No. 20-1082

In The
Supreme Court of the United States

RAYMOND GARDNER,

Petitioner,

v.

MATTHEW T. MGLEJ,

Respondent.

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

STEWART O. PEAY
BEN T. WELCH
ANNIKA L. JONES
SNELL AND WILMER L.L.P.
15 West South Temple
Suite 1200
Salt Lake City, UT 84101-1531
speay@swlaw.com
bwelch@swlaw.com
aljones@swlaw.com
Telephone: (801) 257-1814
Facsimile: (801) 257-1800

ANDREW M. JACOBS
Counsel of Record
AMANDA Z. WEAVER
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, AZ 85004-2202
ajacobs@swlaw.com
aweaver@swlaw.com
Telephone: (602) 382-6000
Facsimile: (602) 382-6070

Counsel for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
JURISDICTION	1
INTRODUCTION AND SUMMARY OF THE CASE	1
STATEMENT OF THE CASE	2
A. Mglej Travels to Boulder, Utah	2
B. Gardner Demands Mglej's ID, and When Mglej Declines to Provide it, Gardner Arrests Him, and Injures Him While Keeping Him in Custody	5
C. After Gardner Realizes His Arrest of Mglej Was Based on Error, Gardner Decides to Keep Mglej Under Arrest, Ultimately Charging Him With Obstructing Justice and Failing to Provide Identification	7
ARGUMENT	9
I. No Circuit Court Conflict Exists on the Question the Petition Raises, and Circuits Agree on Existing Precedent	9
II. Gardner's Petition for Writ of Certiorari Does Not Present Any Compelling Question That Comes Close to Meriting This Court's Attention	12
III. Even if One Looks at the Petition as a Device for Error Correction, Which Is Not a Proper Purpose, It Fails Thus Understood, Because the Decisions Below Are Correct.	14
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

Carroll v. Carman, 574 U.S. 13 (2014) 13

City & County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015) 1

City of Escondido v. Emmons, 139 S. Ct. 500 (2019) 13

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 9

Heien v. North Carolina, 574 U.S. 54 (2014) 17, 19

Hiibel v. Sixth Jud. Dist. Ct., 542 U.S. 177 (2004) 14, 15, 16, 17, 19

Hope v. Pelzer, 536 U.S. 730 (2002) 9

Kinney v. Weaver, 367 F.3d 337 (5th Cir. 2004) 10

Kisela v. Hughes, 138 S. Ct. 1148 (2018) 13

Lovelace v. Lee, 472 F.3d 174 (4th Cir. 2006) 10

Mocek v. City of Albuquerque, 813 F.3d 912 (10th Cir. 2015) 17

Mullenix v. Luna, 577 U.S. 7 (2015) 13

Pearson v. Callahan, 555 U.S. 223 (2009) 9

Plumhoff v. Rickard, 572 U.S. 765 (2014) 1, 12, 13, 16

Reichle v. Howards, 566 U.S. 658 (2012) 13

Stanton v. Sims, 571 U.S. 3 (2013) 13, 18

United States v. Lanier, 520 U.S. 259 (1997) 9, 12

Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002) 11

Wood v. Moss, 572 U.S. 744 (2014) 13

TABLE OF AUTHORITIES—Continued

Page

STATUTES

28 U.S.C. § 1331 1

28 U.S.C. § 1254 1

42 U.S.C. § 1983 .....8, 12

Utah Code § 76-8-301.5 ..... 7, 10, 14, 15, 17

Utah Code § 76-8-306 7

RULES

Supreme Court Rule 10 1

Supreme Court Rule 15 .....1, 2

JURISDICTION

The district court has exercised federal question jurisdiction pursuant to 28 U.S.C. § 1331. The Tenth Circuit exercised jurisdiction only to the extent legal questions were raised. S. Ct. Rule 15(2); Pet. App. 5a; *Plumhoff v. Rickard*, 572 U.S. 765, 772-73 (2014). The Tenth Circuit filed its opinion on September 9, 2020 and denied Gardner's petition for rehearing on October 26, 2020. Pet. App. 1a; 71a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION AND SUMMARY OF THE CASE

