No. 19-956

IN THE

Supreme Court of the United States

SHERIFF DONALD E. CRAIG, SGT. TRAVIS PALMER CURRAN, A.K.A. TRAVIS LEE PALMER, DEP. FRANK GARY HOLLOWAY, DEP. KEELIE KERGER, DEP. BILL HIGDON, DEP TODD MUSGRAVE, *et. al.*,

Petitioners,

v.

JANET TURNER O'KELLEY, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN HARLEY TURNER, JOHN ALLEN TURNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

RUSSELL A. BRITT
Counsel of Record
PHILLIP E. FRIDUSS
JACOB O'NEAL
HALL BOOTH SMITH, P.C.
191 Peachtree Street, N.E., Suite 2900
Atlanta, GA 30303
(404) 954-5000
rbritt@hallboothsmith.com

Counsel for Petitioners

295283

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES:

Cited Authorities

Page

STATUTES AND OTHER AUTHORITIES:

The Petitioners' Questions Presented Were Not Waived Below.

The bulk of the Response is devoted to the incorrect assertion that the Petitioners' questions presented, or the issues raised therein, were not preserved below and therefore have been waived on appeal, and therefore this case is not a proper vehicle for this Court to decide those issues because the Petitioners conceded the issues raised in the Petition. (Response, pp. 11-21). To the contrary, at every opportunity, the Petitioners have asserted their entitlement to qualified immunity, and they timely addressed the Eleventh Circuit panel's errors once those errors were made.

It is true that this Court "do[es] not generally entertain arguments that were not raised below and are not advanced in this Court by any party[.]" Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 721, 134 S. Ct. 2751, 2776, 189 L. Ed. 2d 675 (2014). But as shown by the record and the following detailed procedural history, the Petitioners have raised the issues presented in this Petition at every available juncture. And, in any event, the Petitioners were not required to exhaustively formulate every nuanced iteration of argument on each facet of qualified immunity, nor to anticipate every conceivable error of a Court of Appeals, so long as they did in fact raise the defense of qualified immunity, offer some argument in support of the same, and properly raise the issues in their questions presented. See, e.g., Yee v. City of Escondido, Cal., 503 U.S. 519, 520, 112 S. Ct. 1522, 1525, 118 L. Ed. 2d 153 (1992) (holding that "the fact that [a regulatory taking claim] was not raised below does not mean that it could not be properly raised before this Court, since once

petitioners properly raised a taking claim, they could have formulated, in this Court, any argument they liked in support of that claim" and determining not to consider an issue on grounds that it was not raised in the questions presented rather than on grounds that the issue was not raised in proceedings below).

The Petitioners first raised the defense of qualified immunity in their timely filed Pre-Answer Motion to Dismiss on February 27, 2018. In their initial Brief, the Petitioners expressly laid out the argument that the Petitioners are entitled to qualified immunity under the Harlow analysis because the law was not clearly established at the time of the underlying incident that the Petitioners' acts violated Harley Turner's constitutional rights. (See Case No. 2:17-cv-00215-RWS, N. D. Ga., Doc. 21-1, pp. 7-15). Of note, the Petitioners expressly stated in their Brief that, pursuant to this Court's established precedent, "clearly established law should not be defined at a high level of generality… [r]ather, the clearly established law must be particularized to the facts of the case."(Id., pp. 9-10, citing White v. Pauly, 137 S.Ct. 548, 550, 196 L.Ed.2d 463 (2017), Ashcroft v. al-Kidd, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L. Ed.2d 1149 (2011)). There was, of course, no need—and no obligation—for the Petitioners to raise the issue of whether the panel decision of a Circuit Court decided a mere nine (9) days prior to the underlying conduct could constitute clearly established law, because (1) the Petitioners' Motion, just filed, had yet to be ruled on, let alone appealed to the Eleventh Circuit, and therefore (2) no question of whether Moore's timing or procession from a panel could constitute clearly established law had arisen.

