No. 22-5065 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

O.L.,

Petitioner

v.

LILIANA JARA; ET AL,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

O.L.
11151 VALLEY BLVD #4886,
El Monte, CA 91734
Petitioner, in Pro Se

QUESTIONS PRESENTED FOR REVIEW

1. When government officials seek to rely upon consent to justify the lawfulness of a search or seizure, the burden is on them to show by clear and positive evidence that the consent was freely, voluntarily and knowledgeably given. Where the consent is obtained through a misrepresentation by the government, such consent is not voluntary. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). It is also the government's burden to show the warrantless search or seizure was within the scope of the consent given. *Florida v. Royer*, 460 U.S. 491, 500 (1983); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979).

The questions presented are:

a. When a crime victim possesses only particular messages on her cell phone related to the reported offense and agrees to permit a detective to download those messages, what is the scope of the victim's consent and does that consent extend to a digital duplication of all data contained on that cell phone?

b. Where a crime victim is not informed that a digital duplication of all data contained on her cell phone would be made

and retained by law enforcement indefinitely does she voluntarily give her phone to law enforcement when her initial sole purpose is to permit law enforcement to download particular messages identified during the interview between the victim and detective?

c. Where the government fails to provide the original waiver for forensic examination upon demand and the cell phone owner denies signing any waiver and challenges the search waiver's authenticity, is it the cell phone owner's burden to prove the waiver was forged or the government's burden to prove the waiver was not forged under Fourth Amendment?

d. Where the government fails to provide the original waiver for forensic examination upon demand and the cell phone owner denies signing any waiver and challenges the search waiver's authenticity, does the government meet its burden to show that the consent was freely, voluntarily and knowledgeably given?

e. Does a waiver, granting the government consent to search a crime victim's cell phone for information "related to the case," including "text messages, photographs, videos, messages, [and] emails," grant consent to make a digital duplication of all data

contained on the cell phone?

2. Fourth Amendment protects possessory interest even absent liberty or privacy interests. *Soldal v. Cook Cty., Ill.*, 506 U.S. 56, 65-66 (1992). "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the privacies of life." *Riley v. California*, 573 U.S. 373, 403 (2014). Individuals have a reasonable expectation of privacy in the contents of their cell phones under the Fourth Amendment due to the large amount of personal data stored therein. *Id.* 397-399.

The questions presented are:

a. Does digital duplication of the data contained on a cell phone interfere with the cell phone owner's possessory interest in

that data by depriving the owner of exclusive possession and control of that data and therefore constitute a seizure under the Fourth Amendment and was it clearly established?

b. Whether digital duplication of the data contained on a cell phone outside the scope of the cell phone owner's consent constitutes an unreasonable seizure under the Fourth Amendment?

c. Does a sheriff's department's policy, restricting scope of consent and seizure of evidence, constitute fair warning establishing the unlawfulness of the conduct?

3. At the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party. *Tolan v. Cotton*, 572 U.S. 650, 660 (2014). In ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986).

The question presented is:

a. Where a crime victim's cell phone is fingerprint and password protected and no one else even had access to that cell phone other than the law enforcement she came into contact with,

does the crime victim raise a genuine dispute of fact as to whether law enforcement unreasonably searched the crime victim's cell phone when she discovered a translation of her message she did not make?

4. A district court weighing a motion to dismiss asks "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). It is abuse of discretion to deny leave to amend absent a clear or declared reason such as delay, bad faith, prejudice, or a repeated failure to cure a problem in the complaint. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The questions presented are:

a. Whether a victim of sexual assault adequately alleged that Officers violated her right to equal protection where they intentionally treated her differently than victims of other crimes based on her classification as a sexual assault victim and where there is no rational basis for their discriminatory treatment?

b. Whether a crime victim adequately alleged that the public entity is liable under *Monell* for their failure to discipline and failure

to train their officers, which directly led to the equal protection violation?

c. Whether the District Court abused its discretion in denying a pro se plaintiff leave to amend her complaint after the plaintiff failed to amend her complaint orally as the district court required?