Gardner's Petition fails to provide a compelling reason for this Court to grant review on writ of certiorari. *See* S. Ct. Rule 10. He does not seek to "clarify the law," which is the reason that "certiorari jurisdiction exists." *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015). Instead, Gardner seeks to correct what he asserts is an error, and which in any event is a narrow, fact-driven issue adding little to the law: whether "[i]t was not clearly established in 2011 that an officer lacked probable cause" for arresting an individual when that individual refused to provide a driver's license when the state statute instead called for a "name." Pet. 6. Gardner's Petition falls far short of the heavy burden justifying the exercise of this Court's judicial discretion for at least three reasons.

First, there is no split of authority between the Circuit Courts of Appeals on this narrow, asserted issue that would justify this Court's attention to correct. By contrast, several other Circuit Courts agree that the plain text of a statute "clearly establishes" a law for purposes of qualified immunity, which would resolve the asserted issue here fully and completely. This Court should not attend to the question the Petition poses.

Second, there is no compelling question meriting this Court's analysis. Gardner attempts to argue that this Court commonly accepts issues of qualified immunity to correct error below, but the case law he cites belies this presumptuous claim. This Court is not a court of error correction, and the fact-specific determination of this unique case, relying on the plain text of a state statute, does not merit review.

Third, the Tenth Circuit thoroughly and consistently applied controlling case law to the facts of this case. Gardner violated clearly established law in arresting Mglej without probable cause. This Court should deny his Petition.

STATEMENT OF THE CASE

A. Mglej Travels to Boulder, Utah.

Gardner's exposition of facts neglects multiple details, which the below corrects. *See* S. Ct. Rule 15(2). In the summer of 2011, Mglej left his home in Oregon to

embark on a motorcycle trip to visit family in Dallas, Texas. Pet. App. 35a. His road trip was disrupted when his motorcycle started to malfunction outside of Boulder, Utah, a small town with only about two hundred residents. *Id.*

Mglej went into town and asked around for a mechanic, eventually learning that Chuck Gurle was the only mechanic in town. *Id.* Mr. Gurle offered to help Mglej with his motorcycle, and invited Mglej to stay with him the several days that his motorcycle took to be repaired. *Id.* at 35a-36a.

In Boulder, Mglej found a largely welcoming community. *Id.* He spent his time exploring the town and meeting town residents, as well as socializing with Mr. Gurle. *Id.* at 36a. While initially in Boulder, Mglej and Gardner ran across one another, although their versions of their first meeting are drastically different. *Id.* Mglej states that Gardner, after eyeing him several times, pulled him over while on Mglej was on his motorcycle, and asked him who he was. *Id.* Mglej provided his ID to Gardner at this stop. *Id.* According to Gardner, however, he did not pull Mglej over for speeding, who instead stopped of his own accord to initiate conversation with the deputy. *Id.* at 36a-37a.

Once the motorcycle equipment arrived, Mglej and Mr. Gurle installed it right away, and Mglej planned to leave the next day after saying his goodbyes. *Id.* at 37a. On his planned last day in town, Mglej was spending time with Mr. Gurle in his home, talking, watching television, and playing the guitar. *Id.* At that point,

Gardner came to the door, out of uniform, and asked to speak with Mglej by name. *Id.*

Gardner was apparently following up on a purported theft from the Boulder Exchange, one of the local gas stations. *Id.* at 38a. According to Gardner, he received a dispatch call that an employee at the Boulder Exchange believed $20 were missing from the till; however, the call did not provide any basis for that conclusion, and the employee ultimately gave Gardner Mglej's name. *Id.*

Following this conversation, Gardner went to Mr. Gurle's residence. *Id.* at 40a. When Gardner knocked on the door, Mr. Gurle answered. *Id.* Gardner asked for Mglej by name. *Id.* When Mglej came to the door, Gardner asked to speak with him outside. *Id.* Mglej followed his instructions and went just outside the front door to the bottom of the steps. *Id.*

Mr. Gurle and his wife lived in a mobile home at the end of a dirt driveway off of Burr Trail Road. *Id.* at 39a; 54a. The front yard consists of hard-packed dirt with a fire pit and several lawn chairs. *Id*. at 40a. Neither Mr. Gurle nor his wife conducted any business at their home. *Id.* at 39a.

