No. 19-794

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

REPLY TO BRIEF IN OPPOSITION

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I. The Ninth Circuit's Decision Defies This Court's Qualified Immunity Standards.

A. The Ninth Circuit Failed To Acknowledge The Governing Standard, Which Is A Recurring Problem.

The Petition established that the Ninth Circuit's decision failed to acknowledge this Court's qualified immunity standards, a recurring problem in the Circuit. (Pet. 18-20; *Slater v. Deasey*, 943 F.3d 898, 898-99 (9th Cir. 2019) (dissent from denial of rehearing en banc) ("[b]y repeating—if not outdoing—the same patent errors that have drawn such repeated rebukes from the high Court, the panel here once again invites summary reversal").)

The Brief in Opposition responds that because the Ninth Circuit resolved the case in a memorandum disposition, it "was not required to regurgitate a lengthy qualified immunity standard." (Brief in Opposition (BIO) 24.) Perhaps, but it *was* required to use the correct standard as repeatedly articulated by this Court. As the Court made plain with its reversal in *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019), a memorandum disposition is not a license to ignore controlling precedent.

Indeed, the panel decision here did exactly what this Court decried in *Emmons*—applied a generalized Fourth Amendment standard in a memorandum disposition instead of engaging in a meaningful inquiry into case law addressing highly similar factual scenarios.

Compare Emmons, 139 S. Ct. at 503 ("[T]he 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") with App. 2 (panel decision describing the issue as "whether it was reasonable for Defendants to believe that there was probable cause").

Whether in published opinions or memorandum dispositions—which constitute over 90% of Ninth Circuit decisions[1]—courts must grant qualified immunity to officers "unless existing precedent '*squarely governs*' *the specific facts at issue*." *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148, 1153 (2018) (emphasis added). As noted in the Petition, and discussed below, the panel decision identified no such precedent here.

B. The Ninth Circuit's Decision Failed To Identify A Case That "Obviously Resolved" The Probable Cause Question And "'Squarely Governs' The Specific Facts At Issue."

The Petition also established that the Ninth Circuit failed to conduct the requisite "clearly established" analysis. (Pet. 20-26.)

The Brief in Opposition does not address how the lack of probable cause could have been obvious to "'all but the plainly incompetent or those who knowingly

[1] Administrative Office of the United States Courts, Judicial Business 2018 Tables, tbl. B-12 (2018) (93% of Ninth Circuit decisions unpublished in 2017-2018).

violated the law,'" *Mullenix v. Luna*, 577 U.S. ___, 136 S. Ct. 305, 308 (2015) (per curiam), when a federal magistrate judge and a dissenting Ninth Circuit judge opined earlier in the case that there *was* probable cause, and a member of the panel that decided this appeal, Judge Graber, commented that she was "not sure" she would have found a lack of probable cause in the first instance. (Pet. 20-21.) Judge Graber also commented, with regard to one of the cases that the panel ultimately relied on, that "I know *Allen* [*v. City of Portland*, 73 F.3d 232 (9th Cir. 1995)] says if it's civil, you don't have probable cause. But I'm not sure what distinguishes civil from criminal in this context"; "I don't know where to draw the line and I don't know where the cases draw the line." (Oral argument recording, available at https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000016092 (Oral Argument Recording) at 4:17-4:42.) Police officers cannot be expected to know more about the law than judges. *Barts v. Joyner*, 865 F.2d 1187, 1193 (11th Cir. 1989).

Although Respondents contend that the Ninth Circuit identified cases factually similar enough to make a lack of probable cause obvious here (BIO 13-19), the Brief in Opposition fails to grapple with the high bar that this Court has set: Because probable cause "'turn[s] on the assessment of probabilities in particular factual contexts,'" it "cannot be 'reduced to a neat set of legal rules.'" *District of Columbia v. Wesby*, ___ U.S. ___, 138 S. Ct. 577, 590 (2018). Accordingly, officers are entitled to qualified immunity unless a prior rule "*obviously* resolve[d] 'whether "the circumstances

with which [the particular officer] was confronted . . . constitute probable cause."'" *Id.* (emphasis added, ellipsis in *Wesby*). "[P]olice officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153. As discussed in the Petition, none of the three cases that the Ninth Circuit cited meets that standard. (Pet. 21-26.)

Moreover, the Brief in Opposition's assertion that this case is similar to *Allen*, 73 F.3d 232, because there was no credibility issue confronting the arresting officers here (BIO 16) is incorrect. Showing the arresting officers a rental agreement did not automatically resolve all credibility issues and convert this into a contract dispute. The rental agreement prohibited transferring equipment without explicit approval from the rental company, and a witness told officers that the rental company had said Respondents were not to take the mattress. (2 ER 52, 59, 160-162.) The officers were entitled to credit the witness and to disbelieve Respondents' conflicting story that the rental company had given them permission to take the mattress. *See Wesby*, 138 S. Ct. at 592 (innocent explanations "do not have any automatic, probable-cause-vitiating effect"); *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009) (probable cause does not require officers to "rule out the possibility of innocent behavior").