5. After the District Court granted a plaintiff to proceed under her initials to protect her identity, did the District Court abused its discretion in denying the plaintiff's request to redact personally identifiable information from the record that reveals her identity?

TABLE OF CONTENTS

Page(s)

RELATED PROCEEDINGS

O. L. v. LILIANA JARA; et al, No. 21-55740 (Ct. App. for the Ninth Circuit), judgment entered on May 12, 2022.

O.L. v. City of El Monte, et al, No. 2:20-cv-00797-RGK (JDE) (District Court Central District of California), judgment entered on July 2, 2021.

APPENDICES

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONS

OTHER AUTHORITIES

OPINION AND ORDER BELOW

The unpublished opinion affirming judgment was filed on May 12, 2022 in Case No. 21-55740, and is attached hereto as Appendix A. Pet. App. 1a.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2022. Pet.App.1a. The petition for rehearing was denied on June 22, 2022. Pet. App. 9a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Fourth and Fourteenth Amendments to the United States Constitution.

INTRODUCTION

Under the guise of dating Carlos Suarez (aka Charlie Suarez) lured O.L. (Petitioner) out and plied her with two bottles of whiskey and wine. Petitioner, an unsuspecting victim, fell prey without recognizing alcohol was the No. 1 date rape drug. Petitioner was sexually assaulted on the very first night she met her assailant.

Petitioner did not have any voluntary sexual contact with Suarez while she was not drugged by alcohol. Petitioner came forward after struggling with rape myths and going through the overshadowed realization process.

As opposed to providing protective service as a sworn deputy, the investigating officer Liliana Jara (JARA) employed by Los Angeles County Sheriff's Department (LASD) turned Petitioner into a victim of forgery, discrimination, and unreasonable search and seizure. At every step of the investigation, Petitioner was met with biased and dismissive remarks on the basis of her status as a sexual assault victim that went wholly unaddressed by supervisors in both departments she came into contact with.

This case is an ideal vehicle for resolving profoundly important recurring constitutional questions. The Court should grant certiorari.

STATEMENT OF THE CASE AND FACTS

I. Factual Background Relevant to Petitioner's Equal Protection Claim[1]

[1] Except where otherwise indicated, this Section describes the allegations pled in Petitioner's Second Amended Complaint (SAC).

On June 7, 2019, Petitioner reported a sexual assault to the El Monte Police Department (EMPD). Pet. App. 47a. Petitioner reported that she and her assailant met on April 5, 2019 after communicating virtually through a mobile app. *Id.* She reported that after consuming alcohol provided by the assailant, Petitioner lost consciousness and was raped by her assailant. *Id.* Petitioner consistently maintained that she did not consent to sex with the assailant. *Id.*

The case was subsequently transferred to the Los Angeles County Sheriff's Department (LASD). Pet. App. 48a. On July 2, 2019, Petitioner was interviewed by LASD Detective Liliana Jara, who repeatedly made biased remarks. For example, despite the fact that the assailant brought two bottles of alcohol to meet Petitioner for the very first time which suggests the supply of alcohol was planned, and Petitioner had stated that she was unconscious at the time of the assault, Jara suggested that Petitioner had given consent but did not remember doing so. *Id.* Jara asked if Petitioner had "ever had this situation that your friend told you that you danced last night when you were drunk and you don't remember." *Id.* Jara told Petitioner,

"It doesn't look like you were raped." *Id.* Jara questioned Petitioner's motivation in reporting the crime, claiming that Petitioner only came forward because she was angry that the assailant was cheating on her. *Id.* By contrast, despite Jara, a well-seasoned sexual assault detective, was supposed to know alcohol was No. 1 date rape drug, she never questioned the assailant's motivation in bringing two bottles of alcohol, a total of 1,500 ml of liquor, to meet Petitioner. All of Jara's remarks, questions, and neglect were rooted from her bias to favor evidence that confirms her theory of the case and disregard evidence that doesn't. This selective information processing skews her toward evidence that is consistent with her theory and causes her to minimize the importance of evidence that might challenge or contradict her beliefs. Therefore, Jara fabricated to justify her bias that Petitioner only came forward because she was angry that the assailant was cheating on her.