B. Gardner Demands Mglej's ID, and When Mglej Declines to Provide it, Gardner Arrests Him, and Injures Him While Keeping Him in Custody.

Gardner informed Mglej he was investigating an allegation of money missing from the gas station and asked for Mglej's ID for the report. Pet. App. 40a-41a. He insisted that he needed Mglej's "ID," or his "[f]ull name, date of birth, driver's license information, [and] address." *Id.* Mglej declined to provide him his ID, but did not become upset or in any way escalate the situation. *Id.* at 41a. Mglej felt uncomfortable and scared, and told Gardner that he did not want to answer any questions until he could call his lawyer. *Id.* at 41a-42a. When Mglej reached for his phone, however, Gardner commanded Mglej to put his phone down and said that if Mglej did not "put that phone down right now" he was going to "wrestle [Mglej] to the ground and tase [him]." *Id.* at 42a. Gardner denied Mglej the opportunity to first speak with an attorney because, inexplicably, he had no "reasonable expectation that [Mglej] knew of any attorney or had a phone number for an attorney or . . . had any kind of access to any attorney . . . ." *Id.* at 41a.

Gardner then arrested Mglej, and handcuffed Mglej behind his back. *Id.* at 4a; 43a. Mglej almost immediately told him that the handcuffs were painful, *id.* at 44a, but "Gardner told him to stop saying that, because it did not matter," *id.* at 4a.

This particular day, August 8, 2011, was Gardner's day off and he was not in uniform. *Id.* at 37a. So, after handcuffing Mglej, Gardner decided it would be best to stop by his house and change into his uniform. *Id.* at 42a. While Gardner went inside, Mglej sat in the front seat of the car alone with the doors unlocked, limited only by a seat belt and his arms handcuffed. *Id.* at 41a-42a. Although Gardner's family was inside the house, he did not fear that Mglej would try to escape. *Id.* at 42a.

Upon returning to the car, Gardner realized that the handcuffs were too tight for a two-hour drive to the jail, and attempted to loosen them with the handcuff key, only to discover that they were apparently malfunctioning. *Id.* at 4a; 42a; 45a. Gardner did not call for assistance or attempt to locate other equipment. *Id.* at 44a. Rather, Gardner decided to improvise by trying to remove the handcuffs using tools in his garage, including a vice, presses, and hand drills, and, eventually, by utilizing Mglej's wrists as a fulcrum to break the locking mechanism. *Id.* at 44a. Throughout this process, Mglej was fearful and in extreme pain. *Id.* at 29a; 44a.

Eventually, after about 20 minutes of trial and error wrestling with the handcuffs, Gardner released them, whereupon he promptly put another pair of handcuffs on Mglej. *Id.* at 4a. The new handcuffs caused additional pain to Mglej's injured wrists. *Id.* at 29a.

C. After Gardner Realizes His Arrest of Mglej Was Based on Error, Gardner Decides to Keep Mglej Under Arrest, Ultimately Charging Him With Obstructing Justice and Failing to Provide Identification.

Following the ordeal in the garage, Gardner put Mglej back into the patrol car and started on his way to Panguitch, Utah, where the jail was located. Pet. App. 42a; 44a. About thirty minutes into the drive, Gardner received a call informing him that, upon further investigation, the gas station employee determined that $20 wasn't missing after all. *Id.* at 45a. Rather than release Mglej, however, Gardner kept driving, taking Mglej all the way to the Panguitch jail. *Id.* When the booking officer asked Gardner what he was booking Mglej for, Gardner said "I don't know. Let me look in the book. I'm sure I can find something." *Id.* at 45a-46a. Mglej was ultimately charged with failure to disclose identity, in violation of Utah Code § 76-8-301.5, and obstructing justice, in violation of Utah Code § 76-8-306(1)(i). *Id.* at 9a; 11a. This was the first time Gardner had ever charged anyone with failure to disclose identity. *Id.* at 46a.

