No. 21-533

In the
Supreme Court of the United States

BRAD MARTIN, in his individual capacity and as an employee of the Arizona Department of Public Safety; STATE OF ARIZONA,
Petitioners,

v.

CARLOS CASTRO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

TIMOTHY J. BERG
Counsel of Record
BRADLEY J. PEW
BRETT C. GILMORE
TYLER D. CARLTON
FENNEMORE CRAIG, P.C.
2394 E. Camelback Rd.
Suite 600
Phoenix, AZ 85016
602-916-5421
tberg@fennemorelaw.com

Counsel for Petitioners

January 25, 2022

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REPLY BRIEF

Just three months ago, this Court *once again* reiterated that police officers are entitled to qualified immunity unless existing precedent places the constitutionality of their conduct "beyond debate." *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (per curiam); *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021) (per curiam). In concluding that the facts here could amount to a violation of clearly established law, the Ninth Circuit relied solely on two cases. The first case, *Hernandez v. Town of Gilbert*, 989 F.3d 739 (9th Cir. 2021), post-dates the events in question and is therefore "of no use" in the clearly-established-law inquiry. *City of Tahlequah*, 142 S. Ct. at 12. The second case, *Watkins v. City of Oakland*, 145 F.3d 1087 (9th Cir. 1998), is readily distinguishable and could not put Detective Martin on notice that the Fourth Amendment may require a K9 to disengage a lawfully initiated bite at the precise moment a suspect with a known history of violent crime, and who fled from police and resisted arrest, is being handcuffed and subdued.

This Court's recent decisions also reaffirm that determining whether an officer has used excessive force is a fact-intensive inquiry that requires consideration of all relevant circumstances surrounding the use of force. *Rivas-Villegas*, 142 S. Ct. at 8–9; *City of Tahlequah*, 142 S. Ct. at 11–12. Yet the Ninth Circuit expressly declined to do so here and instead focused "solely" on the twelve to twenty-six seconds that passed between when Castro was handcuffed and the K9 disengaged. Petitioner's Appendix (App.) 4. The Ninth Circuit's narrow focus caused it to reach a result that

is both incorrect and inconsistent with this Court's precedent and decisions in the Fifth, Sixth, and Eighth Circuits.

Faced with these obvious errors, it is no surprise that Respondent argues that factual disputes preclude effective review at this stage of the case. But the Ninth Circuit's decision is expressly "limited to questions of law," App. 4, and so the petition likewise raises only pure questions of law, *see Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007) (holding that at summary judgment, "once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record," the reasonableness of an officer's actions presents "a pure question of law"). Moreover, *Rivas-Villegas* and *City of Tahlequah* demonstrate that the Court "has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law." *Wearry v. Cain*, 577 U.S. 385, 394–95 (2016) (per curiam). No factual dispute precludes review, and review is warranted to compel compliance with settled law.

I. The Decision Below Is Plainly Wrong.

The Ninth Circuit held that whether Detective Martin used excessive force "turn[ed] solely on the 12 to 26 seconds that passed between when Castro was 'handcuffed and subdued' and when the K9 released its bite," and that the evidence, viewed in Castro's favor, supports a violation of clearly established law. Both holdings constitute reversible error.

A. The Ninth Circuit Erred by Failing to Evaluate the Totality of the Circumstances.

This Court has "set[] forth a settled and exclusive framework for analyzing" excessive force cases. *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017). That exclusive framework requires courts to ask "whether the totality of the circumstances justifie[s] a particular sort of search or seizure." *Id.* (alteration in original) (citation omitted). By limiting its analysis to the final seconds of a prolonged effort to bring Castro into custody, the Ninth Circuit disregarded the proper and exclusive framework for analyzing excessive force cases. *Id.*; *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1280 (11th Cir. 2004) (per curiam) ("[C]ourts must look at the totality of the circumstances: not just a small slice of the acts that happened at the tail of the story."). Review is appropriate given this obvious error.

