591 n.8 (citing *Reichle*, 566 U.S. at 665-666). Instead, this Court suggested that it heretofore "[a]ssum[ed] arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law." *Reichle*, 566 U.S. at 665-666.

This Court's recent pronouncements on the sources of "clearly established law" appear to be at odds with its prior rulings. Previously, this Court expressly rejected as "unsound" a "categorical rule" that "*only this Court's decisions* could provide . . . fair warning that [an officer]'s actions violated constitutional rights." *See Lanier*, 520 U.S. at 268-272 (emphases added). This Court noted "that in applying the rule of qualified immunity under 42 U.S.C. § 1983 . . . we have referred to decisions of the Courts of

Appeals when enquiring whether a right was 'clearly established.'" *Lanier*, 520 U.S. at 268-269 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 533 (1985); *Davis v. Scherer*, 468 U.S. 183, 191-192 (1984); *Elder v. Holloway*, 510 U.S. 510, 516 (1994)). This Court later held that "Circuit precedent" can "put a reasonable officer on notice" of clearly established law for purposes of qualified immunity. *Hope*, 536 U.S. at 745.

If this Court grants the petition, it should review the question left unanswered in *Wesby* and *Reichle* and "decide[] what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity," including whether "controlling Court of Appeals' authority [can] be a dispositive source of clearly established law." *Wesby*, 138 S. Ct. at 591 n.8; *Reichle*, 566 U.S. at 665-666. Because resolution of this issue merely presents "alternative grounds" to affirm the judgment below, it will not "modify the judgment" below. *Union Pac. R. Co.*, 558 U.S. at 80; *Bennett*, 520 U.S. at 166-167. This is an "appropriate case"[15] because the Ninth Circuit's

[15] Members of this Court have expressed "growing concern with [the Court's] qualified immunity jurisprudence" because it is "no longer grounded in the common-law backdrop against which Congress enacted [42 U.S.C. § 1983]," and "instead represent[s] precisely the sort of 'freewheeling policy choices' [the Court has] previously disclaimed the power to make." *See*, *e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870-1871 (2017) (Thomas, J., concurring) (quoting *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012)). It was suggested that "[i]n an *appropriate case*, [this Court] should reconsider [its] qualified immunity jurisprudence." *Id.* at 1872 (emphasis added).

decision below was based on Circuit precedent. Pet. App. 1-3, 18-22.

Thus, if the Court grants the petition, it may also decide this question as "an appropriate exercise of [its] discretion[.]" *Bennett*, 520 U.S. at 166-167.

CONCLUSION

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

Respectfully submitted,

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