If Respondents took the mattress without the owner's permission, the lack of probable cause to arrest them would not be as clear as they claim. As one of the Ninth Circuit judges on the panel that issued the

decision here observed, "The fact that you have rented something doesn't mean you can't also steal it." (Oral Argument Recording at 10:18-10:22.) An officer could have come to the same conclusion. It therefore would not have been "obvious[]" to *every* reasonable officer, *Wesby*, 138 S. Ct. at 590, that this situation was controlled by *Allen* and other cases stating that civil disputes do not give rise to probable cause to arrest.

Nor would it have been obvious to every reasonable officer that this situation was controlled by the rule that a defendant's belief that he has a right to property negates the specific intent for theft. (BIO 19.) That rule requires a *good faith* belief in a claim-of-right. *People v. Tufunga*, 21 Cal. 4th 935, 938 (1999) ("The claim-of-right defense provides that a defendant's *good faith belief*, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for conviction of theft or robbery," emphasis added); *People v. Williams*, 176 Cal. App. 4th 1521, 1526-27 (2009) ("good faith belief" defense), cited at BIO 19. Here, the conflicting accounts gave officers a reason to conclude that Respondents were not acting in good faith, given their decision to take the mattress instead of waiting for the situation to be resolved and the witness's report casting doubt on their claimed permission to take it. (*See* Pet. 23.)

California's rule against imprisoning people to collect debts (BIO 19) likewise did not *obviously* establish the lack of probable cause here, as *Wesby* requires. 138 S. Ct. at 590. Defendants can be criminally prosecuted for theft even though stealing property creates a debt

to the owner. This is one of many examples of a civil tort that is also a crime, blurring any purported bright-line distinction between civil and criminal matters. (*See* Pet. 22.) The Ninth Circuit therefore erred in concluding that the lack of probable cause was clearly established by cases holding that civil disputes do not give rise to probable cause to arrest for theft. *See Wesby*, 138 S. Ct. at 590 (probable cause is fact-specific and "cannot be 'reduced to a neat set of legal rules' ").

II. The Ninth Circuit's Bright-Line Rule That Civil Disputes Cannot Give Rise To Probable Cause To Arrest Conflicts With *Wesby* And The Decisions Of Other Circuits, Thus Requiring Clarification By This Court.

The Petition established that the broad rule the Ninth Circuit relied on here—that civil disputes do not give rise to probable cause to arrest—is inconsistent with *Wesby* and the more nuanced approach taken by other federal circuit courts. (Pet. 27-30.) It also demonstrated that if the Ninth Circuit's rule is to stand, law enforcement officers and lower courts need this Court's guidance on what falls into the "civil dispute" category. (Pet. 30-31.) Respondents have not refuted those showings.

A. Contrary To Respondents' Claim, The Ninth Circuit Does Treat This As A Bright-Line Rule.

Respondents first contend that the Ninth Circuit does not have a bright-line or blanket rule that civil disputes cannot give rise to probable cause. (BIO 25.) But the very next paragraph of the Brief in Opposition belies that claim: As Respondents explain, *Allen*, 73 F.3d 232, held that "'civil disputes cannot give rise to probable cause,'" and the Ninth Circuit treats *Allen* as clearly establishing that proposition. (BIO 25.) That is a paradigmatic bright-line rule.

Peng v. Mei Chin Penghu, 335 F.3d 970 (9th Cir. 2003) does not show otherwise. Respondents emphasize that *Peng* held there was probable cause to arrest a plaintiff even though he characterized the events as a civil dispute over ownership of documents. (BIO 26.) But *Peng* found probable cause only by rejecting the "civil dispute" characterization. 335 F.3d at 977 ("we disagree that the allegations underlying Peng's arrest were civil in nature"). The court stressed that "the dispatch in this case was for a domestic dispute," raising the specter of violence and making this "nearer to a case of alleged domestic violence than it is to the extortion cases upon which Peng relies," namely, *Allen* and its progeny. *Id. Peng* therefore does not show flexibility in the civil dispute rule; it merely shows that potential domestic violence cases are outside of the rule.