Castro does not defend the Ninth Circuit's finite view of the facts or otherwise respond to Petitioners' argument that the Ninth Circuit failed to evaluate the totality of the circumstances from Detective Martin's perspective. Instead, Castro offers his own analysis of the facts of this case under *Graham v. Connor*, 490 U.S. 386 (1989). Brief in Opposition (BIO) 5–6. But like the Ninth Circuit, Castro overlooks the full story. Castro suggests there was no basis for applying force after he was handcuffed and subdued, but this ignores that Castro was not handcuffed and subdued when Detective Martin engaged his K9 companion Storm. Castro also ignores his known history of violent crime and flight from police, admitted gang affiliation, and video footage showing him actively resisting arrest

when the bite began. App. 11–16, 27. Moreover, Detective Martin ordered Storm to disengage once he was sure Castro was subdued. The twelve to twenty-six seconds that passed before then is within the time it would take a reasonable officer to react to the "tense, uncertain, and rapidly evolving" circumstances surrounding Castro's arrest.[1] *See Graham*, 490 U.S. at 397.

Castro's *Graham* analysis, much like the Ninth Circuit's decision, also ignores other key facts known to Detective Martin when he deployed Storm. Detective Martin knew Castro was a documented member of a violent gang, had a history of violent felony convictions, had absconded from community supervision after being released from jail, was suspected of two recent violent assaults (including one just hours earlier), had a history of fleeing police, and had just fled through the backyard of occupied residences in an effort to evade arrest. App. 12–16. He also understood Castro might be armed and under the influence of methamphetamines. App. 15. In light of these circumstances, it was reasonable for Detective Martin to deploy Storm and leave him engaged until certain that Castro was safely within police custody. The Ninth Circuit erred in concluding that the facts here amount to a Fourth Amendment violation.

---

[1] Castro incorrectly suggests that the dog bite lasted as long as eighty-eight seconds. BIO 5–6. Video footage of the encounter shows that the bite lasted no more than sixty seconds. App. 23–24 (indicating that the dog bite began at timestamp T07:38:54Z and ended before timestamp T07:39:54Z).

B. Detective Martin Did Not Violate Clearly Established Law.

At a minimum, it certainly was not clearly established that the Fourth Amendment requires a police K9 to disengage a lawfully initiated bite at the precise moment a suspect with a known history of violent crime, and who fled from police and resisted arrest, is being handcuffed and subdued. "[T]o show a violation of clearly established law, [a plaintiff] must identify a case that put [the defendant officer] on notice that his *specific* conduct was unlawful." *Rivas-Villegas*, 142 S. Ct. at 8 (emphasis added). Neither the Ninth Circuit nor Castro identified a single case that puts the constitutionality of Detective Martin's actions "beyond debate." Detective Martin is therefore protected by qualified immunity. *E.g.*, *id.* ("[F]or a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." (citation omitted)); *City of Tahlequah*, 142 S. Ct. at 11 ("It is not enough that a rule be suggested by then-existing precedent; 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*." (cleaned up) (emphasis added)); *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (stating there must be "existing precedent [that] 'squarely governs' the specific facts at issue" (citation omitted)).

The Ninth Circuit cited *Hernandez v. Town of Gilbert*, 989 F.3d 739, 744 (9th Cir. 2021), but that case post-dates the conduct at issue, which occurred in 2017, and is thus irrelevant. *See City of Tahlequah*, 142 S. Ct. at 12 (holding that a case post-dating the events at

issue "is of no use in the clearly established inquiry").[2] *Hernandez* is also unavailing to Castro because the Ninth Circuit found no Fourth Amendment violation where, like here, officers deployed a K9 as a lawful escalation of force following a police chase. 989 F.3d at 741. *Hernandez* thus supports a conclusion that Detective Martin's conduct did not violate the Fourth Amendment.

The only other case the Ninth Circuit cited, *Watkins v. City of Oakland*, 145 F.3d 1087, 1090 (9th Cir. 1998), is readily distinguishable. In *Watkins*, police released a K9 to find a suspect that they knew nothing about and had no reason to believe was armed or dangerous. *Id.* at 1090. The Ninth Circuit held that the "improper *encouragement* of a continuation of the [K9] attack" against the suspect violated clearly established law. *Id.* at 1093 (emphasis added). Here, by contrast, Detective Martin knew Castro was affiliated with a violent gang and had a violent criminal history—including evidence that he committed a strong-arm robbery *hours earlier*. App. 6, 12–13. Further, Castro admitted he did not comply with police commands prior to the bite, unlike the suspect in *Watkins*. App. 18, 27. And critically, unlike the officer in *Watkins*, there is no suggestion or evidence that Detective Martin *encouraged* Storm to continue biting Castro after he was handcuffed. Rather,