Although bail was set on August 9, 2011—the day after his arrest—and Mglej immediately asked for his wallet so he could pay bail, the guards refused to give him his wallet until two days later on August 11. *Id.* During Mglej's three-day detention from August 8 to August 11, he suffered numerous indignities, including taunts from the guards, deprivation of food he could safely eat due to a dairy allergy, and being housed with

an inmate who apparently suffered from schizophrenia and alcoholism, who started behaving erratically and aggressively toward Mglej after the guards refused to give the inmate his medication. *Id.* at 46a-47a. When Mglej was finally released, Mglej was forced to hitchhike back to Boulder, only to find that his motorcycle had been vandalized and his possessions had been stolen. *Id.* at 47a.

After the arrest, Mglej continued to have lasting "burning pain and numbness" in his fingers, radiating up to his elbows. *Id.* at 47a. He also suffers from Asperger's Disorder, anxiety, and PTSD, and these events "have exacerbated [his] symptoms, causing panic attacks, loss of sleep, general anxiety, and flashbacks." *Id.* at 47a-48a.

Mglej asserted violations of the Fourth Amendment under 42 U.S.C. § 1983, and in the underlying litigation, the district court denied qualified immunity upon Gardner's motion for summary judgment for Gardner's arrest of Mglej. *Id.* at 58a-59a. The Tenth Circuit determined that the district court "correctly denied Deputy Gardner qualified immunity from Mglej's § 1983 unlawful-arrest claim." *Id.* at 18a. The Tenth Circuit subsequently denied Gardner's petition for rehearing with no dissent. *Id.* at 72a.

ARGUMENT

I. No Circuit Court Conflict Exists on the Question the Petition Raises, and Circuits Agree on Existing Precedent.

Gardner does not attempt to identify a circuit court conflict on the issue as to whether contravening the plain language of a statute violates clearly established law under the Fourth Amendment. *See* Pet. App. 17a-18a. Nor can he. The issue, as Gardner has chosen to present to this Court, is whether the plain text of a statute constitutes "clearly established law" for purposes of qualified immunity, such that Gardner's ignoring such clear language precludes invocation of immunity from suit. This does not conflict with this Court's precedent, nor has Gardner identified a split in decisions of the Courts of Appeals that would suggest this Court's attention.

The holding below does not conflict with Supreme Court precedent. This Court has made clear that qualified immunity is available for government officials as long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). More specifically, the doctrine does not protect official action when, "in the light of pre-existing law[,] the unlawfulness [is] apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Anderson v. Creighton*, 438 U.S. 635, 640 (1987)). "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning." *United States v. Lanier*,

520 U.S. 259, 270-71 (1997) (equating "fair warning" with "clearly established" in qualified immunity cases). Pre-existing law, here, is the plain text of the Utah statute that Gardner complains of, Utah Code § 76-8-301.5, and the fact that it criminalizes ***only*** a failure to provide one's "name" to a police officer. This sets forth a clear, pre-existing law within the confines of this Court's precedent that Gardner, as a government official charged with enforcing Utah's laws, should have known.

That the plain text of a statute (federal or state) puts a government official on notice and "clearly establishes" the law, is an uncontroversial proposition and needs no clarification from this Court. The Tenth Circuit in its opinion below joins at least three other circuits in acknowledging the ineluctable logic that "clearly established law," for purposes of a government official's right to qualified immunity upon that law's violation, includes the plain and unambiguous text of a statute. This includes the Fourth Circuit, the Fifth Circuit, and the Eleventh Circuit. *See, e.g.*, *Lovelace v. Lee*, 472 F.3d 174, 197 (4th Cir. 2006) ("Federal laws, in other words, do not need judicial approval to take effect and be clearly established."); *see also id.* ("State officials are . . . not entitled . . . to ignore a new federal law in the hopes that a court will subsequently strike it down. If officials choose to ignore a federal law, they do so at their own peril." (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1204 (9th Cir. 2000))); *Kinney v. Weaver*, 367 F.3d 337, 352 (5th Cir. 2004) ("We further conclude that the statute's coverage of expert witnesses was