B. The Ninth Circuit's Absolutist Approach Conflicts With *Wesby* And The Law In Other Circuits.

Respondents essentially ignore, and thus effectively concede, Petitioners' point that the Ninth Circuit's bright-line rule conflicts with *Wesby*'s observation that probable cause is "'imprecise'" and "'cannot be "reduced to a neat set of legal rules."'" (Pet. 29-30, quoting *Wesby*, 138 S. Ct. at 590.) That conflict alone warrants this Court's intervention, to bring the Ninth Circuit into conformity with *Wesby* and to provide guidance for lower courts and law enforcement officers struggling to reconcile the two.

Although Respondents attempt to show that the Ninth Circuit's bright-line rule does not conflict with the approach of its sister circuits, the effort is unavailing.

Eighth Circuit. Respondents assert that there is no conflict between the Eighth and Ninth Circuits because both hold that probable cause can only exist in relation to criminal conduct. (BIO 32.) But the circuits differ in what flows from that proposition. The Ninth Circuit applies a blanket rule that civil disputes cannot give rise to probable cause for arrest. *Allen*, 73 F.3d at 237-38. The Eighth Circuit, by contrast, has stated that the Eighth Circuit case *Allen* relied on does *not* "stand for the blanket proposition that civil disputes always negate the elements of criminal intent" and that another Ninth Circuit decision that the panel relied on here, *Kennedy v. L.A. Police Dep't*, 901 F.2d 702

(9th Cir. 1990), did *not* hold "that civil disputes negate the element of criminal intent." *Royster v. Nichols*, 698 F.3d 681, 690 n.11 (8th Cir. 2012); *Anderson v. Cass Cnty., Mo.*, 367 F.3d 741, 746 n.4 (8th Cir. 2004). Yet, the Ninth Circuit treats *Allen* and *Kennedy* as standing for essentially that proposition. *E.g.*, *Stevens v. Rose*, 298 F.3d 880 (9th Cir. 2002) (citing *Allen* as "clearly established law that civil disputes do not provide probable cause to arrest"). This is a patent conflict.

Seventh Circuit. Respondents assert the Seventh Circuit's recognition that "[c]ivil and criminal law are not hermetically sealed off from one another," *Zappa v. Gonzalez*, 819 F.3d 1002, 1005 (7th Cir. 2016), is consistent with Ninth Circuit law because the Ninth Circuit held in *Conner v. Heiman*, 672 F.3d 1126 (9th Cir. 2012) that officers had probable cause to arrest a plaintiff who refused to return an overpayment he received from a casino. (BIO 34.) But as Respondents previously emphasized, *Conner* "did not involve a contract or any 'meeting of the minds' between parties, but merely one party taking possession of the other's property due to mistake." (Reply Brief of Raymond Nichols and Daniel Nichols in Ninth Circuit No. 15-55938, at 6.) If by that Respondents meant that *Conner* was not a civil dispute within the meaning of the Ninth Circuit's bright-line rule, *Conner* merely highlights the need for this Court's guidance on how officers and judges can determine which side of the line a case falls on.

Moreover, the Seventh Circuit's observation that civil and criminal law are not "hermetically sealed off from one another," *Zappa*, 819 F.3d at 1005, remains in

tension with the rule relied on in *this* case, that disputes over bills or possession "are civil in nature and ordinarily do not give rise to probable cause to arrest." (App. 2.) The Ninth Circuit's approach presumes that there *is* a clear divide between civil and criminal law—otherwise, the general rule would not resolve whether there was probable cause in any specific case.

Respondents' argument that "the 'line between civil and criminal' already exists by default" (BIO 28) reinforces this tension: Respondents are essentially suggesting that criminal and civil law *are* hermetically sealed from each other.

But as Judge Graber observed at oral argument, the law is not that clear: "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—and another Ninth Circuit judge and magistrate judge opined earlier in the case that there *was* probable cause—officers cannot be expected to know either. (Pet. 5-7, 20-21.)

This Court has never addressed the issue. Its guidance would be invaluable for officers responding to calls for help and for the lower court judges reviewing their actions.

III. The Additional Issue Proposed In The Brief In Opposition Further Supports Granting Certiorari.

The Brief in Opposition proposes an additional issue for review: whether decisions of courts other than this Court can "clearly establish" a rights violation for qualified immunity purposes. (BIO 34-37.) As the Court recently noted, this is an open question. *Wesby*, 138 S. Ct. at 591; *see also*, *e.g.*, *Emmons*, 139 S. Ct. at 503 ("[a]ssuming without deciding that a court of appeals decision may constitute clearly established law").

This issue is potentially dispositive here, because the Ninth Circuit relied solely on prior circuit court decisions. (App. 2-3.) If circuit court authority is not "a dispositive source of clearly established law," *Wesby*, 138 S. Ct. at 591 n.8, the Ninth Circuit's error would be an independent ground compelling reversal. Petitioners therefore agree with Respondents that this is an appropriate issue for review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, including the additional issue that Respondents have proposed.

Respectfully submitted,

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