On August 16, 2019, Jara filed a report with the LASD that repeated the biased and erroneous remarks that were made during the interview. The report included statements such as "[Petitioner] agreed to have sex again with the suspect" and that Jara "saw there

were several messages indicating she was in agreement with having sex with [Assailant] . . . and only became angry with him after she believed [Assailant] was cheating on her."[2] The Los Angeles District Attorney's Office (LADA) declined to file charges against the Assailant. Pet. App. 50a.

Petitioner experienced severe emotional distress and mental health consequences as a direct result of officers' actions and statements in response to her claim. *E.g.*, depression and anxiety; placed on suicide watch for five days; attempted suicide. Pet. App. 51a.

Petitioner's complaints regarding Jara's misconduct did not result in any reform or discipline. Petitioner requested that another detective work on her case, but Jara's supervisor, Lieutenant Richard Ruiz, denied her request. Pet. App. 49a. When later discussing the case, Ruiz questioned Petitioner about not coming forward immediately, asking her, "How did you not know you were violated?" *Id.* Petitioner subsequently filed a complaint against Jara

---

[2] Jara's report was not available to Petitioner prior to filing the lawsuit but was produced during discovery.

with LASD and the Inspector General, which was turned into a service comment report investigated by Ruiz. Pet. App. 50a. Jara remained in her job without any discipline and later was promoted to sergeant.

II. Factual Background Relevant to Petitioner's Fourth Amendment Claim[3]

LASD had the following policy and procedures in place in 2019: For Seizure of Photographic, Video, or Audio Evidence From a Private Citizen, the scope of the consent shall be dictated by the owner or person in possession of the film, tape, or storage source believed to contain photographic, video, or audio evidence; Consent shall be limited to looking for information relevant to the particular incident in question; Upon receiving consent, the citizen shall be afforded the opportunity to examine the film, tape, or storage source believed to contain photographic, video, or audio evidence with supervisory personnel in order to ascertain evidentiary value. Only that evidence essential to proving an offense shall be seized; Seizure of evidence shall be scrutinized by supervisory personnel. Pet. App.

[3] The facts described in this Section are supported by evidence submitted in support of the parties' cross-motions for summary judgment.

36a. A Receipt for Property shall be prepared by Department personnel for any property held as evidence, property held for safekeeping, or property surrendered for purposes of destruction or disposition and shall be given to the owner. Also available at http://pars.lasd.org/Viewer/Manuals/11871.

During the July 2, 2019 interview, Jara told Petitioner that, in order to investigate her sexual assault claim, LASD would need to download the conversations between Petitioner and the assailant from Petitioner's cell phone. Pet. App. 25a. The phone was a Samsung S6 - a touch-screen device designed to compete with Apple's iPhone, capable of accessing the internet, capturing photos and videos, and storing notes, calendar, a digital rolodex of contacts, emails and both voice and text messages, among other functions. https://en.wikipedia.org/wiki/Samsung_Galaxy_S6

Petitioner submitted a declaration stating the following: Petitioner never possessed any photographs, videos, or emails related to the reported offense. She agreed that LASD could download from her cell phone only the messages between Assailant and herself, all of which were on the "WeChat" messaging

application. Pet. App. 25-26a. Petitioner informed Jara that these messages were the only evidence material to the case on Petitioner's cell phone. Jara did not inform Petitioner that LASD would create a digital duplication of the entire cell phone or describe LASD's process for searching for or downloading messages from a cell phone. Jara did not ask her to provide any written consent, and Petitioner did not sign any document consenting to any search, downloading, or reproduction of any of her cell phone data other than the WeChat messages between Assailant and herself. The only document she signed was a "Receipt for Property." Pet. App. 23a.

