No. _____

In The
Supreme Court of the United States

CHRIS DUTRA AND ERIC DEJESUS,

Petitioners,

v.

KIM JACKSON,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The meaning of "clearly established" for qualified immunity purposes is not, itself, clearly established. There is a split among this Court's precedents over which authorities provide clearly established law. On one hand, this Court has suggested that no precedents other than its own may supply clearly established law. But for four decades, the Court has repeatedly reserved the question and, instead, assumed without deciding that controlling circuit precedent may provide clearly established law for qualified immunity. On the other hand, this Court has indicated that clearly established law is not limited to its precedents and may, in fact, come from circuit court precedent, "a consensus of cases of persuasive authority," or various other sources. This Court's divide has destabilized qualified immunity doctrine across the country. Circuits are fractured about whether they must look to this Court's decisions or whether they may examine in-circuit, out-of-circuit, district court, and state court authorities, or even whether they may rely on state and federal regulatory guidance.

No matter the source of the clearly established law, this Court has repeatedly cautioned courts—particularly the Ninth Circuit—not to define clearly established law at a high level of generality, especially in the Fourth Amendment excessive force context.

These are the questions presented:

1. Are this Court's precedents the only source of clearly established law for purposes of qualified immunity?

QUESTIONS PRESENTED—Continued

2. Did the Ninth Circuit construe clearly established law too abstractly when it denied qualified immunity by citing only its own precedents involving the use of tasers, police dogs, and neck restraints on already handcuffed or subdued suspects when—as the body cam footage shows—none of those facts were present here?

PARTIES TO THE PROCEEDING

Petitioners are Chris Dutra and Eric Dejesus. Petitioners were the defendants in the district court and appellees in the Ninth Circuit.

Respondent is Kim Jackson. Respondent was the plaintiff in the district court and appellant in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, there are no parent or publicly held companies involved in this proceeding.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

Jackson v. Dutra, No. 22-15622 (9th Cir.) (order denying rehearing en banc, filed May 10, 2023);

Jackson v. Dutra, No. 22-15622 (9th Cir.) (memorandum affirming, in part, and reversing, in part, filed February 17, 2023); and

Jackson v. Dutra, No. 3:20-CV-00288-RCJ-CLB (D. Nev.) (order granting summary judgment to defendants, filed March 29, 2022).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Despite recent debates and popular controversy, the doctrine of qualified immunity remains clearly established in this Court's precedents.[1] Yet the meaning of "clearly established" for qualified immunity purposes is not, itself, clearly established. This Court's cases are split over which authorities provide clearly established law. On one hand, this Court has suggested that no precedents other than its own may set clearly established law. It has chastised courts of appeals for neglecting to identify any Supreme Court case with facts like the ones under review. Even so, for more than forty years, the Court has repeatedly reserved the question. "We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity." *D.C. v. Wesby*, 583 U.S. 48, 66 n.8 (2018); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1982).

Instead, the Court has often assumed, without deciding, that controlling circuit precedent may provide clearly established law for qualified immunity. *See*, *e.g.*, *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5 (2021); *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019); *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018); *Taylor v. Barkes*, 575 U.S. 822, 826 (2015); *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 614

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[1] *See Egbert v. Boule*, 142 S. Ct. 1793, 1821 n.5 (2022) (Sotomayor, J., concurring in the judgment in part and dissenting in part) ("The doctrine of qualified immunity will continue to protect government officials from liability for damages").

(2015); *Carroll v. Carman*, 574 U.S. 13, 17 (2014); *Reichle v. Howards*, 566 U.S. 658, 665 (2012).

On the other hand, this Court has indicated that circuit court precedent, "a consensus of cases of persuasive authority," or even nonjudicial state and federal regulatory guidance may provide clearly established law. *See*, *e.g.*, *Wilson v. Layne*, 526 U.S. 603, 617 (1999); *Hope v. Pelzer*, 536 U.S. 730, 741-46 (2002).

This Court's split has destabilized qualified immunity doctrine across the country. Interpreting this Court's cues, circuits have adopted conflicting approaches to gleaning clearly established law from in-circuit, out-of-circuit, district court, state court, or other authorities.

Although the proper source of clearly established law is unsettled, this Court has been steadfast that courts must not define the clearly established law at a high level of abstraction, especially in the Fourth Amendment context. The Court has enforced this admonishment with summary reversals and repeated warnings—particularly to the Ninth Circuit.

