No. 20-202

In The
Supreme Court of the United States

ROBERT MASSIE,

Petitioner,

v.

BASILEA MENA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. A grant of certiorari is justified and appropriate here.

Mena seeks to downplay the importance of this case, incorrectly claiming that it is "unremarkable in its simple application of precedent" (Opp. 2)[1] and "does not assert . . . any . . . precedential issue." (Opp. 5). None of that is true. Massie has demonstrated that the Ninth Circuit analyzed and ruled on this case in a manner that: (1) ignored the actual factual record; and (2) directly conflicts with this Court's precedent, and its own, on the qualified immunity issue.

II. Mena embraces the Ninth Circuit's fatal factual errors regarding the situation Massie faced, and also (yet again) presents a false version of the handcuffing itself to try to manufacture a nonexistent fact dispute.

Recall Massie's first question presented to this Court:

> (1) Under the particular facts and circumstances of this case, did the Ninth Circuit err in finding that Massie's actions constitute an excessive use of force in violation of the Fourth Amendment?

Seeking to avoid a decision for Massie on this issue, Mena attacks Massie for an alleged "inability to

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[1] References to Mena's Brief in Opposition will be indicated by "Opp." followed by the page number.

adhere to the facts in the light most favorable to Mena." (Opp. 16; *see also* Opp. 1). Mena also accuses Massie of "attempting to engineer new facts and refusing to accept that he relies on facts and inferences that are in dispute." (Opp. 8).

Actually, Massie fully accepts the standards to be applied by this Court, and applied them throughout his Petition. It is Mena, seeking to avoid the application of qualified immunity, who refuses to stick to the issues actually before this Court, adhere to the *material* facts *in the record* regarding those issues, or refrain from a sham version of the "facts" that attempts to create a nonexistent factual dispute.

A. Like the Ninth Circuit, Mena ignores or misstates key facts existing at the point in time when Massie tried to handcuff Mena.

In deciding whether Massie used excessive force, this Court must examine *what he specifically knew, and the specific situation he faced, at the specific time when he decided to handcuff Mena*.

At least three times since early 2018—twice in cases from the Ninth Circuit—this Court has emphasized the crucial importance of the particular facts, circumstances, and situation in applying qualified immunity in the context of excessive force. "Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified

immunity *unless existing precedent squarely governs the specific facts at issue*. . . ." *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019), quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152-53 (2018) (emphasis added). "[T]he 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct *in the particular circumstances before him*. The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*.'" *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018) (emphasis added).

Massie demonstrated, through the relevant factual record, that the Ninth Circuit violated this requirement. Its conclusion that Massie's use of force was clearly established to be a constitutional violation rested on non-existent "facts," contradicted by the record, regarding: (1) the severity of the crime(s) Mena might be involved in; (2) the threat to safety posed by Mena's location and conduct; and (3) Mena's actual level of resistance. (Pet. 34-39).[2]

Mena tries to dismiss Massie's correction of obvious Ninth Circuit errors of fact as "spending five pages . . . attempting to engineer new facts." (Opp. 8). Meanwhile, Mena embraces those same Ninth Circuit errors, hoping this Court will somehow come to believe they are true.

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[2] References to Massie's Petition for Certiorari will be indicated by "Pet." followed by the page number.

1. The severity of the crime(s) at issue was still being investigated.

Recall that the Ninth Circuit incorrectly concluded that, when Massie tried to handcuff Mena, "the crime [was] a non-violent misdemeanor." (Pet. 14-15). Massie already demonstrated the Ninth Circuit's error. (Pet. 34, 35-36).

Yet in symmetry with the Ninth Circuit, Mena now presents a red herring argument that Mena was "only purportedly suspected of (but *did not* commit) a misdemeanor." (Opp. 8 (emphasis in original); *see also* Opp. 10 ("suspected of a misdemeanor"); Opp. 6 ("suspected of a minor crime")). In doing so, Mena refuses to acknowledge the district court's ruling that Massie was entitled to qualified immunity for the illegal seizure/false arrest claim because Massie had reasonable suspicion to detain, or handcuff her, to investigate, among other crimes, *domestic violence*. (Pet. 11; Pet. 17a (emphasis added); *see also* Pet. 5-6, 9, 28, 35). Mena, however, did not appeal this finding and it is not an issue before this Court.

In fact, at the key point in time, Massie did not yet know what crime(s) might be involved, precisely because an intoxicated Mena's three minutes of uncooperative behavior, while standing on a dangerous traffic median, had blocked him from investigating. (Pet. 35-36). When Massie began handcuffing Mena, the officers reasonably believed that they were investigating a potential domestic violence crime in violation of A.R.S. § 13-3601(A), which could encompass many

types of offenses, possibly including assault. (Pet. 5, 28, 35-36).