---

[2] In *City of Tahlequah*, the Tenth Circuit relied on a case that, like *Hernandez*, post-dated the events in question but that purported to describe the state of the law at the time those events occurred. *See Bond v. City of Tahlequah*, 981 F.3d 808, 825 (10th Cir. 2020). This Court nonetheless declared the case to be "of no use." *City of Tahlequah*, 142 S. Ct. at 12. As a decision that post-dates Castro's arrest, *Hernandez* is likewise "of no use" here.

he disengaged Storm within seconds of when Castro was handcuffed and subdued. These facts readily distinguish *Watkins*, rendering it irrelevant.

The other cases Castro cites are similarly unavailing. Castro cites *Mendoza v. Block*, 27 F.3d 1357 (9th Cir. 1994), for the proposition that "excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control." *Id.* at 1362. But here, Detective Martin released Storm on a noncompliant, potentially armed, and dangerous suspect, not one who was completely under control. Moreover, in *Mendoza*, the court determined that the use of a police dog was reasonable in apprehending a suspect who, like Castro, fled from police, hid on private property, and was believed to be armed. *Id.* at 1362–63. *Mendoza* therefore supports a finding that the use of force in this case was not excessive.

Castro raises a litany of cases from other circuits. Even assuming out-of-circuit cases are relevant, Castro fails to identify even one that places the constitutionality of Detective Martin's action beyond debate.

Castro cites several cases that involve officers engaging a K9 on a compliant suspect wanted for a non-violent crime. *See Cooper v. Brown*, 844 F.3d 517, 525 (5th Cir. 2016) (stating K9 use on DUI suspect who did "not attempt[] to resist arrest or flee" was excessive force); *Edwards v. Shanley*, 666 F.3d 1289, 1293–96 (11th Cir. 2012) (concluding officer acted unconstitutionally where K9 attacked a "compliant suspect [] pleading to surrender" for *five to seven*

minutes); *Priester v. City of Riviera Beach*, 208 F.3d 919, 923–24, 927 (11th Cir. 2000) (holding two-minute K9 attack was excessive where officer "ordered [it] to attack" after suspect "complied" with orders). Here, in contrast, Detective Martin engaged Storm while Castro was actively resisting arrest for his suspected role in two violent assaults. These cases are, therefore, irrelevant.

Castro also cites *Becker v. Elfreich*, 821 F.3d 920, 929 (7th Cir. 2016), in which the Seventh Circuit concluded that the officer's use of force was excessive when he deployed a K9 and then pulled the suspect down stairs and placed his knee on the suspect's back when the suspect was wanted for a violent crime but was not resisting "(or [was] at most passively resisting)" during execution of an arrest warrant. Here, however, Castro fled through a residential neighborhood and resisted less forceful efforts to subdue him prior to the bite, rendering *Becker* distinguishable.

The final K9 case Castro cites—*Crenshaw v. Lister*—is unavailing because the court determined that the use of force was not excessive where, as here, the suspect was suspected of committing violent crimes, fled from police, and was believed to be armed. 556 F.3d 1283, 1292–93 (11th Cir. 2009). *Crenshaw* thus supports that the use of force here was not excessive.

The other cases Castro cites involve officers actively using forms of force other than K9 units against a suspect who surrendered, complied, or was not dangerous. *McCoy v. Meyers*, 887 F.3d 1034, 1051 (10th

Cir. 2018) (concluding officers acted unconstitutionally by hitting "unconscious, handcuffed, and zip-tied" suspect ten times); *Lamont v. New Jersey*, 637 F.3d 177, 184 (3d Cir. 2011) (holding it was excessive force to continue shooting for ten seconds after officers saw suspect was unarmed); *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 665–66 (10th Cir. 2010) (stating use of taser against suspect who was not actively resisting or fleeing was unreasonable); *Baker v. City of Hamilton*, 471 F.3d 601, 607 (6th Cir. 2006) (holding that officers' "strike" to compliant suspect's head was unconstitutional); *Waterman v. Batton*, 393 F.3d 471, 482 (4th Cir. 2005) (concluding that officers' shooting of suspect driving car towards them was unreasonable once he passed them); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1197 (10th Cir. 2001) (holding officers used excessive force by training guns on "young people" who "offered no resistance"). Accordingly, none of these cases speak to when an officer must disengage a K9 unit on a noncompliant and dangerous suspect.