'clearly established' for purposes of qualified immunity. No reasonable official would find the terms 'any . . . witness' ambiguous on this point."); *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002) ("[T]he words of the pertinent federal statute or federal constitutional provision in some cases will be specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity. . . ."). Furthermore, Gardner does not even identify that a split between the Circuit Courts of Appeals justifies this Court's attention. It is axiomatic that an unambiguous state statute clearly establishes the law of which a state official ought to be aware.

Gardner instead attempts to confuse the issue by seeking review upon the justification that no court had yet ruled upon the statutory provision in question—however, no contours within qualified immunity actually require this, nor does that conclusion accord with this Court's own precedent. Gardner argues that, conceivably because "[w]hen Officer Gardner arrested respondent in 2011, no court had interpreted whether a person violated [the statute's] requirement that a person must disclose his 'name' when he refused to provide identification," that "it was understandable for Officer Gardner to assume that Utah's law . . . was violated when Gardner asked Mglej for his ID and Mglej refused to provide it." Pet. 8-9. However, this is not what the law requires.

Moreover, in so postulating, Gardner essentially seeks a free-pass rule that would allow a government official to escape liability, even for unreasonable

interpretations of a clear statute (as here), when a court has not first ruled upon it. This is not correct. *See, e.g.*, *Lanier*, 520 U.S. at 271 ("There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." (alterations original) (citation omitted)). Indeed, "the easiest cases don't even arise." *Id.* (citation omitted). The decision below does not conflict with other circuits, and does not compel this Court's attention.

II. Gardner's Petition for Writ of Certiorari Does Not Present Any Compelling Question That Comes Close to Meriting This Court's Attention.

Throughout this litigation, Gardner has continually focused on fact-bound issues and now essentially asks this Court to grant his Petition for the purpose of error correction, which this Court need not—and should not—do.

Gardner has consistently ignored the governing record on review. *Contra, e.g.*, *Plumhoff v. Rickard*, 572 U.S. 765, 768 (2014) ("Because this case arises from the denial of the officers' motion for summary judgment, we view the facts in the light most favorable to the nonmoving party. . . ."). As Mglej has pointed out above, even Gardner's presentation to this Court continues to lack the facts both the district court and Tenth Circuit identified as relevant. These facts, which are relevant

to a particular point of state law, do not compel this Court's attention.

Moreover, Gardner is incorrect to suggest that this Court grants petitions upon qualified immunity ***solely*** for error correction (assuming any error even exists, which it does not), as such a grant would be here. The Supreme Court precedent he identifies as purportedly addressing this point does not address the issue here—whether a government official should be entitled to qualified immunity for disregarding the plain language of a state statute. *See, e.g.*, *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (describing domestic welfare check); *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018) (describing officer shooting a woman holding knife on porch within moments of arriving on scene); *Mullenix v. Luna*, 577 U.S. 7, 13-14 (2015) (describing deadly force in high-speed car chase); *Carroll v. Carman*, 574 U.S. 13, 16 (2014) (describing "knock and talk" warrant justifying officer's walking through backyard and onto deck, rather than up to front door); *Plumhoff*, 572 U.S. at 768 (describing shooting driver of fleeing vehicle in high-speed chase); *Stanton v. Sims*, 571 U.S. 3, 4-5 (2013) (describing officer directly following a suspect into a yard following a direct, lawful order to stop); *Reichle v. Howards*, 566 U.S. 658, 663 (2012) (describing Secret Service detention of man after asking how many children the Vice President had killed over disagreement with policies in Iraq); *Wood v. Moss*, 572 U.S. 744, 747 (2014) (describing protesters' argument that it violated clearly established First

Amendment law to deny them "equal access to the President").