Whether Mena was ultimately guilty of the suspected crime(s) is of no consequence under the qualified immunity analysis, and this Court should reject Mena's attempt to downplay the seriousness of the crimes(s) Massie was investigating.

2. Mena posed a threat to officer safety, as well as her own and the public's.

Recall that the Ninth Circuit incorrectly concluded that, when Massie tried to handcuff Mena, she "was not a threat to the officers or anyone else." (Pet. 14-15).

Massie already showed this conclusion was incorrect and, in fact incredible given the record facts, whether viewed from the perspective of Massie himself or any reasonable police officer. (Pet. 6-7; Pet. 36-37).

Mena now doubles down on the Ninth Circuit's error with self-serving *ipse dixit* seeking to track its conclusion, unsupported by anything in the record, and contradicted by everything that is:

1. An asserted lack of any danger from potential nighttime traffic or intoxicated drivers on what Mena seeks to characterize as a "desolate" six-lane arterial street in central Tucson. (Opp. 9; Opp. 13).

2. An asserted lack of any potential volatility for officers responding to two

intoxicated domestic partners engaging in a screaming argument with each other after midnight on a traffic median in the middle of that arterial street. (Opp. 12).

3. And finally, an asserted lack of any possible threat to the safety of Mena herself, the responding officers, or the public, from intoxicated Mena's persisting uncooperative conduct toward the responding officers on that median, at that time, in that situation, and with the continuing presence of her nearby, likewise intoxicated boyfriend, and any dynamic that that proximity might create at any moment, as additional wild cards. (Opp. 6; Opp. 8; Opp. 10; Opp. 13; Opp. 15).

3. Mena resisted arrest.

Recall that the Ninth Circuit incorrectly concluded that, when Massie tried to handcuff Mena, she "did not resist (or at most passively resisted)." (Pet. 14-15).

Massie already showed the Ninth Circuit had no factual basis for this conclusion. (Pet. 7; Pet. 38-39).

Mena again provides no facts contradicting Massie's, just more *ipse dixit*, again tracking the Ninth Circuit, asserting that Mena did not resist or at most passively resisted. (Opp. 2; Opp. 6; Opp. 8; Opp. 10; Opp. 15).

To sum up the above, Mena's self-serving assertions on all these topics, tracking the Ninth Circuit's own factual errors, fly in the face of the actual factual record in this case and should be rejected.

In turn, the Ninth Circuit's factual errors in analyzing the context of Massie's actions render invalid its refusal to grant qualified immunity to Massie here. This Court should grant certiorari to remedy that refusal.

B. With respect to the handcuffing itself, Mena repetitively peddles an exaggerated version of events, unsupported by the factual record and contrary to her own testimony.

Mena's dissimulation in this Court, and in the courts below, with respect to the handcuffing itself is consistent with her misstatements and avoidance of the factual record described above. Mena tries to create a fake factual dispute where none exists.

Mena's deposition testimony, set forth in detail in Massie's Petition, makes clear that, according to her own version of the facts, Massie pushed or shoved her into a tree *while he was struggling to handcuff her*. (Pet. 7-9; Pet. 32-33). In other words, the two events were happening *simultaneously*, with one occurring *because of* the other.

Yet at all court levels during this litigation, and notwithstanding her own contrary deposition testimony,

Mena has continually tried to peddle the fiction that the two events happened in *sequence*: she was first handcuffed, and then, as a separate, distinct, intentional, and gratuitous act, Massie pushed or shoved her into the tree.

Mena presents this fairy tale, which has no support whatsoever in the record, yet again to this Court, over and over, either expressly (Opp. 12: " . . . driving ***an already-handcuffed*** nonviolent arrestee's ***face into a tree*** is excessive force" (emphasis added)) or impliedly. (Opp. 1; Opp. 4; Opp. 9; Opp. 10; Opp. 12; Opp. 13; Opp. 14).[3]

Mena's persistent repetition of this inaccurate, exaggerated version of the handcuffing itself shows that she is afraid of the actual facts here. Mena should not be permitted to avoid qualified immunity through these tactics.

The Ninth Circuit's conclusion that Massie's actions constituted unconstitutional excessive force rests on fatal factual errors that misstate or ignore the actual situation Massie faced, as shown by the record. Mena's Opposition presents nothing to this Court that demonstrates otherwise, and indeed simply embraces and doubles down on those errors. Based on the Ninth

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[3] Mena also seeks to heighten the effect of this false version by always describing the event using various strong action verbs implying force, violence, or accelerated propulsion: "thrust" (Opp. i; Opp. 1; Opp. 2; Opp. 9; Opp. 10; Opp. 12), "push" (Opp. 1; Opp. 9; Opp. 12), "shove" (Opp. 4; Opp. 8; Opp. 14), "drive" (Opp. 12), "smash" (Opp. 13), "slam" (Opp. 15 n.4), and "batter" (Opp. 8).