By contrast, Jara maintains that Petitioner signed an "Entry and Search Waiver"[4] granting LASD consent to search her cell phone for information "related to the case," including "text messages, photographs, videos, messages, [and] emails." Pet. App. 25a. Upon Petitioner's demand Jara failed to provide the original waiver for forensic examination and Petitioner declared under the penalty of perjury that she did not sign any waiver which was

---

[4] Jara fails to provide the original waiver for forensic examination. The copy of the waiver is inadmissible under Rules 1002 and 1003 of the Federal Rules of Evidence.

accepted by the district court. Pet. App. 25a.

Petitioner wrote down the password for Jara to access her cell phone, and Jara took possession of Petitioner's cell phone. Pet. App. 25a. Jara provided the phone and password to the LASD High Tech Task Force, and submitted a request to search for "all data related to this case; specifically any communication between the victim and (redacted) via 'We Chat' or cell phone number 626-(redacted) any and all photographs, text messages, videos, or emails." Pet. App. 25-26a. Jara also signed a form acknowledging that the task force "will make a digital copy of your evidence and conduct the examination from this digital copy."

Sergeant Peter Hish of the LASD High Tech Task Force responded to Jara's request stating that he "did not see a search warrant or signed written consent form in the file for [Jara's] digital forensic request." Pet. App. 22a. In response, Jara sent Hish the Entry and Search Waiver she claims was signed by Petitioner at the interview.

Despite selective extraction was available, https://youtu.be/XxNab4kper4, Detective Gerhaldt Groenow of the

LASD High Tech Task Force obtained Petitioner's cell phone from evidence storage on July 18, 2019, and, under Jara's instruction and acknowledgement, downloaded the entire contents of Petitioner's cell phone data onto a USB drive, creating a digital reproduction of all data on the cell phone. Pet. App. 26a.

Petitioner's phone was returned to her on October 21, 2019. *Id.* The USB drive containing the duplication of Petitioner's cell phone data remained in LASD custody. Pet. App. 26a.

III. Procedural Background

Petitioner, representing herself *pro se*, filed the instant action in the United States District Court for the Central District of California against the County of Los Angeles, Liliana Jara, and Richard Ruiz, as well as several other Los Angeles County employees, the City of El Monte, and several El Monte employees. Pet. App. 46a. The District Court dismissed all federal causes of action other than the unreasonable search and seizure claim against Jara and Ruiz at the motion to dismiss stage. Pet. App. 43a. The Magistrate Judge denied Petitioner's leave to amend after she failed to orally amend her complaint at the hearing.

The District Court subsequently granted summary judgment for officers on the remaining Fourth Amendment claim. Pet. App. 10a.

Petitioner appealed and the Court of Appeals appointed the UCI Appellate Litigation Clinic to represent Petitioner as pro bono counsel in this matter. After filing her Opening Brief, Petitioner reached a settlement with the City of El Monte, and the Court granted the parties' stipulation to dismiss the appeal as to Defendants-Appellees City of El Monte, David Reynoso, Martha Tate, and Michael Buckhannon.

After oral argument was held, the panel's opinion describes that the screenshot Petitioner provided does not show when the translation happened. Pet. App. 4a. Such statement ignores the actual translation function (See https://m.youtube.com/watch?v=wJtMqX9rDHs) and other evidence that (1) No one else ever had access to Petitioner's phone other than LASD which means only LASD personnel had the opportunity to make that translation; (2) Neither Petitioner nor her female friend translated Petitioner's self-authored message; (3) The translation

appeared only after Petitioner retrieved her phone back from LASD; (4) Petitioner did not identify to Jara that any particular message with her female friend was relevant to the reported offense and Petitioner did not permit anyone to read or translate it; and (5) Without the translation Petitioner was still in belief that only the Assailant's incriminating messages were downloaded and the forged waiver would never have come into light.