This case exemplifies both issues of national importance. Petitioners Chris Dutra and Eric Dejesus are officers in the Sparks, Nevada Police Department. In November 2018, they arrived on scene to help recover a three-year old who child protective services worried Respondent Kim Jackson was kidnapping. The interaction was captured on the officers' body-worn cameras and those videos are in the record.

The footage shows a highly charged and fast-moving situation. At one point, as officers frantically protested, Jackson declared, "You want her?" and began to raise the child over a second story apartment railing. The child would have fallen from the second story to the ground had Jackson dropped the child while attempting to pass her to officers. Fortunately, Jackson later released the child and child protective services agents whisked her away. But the encounter did not end there.

Officers remained outside the apartment until Jackson exited. Less than two minutes after Jackson came outside, the body cam videos show Jackson seeking to flee from the officers by abruptly trying to climb over a railing as if to jump to her apartment's balcony. To prevent Jackson's escape, Officers Dutra and Dejesus pulled the struggling Jackson away from the rail while trying to place her hands behind her back. The officers did not strike or use any taser, police dog, or neck restraint against Jackson.

Jackson sued. The district court reviewed the videos and granted summary judgment to the officers. It determined that no juror could reasonably construe the force as excessive from the body cam footage. App.28. The district court explained that "[g]rabbing [Jackson], taking her away from the railing, and attempting to pull her arm back to put her into handcuffs to restrain her by putting her under arrest and prevent her from jumping off the second-story railing is reasonable force." *Id.* at 27. The district court also concluded that the officers had probable cause to arrest Jackson

for attempted child endangerment and attempting to flee. *Id*. at 21, 24-25.

The Ninth Circuit, however, reversed in part. It reviewed the video replay of the fast moving, seconds-long sequence in slow-motion. With the discernment of a film critic, the court spliced down to the millisecond when the officers' force allegedly transitioned from "non-excessive" to "excessive." The court described its frame-by-frame dissection like this: "Officers Dutra and Dejesus acted reasonably when they grabbed Jackson to prevent her from climbing over the second-floor railing. Their use of force remained reasonable as Jackson resisted and they attempted to handcuff her and move her away from the railing." *Id.* at 3. But mere moments later, the Ninth Circuit concluded, "the officers continued to pull Jackson's arms in opposite directions even after they had moved her away from the railing. A question of fact exists as to when Jackson ceased resisting and whether the officers' use of force continued after the emergency had ended." *Id.*

But no precedent from this Court clearly establishes that the officers' conduct was unlawful in like circumstances. No precedent from the Ninth Circuit does either. When reversing, the Ninth Circuit string-cited only its own cases involving the use of tasers, police dogs, and neck restraints on already subdued suspects. The body cam videos show none of those elements were remotely present here. Still, the Ninth Circuit found that there was a fact question whether, "under *clearly established Ninth Circuit caselaw*, their use of force was excessive." *Id.* at 3 (emphasis added).

The Ninth Circuit therefore strayed beyond this Court's precedents searching for clearly established law and interpreted its own cases at an impermissibly high level of generality to expose Petitioners to constitutional liability.

This case is an ideal vehicle to resolve the split in the Court's cases, and in the circuits, over the authority that provides clearly established law for qualified immunity purposes. The Court's frequent reservation of the question shows that the issue is plainly recurring and important. Police officers are being labeled inconsistently as constitutional violators based on legal sources that do not originate from this Court or stem from far-flung jurisdictions away from their headquarters. Officers walking the beat must know—in advance—the authorities with which they must familiarize themselves to avoid liability.

At minimum, the Court should once again remind and admonish the Ninth Circuit that it cannot define clearly established law at a high level of generality. There must be an existing precedent that places the constitutional question beyond debate. There is no governing precedent here. Thus, the Court should grant certiorari and reverse in favor of Petitioners.

OPINIONS BELOW

The district court's March 29, 2022 order granting summary judgment to Petitioners is not reported, and is reproduced in the appendix ("App.") at pages 5 to 48.

The Ninth Circuit's February 17, 2023 memorandum affirming in part, reversing in part, and remanding is not published, and is reproduced in the appendix at pages 1 to 4. The Ninth Circuit's May 10, 2023 order denying Petitioners' petition for rehearing en banc is not published, and is reproduced in the appendix at page 49.