Circuit's factual errors alone, this Court should grant Massie's petition for certiorari.

III. Mena confirms the Ninth Circuit's failure to cite any precedent specifically defining a clearly established right that Massie allegedly violated.

Recall Massie's second question presented to this Court:

> (2) Regardless of the answer to Number (1), did the district court and Ninth Circuit nonetheless err in denying qualified immunity to Massie when it was not clearly established at the time of the incident (or now) that his actions constituted an excessive use of force in violation of the Fourth Amendment?

Massie has already shown that, in contravention of this Court's precedent (Pet. 20-23), the Ninth Circuit has again defined "clearly established" law at too high a level of generality by failing to cite any precedent specifically defining a clearly established right that Massie allegedly violated. (Pet. 23-30).

The Ninth Circuit erroneously relied on three "bystander" cases not comparable to our facts here. (Pet. 23-25). It also incorrectly relied on *Young v. City of Los Angeles*, 655 F.3d 1156 (9th Cir. 2011), a case again involving much different facts generally, including a higher level of force specifically, and in which, ironically, the Ninth Circuit told Massie to do

exactly what it is now refusing to grant him qualified immunity for doing: "effect [Mena's] arrest by attempting to handcuff [her]." *Id.* at 1165-66. (Pet. 26-27; Pet. 32-33). Mena fails to grasp the irony. (Opp. 13).

Mena's only response to Massie's arguments showing the inapplicability of the Ninth Circuit's three cited "bystander" cases is to invent a brand-new claim that she was "exactly the same as [a] bystander[]." (Opp. 13). But this is an impossibility given both: (1) the facts in the record; and (2) the legal distinction made in qualified immunity cases, and especially in a potential "domestic violence call," between bystanders and a person "integrally involved in the volatile situation to which officers were responding." *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1092 (9th Cir. 2013). (See Pet. 25). Ironically (again) for Mena, *Gravelet-Blondin* is itself one of the three "bystander" cases the Ninth Circuit relied on here in denying Massie qualified immunity.

That leaves Mena and the Ninth Circuit with only *Young* as a possible basis for the latter's ruling. But Mena's arguments regarding *Young* simply highlight and confirm Massie's previous showing that that case is distinguishable and inapplicable. Mena herself describes *Young* as "holding that using force on a *docile* person *suspected of a misdemeanor posing no threat to public safety* violates the Fourth Amendment." (Opp. 10 (emphasis added)). And in her own version of existing law as of the time of this incident, Mena states only that "[t]his Court and the Ninth Circuit already had ruled in published opinions that an officer could

not impose non-trivial force on a *compliant* and non-violent arrestee." (Opp. 1 (emphasis added)).

Mena herself describes all the differences between *Young* and our facts. Mena was not "docile" or "compliant"; based on her behavior and location, she did pose a threat to the public, officers', and her own safety; and at the time Massie tried to handcuff her, the nature of her crimes if any, were unknown, precisely because her own conduct was blocking investigation.

Note, finally, that the Ninth Circuit's decision also sought to either rely on a previously nonexistent absolute requirement that Massie warn Mena before using violent force, or else ended up unwittingly creating a new such requirement. (Pet. 14-15). Mena now seeks to downplay the Ninth Circuit's action by dropping discussion of it into a footnote and claiming that it is not a "requirement" but rather a "path to absolution Massie did not take." (Opp. 15, n.4).

Unfortunately for Mena, the Ninth Circuit's own wording contradicts that argument. The lack of a warning is presented as part of the purportedly "established law" that, according to the Ninth Circuit, put Massie on notice that what he was doing would be "excessive force." In turn, that creates only two possibilities.

First, if the Ninth Circuit is indeed holding that the "warning" standard somehow already existed, based on the cases it cited, then that holding is simply wrong, as Massie has already shown. (Pet. 27-28). And

since there actually is no such prior warning standard, Massie cannot have violated it, and it cannot form part of the basis for the Ninth Circuit's decision denying Massie qualified immunity.

The only other possibility is that the Ninth Circuit actually has unwittingly, through its own legal error, created a "new" standard for officers through this decision, which includes this warning requirement. But if that is the case, then two conclusions immediately follow. First, this Court should grant Massie's petition and review whether, under this Court's jurisprudence, and especially on our particular facts, that new standard is correct overall, and whether a warning is one of its correct requirements. Second, in Massie's case specifically, he is immediately entitled to qualified immunity, because there is no way that a standard first created by the Ninth Circuit in 2020 could have provided Massie with clearly established law four years earlier, in 2016.

Under both prongs of this Court's qualified immunity jurisprudence, and contrary to the Ninth Circuit's ruling, Massie is entitled to qualified immunity.

CONCLUSION

This Court should grant Massie's petition for certiorari.

Respectfully submitted,

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