Moore v. Pederson, 806 F.3d 1036 (11th Cir. 2015) reared its head for the first time in the Respondents' Response in Opposition to the Motion to Dismiss, wherein the Respondents argued—incorrectly—that Moore controlled the Petitioners' conduct in this case, simply for the generalized proposition that "police cannot make a valid Terry stop within the boundaries of the home," on which basis the Respondents argued that the Petitioners were not entitled to qualified immunity for lack of probable cause and exigent circumstances. (Case No. 2:17-cv-00215-RWS, N. D. Ga., Doc. 22, pp. 13-15). The Petitioners then addressed this argument in their Reply. (See generally Case No. 2:17-cv-00215-RWS, N. D. Ga., Doc. 25).

There followed the trial court's order granting the Petitioners' Motion, wherein the trial court held, in relevant part, that Moore did not apply—not because of its extreme novelty nor its proceeding from a panel, but because Moore was too factually dissimilar from the events underlying this matter to put the Petitioners on notice that their conduct amounted to a constitutional violation. (App. 38a-39a). At this juncture, the Petitioners were the victorious parties—again, they had neither the need, nor the obligation, to *raise* an issue on appeal, for there was no adverse ruling, and therefore no issue, *for* the Petitioners to appeal.

The Respondents then, in their Notice of Appeal, repeated their arguments on Moore. And there was, of course, no opportunity for the Petitioners to respond to the Notice of Appeal, as there is no provision for the same in law. See generally Fed. R. App. P. 3, 4 (containing no provision for reply to a Notice of Appeal taken as of right); contrast Fed. R. App. P. 5(b)(2) (providing for answer or cross-petition to petition for permission to appeal).

In their initial Brief on appeal to the Eleventh Circuit, the Respondents/ Appellants (as they were then) repeated this same argument about Moore essentially verbatim. (See Appeal No. 18-14512-EE, Brief of Appellants, pp. 19-20, filed December 24, 2018). In response—and crucially, in the very first opportunity for the Petitioners to raise any issue on appeal, as the then-Appellees—the Petitioners expressly argued not only that Moore could not strip the Petitioners of qualified immunity because of Moore's factual dissimilarity, but "[n]or can a decision, having been made just 9 days prior to the incident, be deemed so clearly established that every reasonable officer would know that [the] actions here were impermissible." (Appeal No. 18-14512-EE, Brief of Appellees, p. 36, filed March 13, 2019). The Respondents/ Appellants then replied; and in their reply brief, the *Respondents* failed to raise any response to the Petitioners' contention that the recentness of Moore made Moore impossible as a source of clearly established law. (Appeal No. 18-14512-EE, Reply Brief of Appellants, pp. 3-4).

The three-judge panel of the Eleventh Circuit then issued its Opinion, from which the Petitioners seek to appeal, holding in relevant part that Moore constituted "clearly established" law as of the date of the underlying incident here. (App. 1a). The Eleventh Circuit panel did not specifically address the Petitioners' argument concerning the recentness of the Moore decision; but by its holding necessarily implicated the proposition that the mere nine (9) days from Moore was sufficient for Moore to become "clearly established" law.

At this point, for the first time in this matter, the Petitioners had a decision applying Moore to their conduct

and stripping them of their immunity on that basis. Timely, the Petitioners moved for a panel rehearing or, in the alternative, rehearing *en banc*, in which the Petitioners explicitly again raised the issue of Moore's recentness, as well as the panel's error in interpreting "clearly established law" at too high a level of generality. (Appeal No. 18-14512-EE, Motion, filed August 6, 2019, pp. C-4, 8-9, 12-16). Therein, the Petitioners expressly argued that not only is the nine day period too recent in itself, but also that the uncertainty generated by the as-yet unexhausted appeals process in the supposedly controlling case means that the case cannot constitute clearly established law, because the controlling opinion may be altered, vacated, or reversed. (Id., p. 15) ("Moreover, with a nine-day-old Eleventh Circuit opinion, it is unknown whether a panel rehearing or rehearing *en banc* will be granted, or if the Supreme Court will grant certiorari and possibly overturn the precedent."). The Motion was denied, and the subject Petition followed.