BASIS FOR JURISDICTION IN THIS COURT

This Court has jurisdiction to review the Ninth Circuit's February 17, 2023 decision on writ of certiorari under 28 U.S.C. § 1254(1). The Ninth Circuit denied Petitioners' timely petition for rehearing en banc on May 10, 2023. The petition is timely filed per this Court's July 25, 2023 order extending Petitioners' time to file a petition for writ of certiorari to and including October 6, 2023.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution and 42 U.S.C. § 1983 are reproduced at App.50.

STATEMENT OF THE CASE

A. Petitioners Arrest Respondent.

On November 1, 2018, Officers Dutra and Dejesus met employees of Washoe County Human Services Agency's Child Protective Services ("CPS") outside Jackson's apartment. App.6. CPS told the officers that Jackson was refusing access to a child, A.M., who was in CPS custody. *Id.* at 6-7. CPS relayed its conclusion that Jackson's conduct amounted to kidnapping a child in the custody of CPS. *Id*. at 7.

Officer Dutra knocked on Jackson's door, and through the door, asked if everything was okay and if they could come into the apartment. *Id*. Jackson stepped onto her second-story balcony and continued speaking with Officer Dutra. *Id*. She declined to let them inside. *Id*. Jackson insisted that everyone was okay. *Id*.

CPS asked Jackson to bring A.M. out onto the balcony, and Jackson went inside to get her. *Id*. at 8. Jackson returned with A.M. in her arms. *Id*. CPS told Jackson that A.M. was in its custody and asked Jackson to open the door. *Id*. Jackson answered that she would not open the door for any reason, pointing to a scheduled meeting the next day. *Id*. Jackson then went back inside the apartment. *Id*.

Less than a minute later, Jackson came back out onto the balcony alone and began arguing with CPS. *Id*. As the argument escalated, another officer with Dutra and Dejesus said that Jackson's refusal to release

A.M. was kidnapping. *Id*. Jackson replied, "Oh you want her?" *Id*.

Jackson went back inside and quickly returned to the second-story balcony holding out A.M. in her hands. *Id*. Again, Jackson asked, "You want her?" and started moving toward the railing with A.M. in her outstretched arms across to another officer who was on the landing outside the front door. *Id*. The child would have fallen to the ground from the second story if Jackson had dropped A.M. while trying to pass her to the officer. *Id*. at 8-9. The officer yelled "Do not put her over the rail!" *Id*. at 9.

Jackson stated, "I am not opening my door though" and then "As you can see, your hand is right here. You can grab her." *Id*. Officers and CPS implored Jackson that it was not safe for them to get A.M. by passing her over the railing. *Id*.

Meanwhile, Officer Dutra ran down the stairs to the ground below the balcony. *Id*. Another officer ordered Officer Dejesus to get a ram from his vehicle. *Id*.

Next, Jackson said that she would put A.M. outside the door if officers and CPS backed away. *Id*. Jackson cracked the door and A.M. came out before Jackson quickly shut the door again. *Id*. CPS whisked A.M. away. *Id*.

Officers Dutra and Dejesus returned to Jackson's door. *Id*. at 9-10. Inside, Jackson was calling 911 and speaking to a dispatcher. *Id*. at 10. While on the phone with the dispatcher, Jackson came outside and locked

the door behind her. *Id*. Officer Dutra positioned himself in front of the door and told Jackson "Now you get to stay out here and visit with me now." *Id*. Jackson responded, "No problem sir, I came out to visit with you." *Id*. Jackson also said, "Let me sit down so you guys know that I'm not trying to get away from you." *Id*. Jackson sat on the stairs leading up to the third floor. *Id*. Dutra remained in front of the door and Dejesus stood a couple steps above Jackson on the stairs. *Id*. Jackson continued talking on the phone to the dispatcher when Dutra told dispatch, "You can hang up with her." *Id*.

"Oh, in that case, I'm gonna go back in my house," said Jackson. *Id*. at 11. She got up from the stairs and quickly walked over to the hallway railing outside her door. *Id*. Jackson lifted her right leg on top of the railing and tried to climb over the railing as if to jump from there to her apartment's balcony. *Id*. at 11, 24. Officer Dutra immediately grabbed Jackson's upper body and Officer Dejesus grabbed her right leg. *Id*. at 11. Dutra said, "Put her in handcuffs." *Id*.