Despite the district court found that Petitioner did not sign any waiver[5], Pet. App. 25a, despite Jara did not argue on appeal the district court's finding that Petitioner did not sign a waiver form was illogical, implausible, or without support in inferences that may be drawn from the record, the panel set aside findings of fact that were not clearly erroneous, failed to defer to district court and found Petitioner had abandoned the argument that her signature was forged by failing to challenge the district court's finding on appeal. Pet. App. 4a. The panel's only plausible inference that Petitioner signed the search waiver form when she gave her cell phone to

[5] Jara did not object to magistrate judge's finding that Petitioner did not sign any waiver.

JARA is misplaced on *Scott v. Harris*, 550 U.S. 372, 378 (2007) (holding that the plaintiff's version of events was "utterly discredited" by a videotape of the incident where there were no allegations that the video was doctored or altered in any way.) Unlike *Scott*, a genuine question has been raised here about the original search waiver's authenticity.

Despite the panel identified no evidence in the record establishing that Petitioner consented to the copying and retention of all data on her phone, the panel affirmed the district court, holding, that "qualified immunity bars [Petitioner's] unlawful seizure claim because it is not clearly established that copying electronic data for review after voluntarily agreeing to a search amounts to a Fourth Amendment violation." Pet. App. 5a.

The panel's equal protection analysis erroneously addresses only the conduct of a City of El Monte employee who has been dismissed from the appeal and is no longer party to the case. Pet. App. 6a.

Completely ignoring the existence of evidence establishing sexual assault, e.g., the assailant carefully selected his victim and the

supply of alcohol was planned, the panel held, with respect to Petitioner's equal protection claim, that "[s]he does not allege facts showing that the officers treated her investigation differently than other criminal investigations." Pet. App. 6a.

Despite Petitioner's first amended complaint was only to change her name from the pseudonym "Jane Doe" to her initials in response to a court order, and she was not provided with a genuine opportunity to amend her complaint prior to the dismissal the panel held that the district court did not abuse its discretion in denying Petitioner leave to amend her complaint. Pet. App. 7a.

Despite the district court granted Petitioner to proceed under her initials to protect her identity, despite redaction of personally identifiable information requires only good cause, the panel erroneously required Petitioner to show "compelling reason" to redact personally identifiable information. Pet. App. 8a.

Petitioner's petition for rehearing was denied on June 22, 2022. Pet. App. 9a.

REASONS FOR GRANTING THE WRIT

This Court should use this case - which presents the issues in

the context of a modern "smartphone" and a particularly comprehensive fact pattern – to hold that the Fourth Amendment prohibits digital duplication of the data contained on a cell phone without a warrant or outside the scope of consent.

I. The Ninth Circuit Decision Conflicts With This Court's Precedent That "Obvious" Constitutional Violations Are Clearly Established Even Absent Factually Similar Precedent And Splits From Decisions Of Other Circuits Applying Fourth Amendment Review to Unauthorized Duplication of Information or Data

Having recognized the sensitive and private nature of cell phone data, the Ninth Circuit should have followed this Court's guidance that the unconstitutionality of truly egregious conduct may be clearly established without any case law directly on point. The Ninth Circuit's holding that Jara is entitled to qualified immunity despite the obviousness of the constitutional violation conflicts not only with this Court's precedent, but also with decisions of the Second, Fourth, Ninth, and Eleventh Circuits involving analogous fact patterns.

A. The Ninth Circuit's holding that Jara is entitled to qualified immunity despite the obvious unconstitutionality of her conduct conflicts with this Court's precedent

The animating concern underlying modern qualified immunity jurisprudence is that officers must be "on notice their conduct is unlawful" before being subjected to suit for damages. *Saucier v. Katz*, 533 U.S. 194, 206 (2001). That is, officers must have "fair warning that their conduct violated the Constitution." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Often, this fair warning is provided by prior cases establishing the unlawfulness of the conduct. But an official's conduct may also be so "obvious[ly]" illegal that no "body of relevant case law" is necessary. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (citing *Hope*, 536 U.S. at 738); see also *Hope*, 536 U.S. at 753 (Thomas, J., dissenting) ("Certain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address 'materially similar' conduct."); *United States v. Lanier*, 520 U.S. 259, 270-71 (1997) (particularly egregious conduct may be clearly unconstitutional even if "the very action in question has [not] previously been held unlawful"). Recent decisions of this Court have reaffirmed that obviously illegal conduct can defeat qualified immunity. See *City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019)

(per curiam); *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018); *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam).