Simply put, the Respondents' contention that the Petitioners did not raise, and therefore failed to preserve on appeal, the issues articulated in their Questions Presented is incorrect and directly contradicted by the record. At every possible turn, the Petitioners argued and preserved the issue of whether they are entitled to qualified immunity on the facts as pled by the Respondents; and, as the Moore panel itself recognized, the qualified immunity analysis necessarily requires assessment of whether a precedent provides fair notice to governmental officials that their conduct is unconstitutional, in order to constitute "clearly established" law. See Moore, 806 F.3d at 1046 ("[t]he touchstone of qualified immunity is notice."). The Petitioners never "conceded," expressly or otherwise,

that Moore constitutes instructive clearly established law. (Response, pp. 12-13). Instead, they have consistently maintained that, though Moore does articulate a valid "basic principle" that a Terry-like stop may not be conducted in a home absent exigent circumstances, that principle itself is too generalized for the qualified immunity analysis this Court has propounded to notify the Petitioners that their conduct was unconstitutional; and Moore therefore cannot constitute clearly established law. (Appeal No. 18-14512-EE, Brief of Appellees, p. 37) ("As for the substantive law, Moore is indeed our guidepost. As for utilizing Moore to show it was clearly established law. . . not so much. In fact, not at all.").

As it relates, unlike the Petitioners' arguments, the Respondents' argument that dismissal was not proper because they pled in their Complaint that the Petitioners subjectively knew there was no exception to the warrant requirement *is* raised for the first time before this Court, and therefore not properly in consideration should the Petition be granted. (See Response, pp. 21-22). Even if it were not, "if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). No matter what conclusory allegations the Respondents pled, the Petitioners could not have known subjectively that Moore proscribed a warrant requirement exception in this case because Moore was too factually dissimilar, too recent, and was subject to an as-yet unexhausted appeals process at the time of the Petitioners' conduct. This pleading is therefore not a sound basis for denial of certiorari.

The Circuit Opinions Canvassed In The Petition Clearly Pose A Split On The Issue Of How Recent A Decision Must Be To Constitute Clearly Established Law Both Explicitly And By Necessary Implication.

The Respondents argue that there is no circuit split on the issue of how much time must pass between the precedent at issue and the underlying conduct, such that an officer may have notice that his conduct violates the Constitution, since some decisions did not precisely rule on the question. (Response, pp. 19-20). What the Respondents conveniently ignore, however, is that a circuit split can exist and need not result from Circuit Courts expressly addressing a question in precisely the same terms, but can arise when the Circuit Courts reach different answers by the logically necessary implications of their rulings. See, e.g., E.I. Du Pont De Nemours & Co. v. Smiley, 138 S. Ct. 2563 (Mem), 2564, 201 L. Ed. 2d 1100 (2018) (citations and quotations omitted) ("Can an agency advance an interpretation of a statute for the first time in litigation and then demand deference for its view? There is a well-defined circuit split on the question. The Court of Appeals in this case said yes, joining several other circuits who share that view. . . But two circuits, the Sixth and Ninth, expressly deny Skidmore deference to agency litigation interpretations, and the Seventh does so *implicitly*....I believe this circuit split and these questions warrant this Court's attention.") (emphasis supplied). And a proposition of law, as a general matter, need not be expressly decided in order to constitute precedent in itself. See, e.g., United States v. Stanley, 483 U.S. 669, 681, 107 S. Ct. 3054, 3062, 97 L. Ed. 2d 550 (1987) (stating that in a previously decided case, Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362 (1983), this Court "implicitly recognized" that there

are varying levels of generality at which one may apply a "special factors" analysis in determining the propriety of a Bivens action).

The fact that timing of precedent alone was not the dispositive issue in some of the cases canvassed by the Petitioners in the determination of whether a governmental official is entitled to qualified immunity is neither here nor there. Each and every one of those cases decided that an official was, or was not, entitled to immunity on the basis of the existence or nonexistence of some previously decided legal precedent—and, as the Petitioners showed, those precedents were decided with wild variations in the amount of time between the applicable precedent and the underlying conduct at issue in the Circuit Court cases applying it. See, e.g., Lintz v. Skipski, 25 F.3d 304, 306 (6th Cir. 1994) (120 days sufficient to "clearly establish" applicable law); Bryan v. United States, 913 F.3d 356, 358 (3d Cir. 2019) (two days not sufficient for decision to constitute "clearly established" law). Certiorari should be granted so that this Court can provide guidance to resolve these great inconsistencies across the nation.

The Fact That There Were Multiple Decisions Issued In Moore Underscores The Lack Of Finality Of Panel Decisions And Their Insufficiency To Constitute Clearly Established Law.