Jackson started screaming and struggling. *Id*. Multiple times, Dejesus told her to stop and tried to put Jackson's right arm behind her back. *Id*. Jackson continued to struggle until she finally sat on the ground. *Id*.

Dejesus said to Jackson "You just tried jumping over the fence. You think I'm going to let you jump over the fence?" *Id.* at 12. Another arriving officer added, "Like you almost tried to hand a baby over the fence."

Id. at 11-12. In apparent response to the comment about A.M., Jackson answered "Now again, I said I was wrong for that." *Id*. at 12. Jackson did not deny trying to jump over the railing. *Id*.

Officers did not strike Jackson or use a taser, police dog, or neck restraint before or after Jackson was subdued. Jackson was arrested and charged. *Id*.

B. The Lawsuit.

1. Jackson sued and, as relevant to Officers Dutra and Dejesus, alleged claims for unlawful seizure, false arrest, and excessive force. App.17.[2] For the excessive force claim, Jackson averred that Officers Dutra and Dejesus used excessive force by carrying her off the railing and pulling her wrist behind her back to handcuff her. *Id.* at 26.

At the summary judgment stage, the district court found that "review of the body camera footage conclusively shows that Defendants had probable cause and their force was not excessive." *Id.* at 5-6, 17. The district court held that there was probable cause to arrest Jackson for attempted child endangerment because, while on the second-story balcony, she walked toward

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[2] Jackson asserted a supervisory liability claim against Officer Edmonson. *Id*. The Ninth Circuit affirmed the district court's grant of summary judgment to Officer Edmonson so he is not a party to this Petition. App.4. Jackson also initially advanced claims under the Americans with Disabilities Act and for First Amendment retaliation but she voluntarily dismissed them. App.17.

them with A.M in her outstretched arms and they could reasonably conclude that Jackson was trying to pass A.M. over the balcony if they had not yelled at her to stop. *Id*. at 21. There was also probable cause to arrest Jackson for attempting to flee and obstruct her arrest. *Id*. at 25.

Finally, the district court determined that no juror could construe as excessive the force shown on film. *Id.* at 27. According to the district court, the Officers used "minimal force." *Id.* at 28. "Grabbing [Jackson], taking her away from the railing, and attempting to pull her arm back to put her into handcuffs to restrain her by putting her under arrest and prevent her from jumping off the second-story railing is reasonable force." *Id*. at 27. Thus, "[i]n light of the [body-worn camera] footage," the district court granted summary judgment to Officers Dutra and Dejesus. *Id*. at 17, 29.

2. Jackson appealed. The Ninth Circuit affirmed summary judgment on Jackson's unlawful seizure and false arrest claims. *Id*. at 2. It agreed "a reasonable police officer in [Petitioners'] position could have concluded that there was probable cause to suspect Jackson committed the crime of attempted child endangerment and qualified immunity protects an officer from suit when he makes a reasonable mistake of law." *Id*. (quotation and citation omitted).

The Ninth Circuit, however, reversed summary judgment on Jackson's excessive force claim. In a short, unpublished memorandum disposition, the court cited only its own precedents and recited the general Fourth

Amendment propositions that force "must meet the overarching standard of 'reasonableness'" and force may not continue "once an individual is subdued and no longer resisting." *Id*. (citations omitted). The court engaged in no factual comparison, differentiation, or analogization between its precedents and the circumstances that Officers Dutra and Dejesus faced with Jackson.

The court merely string-cited (with parentheticals) only Ninth Circuit cases involving the use of tasers, police dogs, and neck restraints on already subdued suspects. *Id*. at 2-3 (citing *Hyde v. City of Willcox*, 23 F.4th 863, 871 (9th Cir. 2022); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003); *Watkins v. City of Oakland*, 145 F.3d 1087, 1090 (9th Cir. 1998)). One case, *Hyde*, was issued more than three years *after* Jackson's arrest.

Through the thirty-thousand-foot view of these distinguishable precedents, the court analyzed the body cam footage with suspended animation. It spliced each moment to pinpoint when the officers' force could have morphed from reasonable to excessive. With the benefit of a pause-button, the court held:

> Officers Dutra and Dejesus acted reasonably when they grabbed Jackson to prevent her from climbing over the second-floor railing. Their use of force remained reasonable as Jackson resisted and they attempted to handcuff her and move her away from the railing. But the officers continued to pull Jackson's

> arms in opposite directions even after they had moved her away from the railing. A question of fact exists as to when Jackson ceased resisting and whether the officers' use of force continued after the emergency had ended.