The obviousness principle follows directly from the fair warning requirement. For conduct that is "obviously" illegal, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741. The principle is also essential to ensure that the most egregiously violative conduct gives rise to liability. Obviously unconstitutional conduct is by its nature less likely to lead to the development of precedent to serve as clearly established law: Because it is obviously unconstitutional, officials are—or should be—less likely to do it. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377-78 (2009) ("[O]utrageous conduct obviously will be unconstitutional, this being the reason ... that the easiest cases don't even arise." (internal quotation marks and brackets omitted.))

If there is any circumstance that involves obviously illegal conduct, it is deliberate duplication of all data on a private citizen's smartphone, without consent or warrant. LASD's own policy, restricting scope of consent and seizure of evidence, constitutes fair

warning establishing the unlawfulness of the conduct. The holding that Jara is entitled to qualified immunity is inconsistent with this Court's direction that claims describing obviously unconstitutional behavior overcome qualified immunity even absent case law directly on point. Indeed, in *United States v. Comprehensive Drug Testing, Inc.*, an en banc panel of the Ninth Circuit required the government to return a copy of data that was created outside the scope of a warrant, describing a reproduction of data created by the government as "seized data." *Comprehensive Drug Testing*, 621 F.3d at 1174. *Comprehensive Drug Testing* is consistent with long-established Supreme Court doctrine confirming that replicating intangible property such as information constitutes a seizure subject to the Fourth Amendment's reasonableness requirement. See, e.g., *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 170 (1977); *Katz v. United States*, 389 U.S. 347, 353 (1967); *Berger v. New York*, 388 U.S. 41, 54-55, 57 (1967); *Hoffa v. United States*, 385 U.S. 293, 301 (1966).

B. The Ninth Circuit's holding that Jara is entitled to qualified immunity despite the obvious unconstitutionality of her conduct conflicts with decisions of the Second, Fourth, and Eleventh Circuits applying Fourth Amendment review to unauthorized duplication of information or data on analogous

facts

Other lower courts have applied Fourth Amendment review to unauthorized duplication of information or data. See, e.g., *United States v. Jefferson*, 571 F. Supp. 2d 696, 701-02 (E.D. Va. 2008); *In re Se. Equip. Co. Search Warrant*, 746 F. Supp. 1563, 1576 (S.D. Ga. 1990); *United States v. Metter*, 860 F. Supp. 2d 205, 212 (E.D.N.Y. 2012).

II. The Ninth Circuit Decision Further Entrenches A Deep And Acknowledged Circuit Split On The Degree of Factual Similarity To Prior Precedent Required For A Constitutional Right To Be Clearly Established

The decision below also entrenches a second conflict among the circuits that demands this Court's attention. "[C]ourts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" to find a clearly established constitutional violation. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part). The Ninth Circuit stands at one end of the spectrum in applying a remarkably myopic approach to qualified immunity, which permits government officials to avoid accountability for patently unconstitutional behavior so long as there is no published precedent recognizing that the exact conduct

under identical circumstances violates the Constitution. This case is emblematic of the Ninth Circuit's approach.

Despite it's clearly established that a "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property, the Ninth Circuit in this case found no violation of clearly established law because it is unsettled as to how far the "possessory interest" principle extends. Pet. App. 5a. The Ninth Circuit has employed a narrow approach by demanding high level of "specificity and granularity" in examining whether a constitutional violation is clearly established.