The Respondents attempt to make much of the fact that the Moore decision decided a mere nine (9) days prior to the underlying events in this case was itself preceded by an earlier panel decision in that same matter, decided some thirty-eight (38) days before the Petitioners' conduct, which was substituted by the later decision—apparently

arguing that, since the earlier decision contained the same proposition that a Terry stop may not be conducted in the home absent exigent circumstances, that earlier decision extended the Petitioners' putative notice of the supposed constitutional infirmity of their conduct from nine (9) to thirty-eight (38) days. (Response. pp. 15-16).

First, it was the second Moore decision, decided a mere nine (9) days prior to the underlying conduct in this matter, which the Eleventh Circuit panel applied to strip the Petitioners of their qualified immunity, and it is from that application the Petitioners seek to appeal. (See Appeal No. 18-14512-EE, Opinion, issued July 16, 2019, p. 19) ("In Moore, decided on October 15, 2015, we held that an officer may not conduct a Terry-like stop in the home in the absence of exigent circumstances, consent, or a warrant. . . . Thus, binding precedent clearly established, at the time of the encounter on October 24, 2015, that a seizure or entry within the home without a warrant or exigent circumstances violates the Fourth Amendment's prohibition on unreasonable searches and seizures.") (citations and quotations omitted).

Second, it is true that the second Moore opinion substituted an earlier opinion containing the same general proposition. See Moore v. Pederson, 801 F.3d 1325 (11th Cir.), withdrawn from bound volume, opinion vacated and superseded, 806 F.3d 1036 (11th Cir. 2015). But the fact that the earlier panel decision was later withdrawn a mere twenty-nine (29) days after it was issued, by that same panel, vividly illustrates the unfinalized, tenuous nature of panel decisions wherein the further appeals process has yet to be exhausted. And this subjection of panel precedent to the possibility of sudden change or rescission, as the

Petitioners argued in their Petition and below, is exactly the kind of uncertainty in the contents and prescriptions of the law against which the doctrine qualified immunity is intended to guard. See, e.g., Musacchio v. United States, 136 S. Ct. 709, 716, 193 L. Ed. 2d 639 (2016), quoting United States v. Wells, 519 U.S. 482, 487, n. 4, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997). ("An appellate court›s function is to revisit matters decided in the trial court. . . . [I]t is not bound by [rulings below] under the law-of-the-case doctrine."); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments[.]"). This case, therefore, is an ideal vehicle for this Court to address the uncertainty posed by the prospect that a panel decision could constitute clearly established law, only to be rescinded once an officer is stripped of immunity by the application of such a decision.

Whether Exigent Circumstances Existed In This Case Under Intra-Circuit Precedent *In Fact* Is Not The Subject Of Appeal, And Therefore Not A Basis For Denial Of Certiorari

Strangely, the Respondents appear to argue that, since the Eleventh Circuit relied on its own precedent decided prior to Moore for defining the parameters of exigent circumstances, its reliance on Moore itself was not in error because Moore did not announce any new rules about what "exigent circumstances" are in a given situation, and therefore an appeal is not warranted. (Response, pp. 22-23). But the issues the Petitioners seek this Court to review are not the merits of whether there were exigent circumstances here, because the qualified

immunity analysis does not turn on whether exigent circumstances for the seizure of Harley Turner actually existed, but instead on whether the Petitioners had sufficient notice from prior factually-analogous case law that their specific conduct violated the Constitution. And it is the fact that Moore, on which the Eleventh Circuit panel relied, is *not* sufficiently factually analogous that forms one of the bases of the Petition in this matter—that is, whether or not the Petitioners would *know* from Moore that their conduct was unconstitutional on the facts of the situation they faced, not whether the Eleventh Circuit correctly concluded that exigent circumstances did not in fact exist.

CONCLUSION

For the foregoing reasons and those shown in the Petition, the Petitioners respectfully pray that their Petition for Certiorari be GRANTED.

Respectfully Submitted,

Russell A. Britt
Counsel of Record
Phillip E. Friduss
Jacob O'Neal
Hall Booth Smith, P.C.
191 Peachtree Street, N.E., Suite 2900
Atlanta, GA 30303
(404) 954-5000
rbritt@hallboothsmith.com

Counsel for Petitioners