By contrast, Gardner here seeks the weighty exercise of this Court's judicial discretion for a fact-bound determination of an unambiguous, straightforward state statute under which Gardner improperly arrested Mglej nearly a decade ago. This is not a compelling issue warranting this Court's attention.

III. Even if One Looks at the Petition as a Device for Error Correction, Which Is Not a Proper Purpose, It Fails Thus Understood, Because the Decisions Below Are Correct.

Finally, review is unwarranted because the Tenth Circuit's decision, which upheld the district court's decision, is correct. Gardner's position contravenes Section 76-8-301.5's plain text and the record on review. His argument is meritless and should be rejected.

Gardner's attempt to justify his actions by misreading Section 76-8-301.5 ignores the Tenth Circuit's analysis of this Court's precedent. *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004), which the Tenth Circuit cited in passing for support,[1] does not justify Gardner's interpretation in the least.

---

[1] Gardner also appears to rely on the Tenth Circuit's citation to *Hiibel* to claim that the Utah statute was modeled after *Hiibel*, *see* Pet. 10, but the court's citation to *Hiibel* does not bear that reading. *Id.* at 12 n.6.

In *Hiibel*, Nevada's stop-and-identify statute required the suspect to "identify himself." 542 U.S. at 181 (quoting Nev. Rev. Stat. 171.123(3)). This Court concluded that the statute did "not require a suspect to give the officer a driver's license or any other document," and that the suspect had a choice under that statute to "either state[ ] his name or communicate[ ] it to the officer by other means." *Id.* at 185. The suspect refused to provide either, and probable cause therefore existed for his arrest. *Id.*

In this case, by contrast, the Utah statute for which Mglej was arrested criminalizes only "fail[ing] to disclose [a] person's ***name***" in certain circumstances. *See* Utah Code § 76-8-301.5(1) (emphasis added). There is no similar requirement or option to "otherwise identify [one]self" through a driver's license or other identification. Accordingly, it is a critical and dispositive fact in this case that Gardner "did not just ask Mglej for his name." Pet. App. 15a.[2] Rather, Gardner "specifically demanded Mglej's driver's license or some other form of identification," *id.* at 16a, then arrested Mglej for refusing to comply. Because Utah's statute, by its plain language, does not criminalize refusing to provide written identification during a *Terry* stop, Gardner lacked probable cause to believe Mglej violated the Utah statute and the arrest therefore violated clearly established Fourth Amendment law.

---

[2] In fact, Gardner already knew Mglej's name. *See* Pet. App. 3a ("Gardner . . . asked to speak with Mglej outside, calling him by his first name, 'Matthew or Matt.' ").

Finally, Gardner's belated and incorrect assertions regarding *Hiibel* also fail to account for a critical fact that was not present in that case: unlike the officer in *Hiibel*, Gardner already ***knew the suspect's name***. *See* n.2, *supra*. This single fact, which the Court must view in the light most favorable to Mglej, *see, e.g.*, *Plumhoff v. Rickard*, 572 U.S. 765, 768 (2012); Pet. App. 6a, proves that the entire basis for Gardner's arrest was merely a pretext. In other words, this case is not about Gardner's mistaken understanding of the law, as he would have this Court believe, but rather Gardner's attempt to rewrite the factual history of his encounter with Mglej.

Gardner initially purportedly arrested Mglej on the underlying suspicion of theft of $20. That suspicion was allayed when the store clerk who reported the theft later informed Gardner while en route to the jail that no money was missing. In that moment, Gardner stood at the edge of the proverbial Rubicon: either he could release Mglej or gin up another charge once he arrived at the jail. He chose the latter.[3] The problem for Gardner is that the post hoc charge he ultimately chose to bring against Mglej—failure to identify—relied on Mglej's alleged failure to give information that Gardner already had: Mglej's name. This critical fact distinguishes Gardner's conduct from that of the officer in *Hiibel*, and pulls the rug out from whatever

[3] Mglej testified that when the booking officer at the jail asked Gardner what he was booking Mglej for, Gardner said "I don't know. Let me look at the book. I am sure I can find something." Pet. App. 31a.