Id. at 3. According to the Ninth Circuit, "[i]f Officers Dutra and Dejesus used more force than necessary once Jackson had been subdued, *then under clearly established Ninth Circuit caselaw*, their use of force was excessive." *Id*. (emphasis added).

3. Officers Dutra and Dejesus sought rehearing en banc. They argued "the panel cited no United States Supreme Court cases." CA9 Pet. Rehearing En Banc 2. They urged rehearing because "[n]either Jackson nor the panel identified any Supreme Court case that addresses facts like the ones at issue here. Instead, the panel denied qualified immunity with its own circuit cases, which Jackson did not cite." *Id*. at 10; *id.* at 13 ("neither Jackson nor the panel identified any Supreme Court case that addresses facts like the ones at issue here. Instead, the panel denied qualified immunity at a high level of generality with its own circuit cases").

Officers Dutra and Dejesus also asserted that, even if circuit precedent were enough, the cited Ninth Circuit cases were materially distinguishable and not sufficiently specific to place every reasonable officer on notice of a potential constitutional violation in their circumstances. *Id.* at 3-11, 13-14.

Jackson opposed rehearing. She argued that "Supreme Court precedent has never been required." CA9 Resp. to Pet. Rehearing En Banc 2. Rather, Jackson contended that "it is not always necessary to identify a case factually on all fours" because "in many circumstances" a general constitutional rule may suffice. *Id*. at 9.

The Ninth Circuit denied rehearing en banc on May 10, 2023. App.49. This petition follows.

REASONS FOR GRANTING THE PETITION

I. There is a Split in this Court's Precedents, and in the Circuits, Over the Authority that May Provide Clearly Established Law for Qualified Immunity Purposes.

1. In its landmark decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), this Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages *insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known*." (emphasis added). The Court instructed lower courts, on summary judgment, to "determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred." *Id*. "If the law at that time was not clearly established," the Court continued, "an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be

said to 'know' that the law forbade conduct not previously identified as unlawful." *Id*.

The Court explained, "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Id*. But where clearly established law is not settled, the public interest is served when officers can act to protect the public without fear of retroactive hindsight-based liability. *Id*.

Harlow, however, expressly left open the question about the sources of authority that may provide clearly established law. In a footnote, the Court said, "we need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.'" *Id*. at 818 n.32 (quoting *Procunier v. Navarette*, 434 U.S. 555, 565 (1978)).

Four decades later, the question remains unresolved, and this Court's opinions have given inconsistent signals to the lower courts. At times, the Court has indicated that clearly established law is not confined to its precedents. *See U.S. v. Lanier*, 520 U.S. 259, 268-69 (1997). For instance, in *Elder v. Holloway*, 510 U.S. 510, 516 (1994), the Court held that "[a] court engaging in review of a qualified immunity judgment should therefore use its 'full knowledge of its own [and other relevant] precedents.'" (bracketed addition

in original). *Elder* treated circuit decisions as "relevant authority" to consider. *Id*.

Since *Elder*, this Court has—without citation to authority—said that lower courts may look to "any cases of controlling authority in their jurisdiction" or to "a consensus of cases of persuasive authority." *Wilson v. Layne*, 526 U.S. 603, 617 (1999); *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). This Court has sometimes indicated that federal district court or state intermediate courts of appeals decisions may be relevant to the "clearly established" analysis. *Stanton v. Sims*, 571 U.S. 3, 10 (2013). The authority might stem from outside the defendant's circuit. *See Pearson v. Callahan*, 555 U.S. 223, 244 (2009). And the Court has intimated that state regulations or federal agency reports are relevant. *Hope v. Pelzer*, 536 U.S. 730, 741-46 (2002).

Elsewhere, the Court has disclaimed those authorities as sources for clearly established law. For example, the Court has held that district court and state court decisions "of course, cannot 'clearly establish'" law or constitutional violations. *Wilson*, 526 U.S. at 616; *see also Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity"). The Court has also announced that administrative regulations do not define clearly established constitutional rights for qualified immunity. *Davis v. Scherer*, 468 U.S. 183, 194-96 (1984).