On the other side of the spectrum, the Third, Fourth, Seventh, Tenth, and Eleventh Circuits hold that a case involving precisely the same facts is not required for law to be clearly established. See, e.g., *Kane v. Barger*, 902 F.3d 185, 195 (3d Cir. 2018) ("[W]e do not require a case directly mirroring the facts at hand, so long as there are sufficiently analogous cases that should have placed a reasonable official on notice that his actions were unlawful." (internal quotation marks and brackets omitted)); *Thompson v. Virginia*, 878 F.3d 89, 98 (4th Cir. 2017) ("In the absence of directly on-point, binding

authority, courts may also consider whether the right was clearly established based on general constitutional principles or a consensus of persuasive authority." (internal quotation marks omitted)); *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012) ("Every time the police employ a new weapon, officers do not get a free pass to use it in any manner until a case from the Supreme Court or from this circuit involving that particular weapon is decided."); *Davis v. Clifford*, 825 F.3d 1131, 1136 (10th Cir. 2016) ("[T]he qualified immunity analysis involves more than a scavenger hunt for prior cases with precisely the same facts.")

The divergent approaches of the courts of appeals demonstrate that "[i]n day-to-day practice, the 'clearly established' standard is neither clear nor established among our Nation's lower courts." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part, dissenting in part); see also John C. Jeffries, Jr., What's Wrong with Qualified Immunity?, 62 Fla. L. Rev. 851, 869 (2010) (discussing "the divergent approaches of the Circuits" in determining whether prior precedent clearly establishes a constitutional violation for qualified immunity purposes.)

III. Review is Necessary to Clarify and Compel Compliance With Standards Set by This Court

A. The Ninth Circuit Decision Fails to Properly Apply The Anderson Standards in Deciding to Grant a Summary Judgment

Even though Petitioner's screenshot does not show when the translation happened, the grant of summary judgment prematurely took the weighing evidence and determination from the jury. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (holding that, in deciding whether to grant summary judgment , "the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.")

B. The Ninth Circuit Decision Fails to Properly Apply The Scheuer Standards in Deciding to Grant a Motion to Dismiss

Petitioner's allegations are sufficient to state a claim that the biased and dismissive remarks made to her throughout the course of the investigation were based on archaic notions and stereotypes about sexual assault and consent and therefore Petitioner was intentionally treated differently than victims of other crimes because she is a sexual assault victim. See *Tellabs, Inc. v. Makor Issues &*

Rights, Ltd., 551 U.S. 308, 322 (2007) (holding that assessing whether a complaint fails to plead a claim, the court must accept all factual allegations as true.) Petitioner is entitled to offer evidence to support her claims. At a minimum, Petitioner is entitled to a genuine opportunity to amend her complaint.

IV. This Case is The Ideal Vehicle to Resolve The Questions Presented

Several aspects of this case make it an ideal vehicle for addressing these critical questions about the scope and propriety of qualified immunity.

This case does not feature split-second decisionmaking, and the officials here were not faced with an urgent decision that they resolved without deliberation. Instead, Jara intentionally placed a request to download private data not related to the investigation outside Petitioner's consent. Moreover, there was no possible penological justification for Jara's behavior; Jara did not choose incorrectly between two plausible approaches but instead subjected Petitioner to "obvious" disregard for her constitutional rights. Official immunity should be at its nadir in the face of a deliberate

constitutional violation.

This case is an ideal vehicle to decide the questions presented, which have enormous legal and practical consequences for each American comes into contact with law enforcement.

The importance of the issues is self-evident. It is rare today that modern people don't have a smartphone. The real world impact of the panel's decision would be every limited consent to search or seize particular electronic data would become, in essence, unlimited waiver. The issues here greatly affect fundamental personal rights and liberties. The recurring nature of the issues calls out for this Court's intervention.

CONCLUSION

For all of the above reasons, Petitioner respectfully requests the writ be granted. Alternatively, this Court should appoint counsel to Petitioner and allow her to resubmit her petition with assistance of court appointed counsel.

Dated: June 29, 2022

Respectfully submitted,

/s/ O.L.
Petitioner, in Pro Se