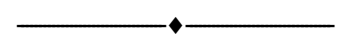
legal interpretation he seeks to extrapolate from those cases. Regardless of whether Gardner thought it was permissible to ask for Mglej's name or ID, there is no question that he lacked probable cause to arrest Mglej for failing to do so because Gardner already had that information. As such, even under Gardner's strained reading of *Hiibel*, the "rule" he seeks to apply is unavailing under the actual facts of this case.

And as the Tenth Circuit explained when it distinguished *Mocek v. City of Albuquerque*, 813 F.3d 912 (10th Cir. 2015), which criminalized concealing one's "true name or identity" from an officer, *id.* at 922, Utah's statute could not be more clear: it prohibits a suspect in certain circumstances from "fail[ing] to disclose [his or her] ***name***." Utah Code § 76-8-301.5 (emphasis added). The Tenth Circuit compared the two statutes and determined (correctly) that Utah's statute, unlike that in *Mocek*, is "unmistakably clear" in its language. Pet. App. 18a.

For this same reason, Gardner's reliance on *Heien v. North Carolina*, 574 U.S. 54 (2014), is fully unavailing. This Court in *Heien* analyzed the statutory text providing that "[t]he stop lamp may be incorporated into a unit with one or more other rear lamps" to conclude that "an everyday reader of English" could permissibly surmise that "other" rear lamps meant that more than one stop lamp needed to be operative. *Id.* at 67-68. The officer's mistaken analysis to that effect was therefore reasonable. *Id.* at 68. However, Gardner then straight-facedly asks this Court to determine that his interpretation of asking for a name instead means

identification, and that his mistake was reasonable in ignoring the crystal clear, non-technical language of this statute. *See* Pet. App. 12-13. This offends reason.

"Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects all but the plainly incompetent or those who knowingly violate the law." *Stanton v. Sims*, 571 U.S. 3, 6 (2013) (internal quotation marks and citation omitted). Gardner's mistaken judgment was ***not*** reasonable. He approached Mglej, asked for him by name, demanded to see an identification, arrested Mglej when he was refused, and then attempted to justify that arrest under a statute criminalizing failure to state a name. He did not need a court to tell him that a statute requiring someone to state his or her name meant, in fact, that the statute required a person to state his or her name. Indeed, the district court observed that "Mglej's account of the facts is one of plain incompetence and failure to know the otherwise clearly established law that, if believed, would preclude Officer Gardner from immunity [and he] should not be permitted to avoid liability because he simply did not know the otherwise clearly established law." Pet. App. 59a. The district court properly so held, and the Tenth Circuit properly affirmed. There is no error to correct here.



CONCLUSION

The Petition fails to justify the extraordinary exercise of this Court's discretion in granting review. Gardner fails to show how Supreme Court precedent is not only controlling but somehow in conflict with the Tenth Circuit's decision. To the contrary, the Tenth Circuit properly analyzed and interpreted governing law in reaching its unanimous decision. The court also properly applied the governing standard of review, in which the Court must view all facts in the light most favorable to Mglej. One of those facts is Mglej's sworn testimony that Gardner already knew Mglej's name at the time of arrest. This fact distinguishes the present dispute from Gardner's strained reading of *Hiibel* and *Heien*, which is nothing more than a hypothetical exercise, and which falls far below the mark for granting review. Wherefore, the Petition should be denied.

Respectfully submitted,

STEWART O. PEAY
BEN T. WELCH
ANNIKA L. JONES
SNELL AND WILMER L.L.P.
15 West South Temple
Suite 1200
Salt Lake City, UT 84101-1531
speay@swlaw.com
bwelch@swlaw.com
aljones@swlaw.com
Telephone: (801) 257-1814
Facsimile: (801) 257-1800

ANDREW M. JACOBS
Counsel of Record
AMANDA Z. WEAVER
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, AZ 85004-2202
ajacobs@swlaw.com
aweaver@swlaw.com
Telephone: (602) 382-6000
Facsimile: (602) 382-6070

Counsel for Respondent