In sum, neither the Ninth Circuit nor Castro identified any case in which an officer's conduct violated the Fourth Amendment under circumstances similar to those at issue here. Petitioners are therefore protected by qualified immunity, and this Court should grant review to compel compliance with this Court's repeated directives to grant officers qualified immunity absent a violation of clearly established law.

II. The Decision Below Conflicts with Decisions in Other Circuits.

The Ninth Circuit's decision conflicts with cases in the Fifth, Sixth, and Eighth Circuits that analyzed analogous facts and concluded, based on the totality of the circumstances, that no Fourth Amendment violation occurred. Castro strains to distinguish these cases on the basis that they did not involve "a police dog bite of a handcuffed suspect." BIO 12. But neither does this case. Based on indisputable video evidence, the district court found that Detective Martin engaged Storm before Castro was handcuffed and while he was still actively resisting arrest. App. 27. The bite terminated within seconds of Castro being handcuffed, App. 21, 23–24, which was a reasonable amount of time for Detective Martin to assess the situation and disengage Storm.

Castro claims *Escobar v. Montee*, 895 F.3d 387 (5th Cir. 2018), is distinguishable because "the dog bite occurred while Escobar was in the process of surrendering" and "before he had been handcuffed." BIO 12. The officer in *Escobar* "allowed [the dog] to continue biting Escobar until Escobar was fully subdued and in handcuffs," 895 F.3d at 391, which is precisely what happened here. App. 21, 23–24. In any event, Castro's focus on handcuffing is misplaced; the issue is whether a police dog may continue biting after the suspect is subdued, which is precisely what the Fifth Circuit addressed in *Escobar*. 895 F.3d at 391 (observing that Escobar's claim was that police "violated his Fourth Amendment right to be free from excessive force by . . . permitting [a police dog] to

continue biting after he surrendered and was not resisting").

Similarly, Castro attempts to distinguish *Zuress v. City of Newark*, 815 F. App'x 1 (6th Cir. 2020), on the basis that the word *handcuffs* is not mentioned in the decision. But the court in *Zuress* found no Fourth Amendment violation where a dog bite lasted for over twenty seconds after the suspect was subdued. *Id.* at 7–8. The court held that the "short amount of time" that elapsed while the officers ensured the suspect was secure "was not the kind of delay that 'rise[s] to the level of an unreasonable seizure.'" *Id.* at 7 (citation omitted). The same is true here. The seconds that passed between when Castro was handcuffed and subdued and Storm released his bite is "not the stuff of a Fourth Amendment violation." *Id.* (cleaned up) (quoting *Ashford v. Raby*, 951 F.3d 798, 804 (6th Cir. 2020)).

Castro also tries to distinguish *Kuha v. City of Minnetonka*, 365 F.3d 590 (8th Cir. 2003), on the basis that the suspect in that case was not handcuffed, but the court found that allowing a dog to bite a suspect for ten to fifteen seconds following a police chase while officers searched the area for weapons did not constitute a Fourth Amendment violation. *Id.* at 600–01. Like *Kuha*, the present case is not one "where the officers are accused of siccing a police dog on a manifestly unarmed and compliant suspect." *Id.* Castro's attempt to distinguish *Kuha* fails.

III. This Case Is a Proper Vehicle.

Castro suggests that factual disputes make this case a poor vehicle for review. At summary judgment, however, once the court has "determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record," whether an officer's actions are objectively reasonable is a pure question of law. *Scott*, 550 U.S. at 381 n.8; *see also Plumhoff v. Rikard*, 572 U.S. 765, 773 (2014). Further, the Court has "repeatedly [] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citation omitted). Viewing the facts in the light most favorable to Castro, Detective Martin's actions do not constitute excessive force, much less a violation of a clearly established right. No factual disputes preclude review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

TIMOTHY J. BERG
Counsel of Record
BRADLEY J. PEW
BRETT C. GILMORE
TYLER D. CARLTON
FENNEMORE CRAIG, P.C.
2394 E. Camelback Rd.
Suite 600
Phoenix, AZ 85016
602-916-5421
tberg@fennemorelaw.com

Counsel for Petitioners