More recently, the Court has cast doubt on whether any precedents except its own can create clearly established law. In *Wesby*, the Court highlighted that "[w]e have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity." *Wesby*, 583 U.S. 48, 66 n.8. The Court "express[ed] no view on that question [t]here." *Id*. But, in *Rivas-Villegas v. Cortesluna*, the Court criticized the plaintiff and the Ninth Circuit because neither "identified any Supreme Court case that addresses facts like the ones at issue here. Instead, the Court of Appeals relied solely on its precedent." 595 U.S. at 6; *see also Mullenix v. Luna*, 577 U.S. 7, 15 (2015) (reviewing this Court's precedents before circuit cases and stating "[i]n any event, none of our precedents 'squarely governs' the facts here").

Rather than directly answering the question *Harlow* and *Wesby* left open, the Court has continued to simply assume, without deciding, that circuit precedent—like the Ninth Circuit used here—provides clearly established law. *Rivas-Villegas*, 595 U.S. at 6 ("Even assuming that controlling Circuit precedent clearly establishes law for purposes of § 1983"); *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019); *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018); *Taylor v. Barkes*, 575 U.S. 822, 826 (2015); *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 614 (2015); *Carroll v. Carman*, 574 U.S. 13, 17 (2014); *Reichle v. Howards*, 566 U.S. 658, 665 (2012).

As with Petitioners here, other litigants have argued that only this Court's precedents can clearly

establish law under the facts of each case. *See*, *e.g.*, *Ullery v. Bradley*, 949 F.3d 1282, 1292 (10th Cir. 2020); *Est. of Clark v. Walker*, 865 F.3d 544, 552 (7th Cir. 2017). The circuits have responded by acknowledging *Wesby* and the Court's continual reservations "may have suggested this is an open question [but they] do not think only Supreme Court precedents are relevant in deciding whether a right is clearly established." *Ullery*, 949 F.3d at 1292; *see also Est. of Clark*, 865 F.3d at 552.

2. Without definitive guidance from this Court, the circuits have adopted conflicting positions about the authorities that can clearly establish law for qualified immunity. *See* Michael S. Catlett, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1044 (2005) ("With little or no guidance from the U.S. Supreme Court, the U.S. Courts of Appeals have continuously struggled to shape their own standards regarding which decisional law is relevant."); MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION § 3.9 (Nov. 2022) ("As a general matter, lower federal courts continue to take varying positions on what authorities can clearly establish law for purposes of qualified immunity, and indeed in some circuits different panels have announced conflicting approaches."). The fissures among the circuits spiderweb across many possible sources of authority.

The Ninth Circuit employs an especially permissive approach. " 'In the absence of binding precedent, we look to whatever decisional law is available to

ascertain whether the law is clearly established for qualified immunity purposes, including decisions of state courts, other circuits, and district courts.'" *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 601 n.9 (9th Cir. 2019) (quoting *Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004)).

The Eighth Circuit does too. *See Vaughn v. Ruoff*, 253 F.3d 1124, 1129 (8th Cir. 2001) ("We subscribe to a broad view of the concept of clearly established law, and we look to all available decisional law, including decisions from other courts, federal and state, when there is no binding precedent in this circuit.").

Like the Eighth and Ninth Circuits, most other circuits "consider both binding circuit precedent and decisions from other circuits in determining whether the law is clearly established." *Ullery*, 949 F.3d at 1292 (citing *Perry v. Durborow*, 892 F.3d 1116, 1123 (10th Cir. 2018); *Baloga v. Pittston Area Sch. Dist.*, 927 F.3d 742, 762 (3d Cir. 2019); *Turner v. Thomas*, 930 F.3d 640, 644 (4th Cir. 2019); *Werner v. Wall*, 836 F.3d 751, 762 (7th Cir. 2016); *Tarabochia v. Adkins*, 766 F.3d 1115, 1125 (9th Cir. 2014); *Terebesi v. Torreso*, 764 F.3d 217, 231 (2d Cir. 2014); *Bame v. Dillard*, 637 F.3d 380, 384 (D.C. Cir. 2011); *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011); *Baker v. City of Hamilton*, 471 F.3d 601, 606 (6th Cir. 2006); *Wilson v. City of Boston*, 421 F.3d 45, 56 (1st Cir. 2005); *Turner v. Ark. Ins. Dep't*, 297 F.3d 751, 755 (8th Cir. 2002)).

The Eleventh Circuit takes a narrower view. There, "the case law of one other circuit cannot settle

the law in this circuit to the point of it being 'clearly established.'" *Hansen v. Soldenwagner*, 19 F.3d 573, 578 n.6 (11th Cir. 1994). Eleventh Circuit courts only "look to decisions of the U.S. Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state." *Snider v. Jefferson State Cmty. Coll.*, 344 F.3d 1325, 1328 (11th Cir. 2003) (quotation omitted); *Carruth v. Bentley*, 942 F.3d 1047, 1054 (11th Cir. 2019).

The Sixth Circuit is slightly less restrictive than the Eleventh. The Sixth Circuit has identified a "general rule against out-of-circuit authority" except in extraordinary cases. *Ashford v. Raby*, 951 F.3d 798, 804 (6th Cir. 2020).

While disagreeing with the Sixth and Eleventh Circuits about the applicability of out-of-circuit authority, some circuits agree with the Eleventh Circuit's reliance on state court cases. *Wilson v. Prince George's Cnty., Maryland*, 893 F.3d 213, 221 (4th Cir. 2018); *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 573 (7th Cir. 2014); *Horton by Horton*, 915 F.3d at 601 n.9

Other circuits do not. *Alfano v. Lynch*, 847 F.3d 71, 76 (1st Cir. 2017) ("In applying the test for clearly established law, the focus must be on federal precedents."); *see also Charles W. v. Maul*, 214 F.3d 350, 353 (2d Cir. 2000) ("Whether a right recognized only by a trial court or by a state court is clearly established presents a closer question.").

The circuits' divisions extend to the role of federal district court decisions when identifying clearly

established law. This Court has observed that "[m]any Courts of Appeals . . . decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity." *Camreta*, 563 U.S. 692, 709 n.7 (2011) *accord Richardson v. Selsky*, 5 F.3d 616, 623 (2d Cir. 1993); *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 545 (4th Cir. 2017); *Crane v. Utah Dep't of Corr.*, 15 F.4th 1296, 1306-07 (10th Cir. 2021); *Gaines v. Wardynski*, 871 F.3d 1203, 1211 (11th Cir. 2017).

Some circuits clash and still consider district court cases from inside and outside the circuit. *Peroza-Benitez v. Smith*, 994 F.3d 157, 165-66 (3d Cir. 2021); *K.W.P. v. Kansas City Pub. Sch.*, 931 F.3d 813, 828 (8th Cir. 2019); *Entler v. Gregoire*, 872 F.3d 1031, 1044 (9th Cir. 2017); *see also T.E. v. Grindle*, 599 F.3d 583, 590 (7th Cir. 2010) (stating that "[w]hile district court decisions alone do not clearly establish a right for the purpose of qualified immunity, the number and unanimity of these decisions, combined with our circuit-level precedent" may provide reasonable notice of a constitutional violation).

Finally, like this Court's own cases, the circuits are in different camps about the influence of regulatory guidance and administrative policies on clearly established law. *Compare Booker*, 855 F.3d at 546 ("Our conclusion that a reasonable person would have known of the violation is buttressed by the South Carolina Department of Correction's internal policies.") (cleaned up); *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 531 (8th Cir. 2009) ("Prison regulations governing the conduct

of correctional officers are also relevant in determining whether an inmate's right was clearly established."); *Furnace v. Sullivan*, 705 F.3d 1021, 1027 (9th Cir. 2013) (same; quoting Eighth Circuit authority) *with Frasier v. Evans*, 992 F.3d 1003, 1015 (10th Cir. 2021) ("judicial decisions are the only valid interpretive source of the content of clearly established law, and, consequently, whatever training the officers received concerning the nature of Mr. Frasier's First Amendment rights was irrelevant to the clearly-established-law inquiry"); *Pratt v. Harris Cnty., Tex.*, 822 F.3d 174, 183-84 (5th Cir. 2016) ("the constitutionality of an officer's actions, is [not] guided . . . by his adherence to the policies of the department under which he operates"); *Latits v. Phillips*, 878 F.3d 541, 553 (6th Cir. 2017) ("[T]he fact that an officer's conduct merely violates a departmental policy does not cause that officer to lose their qualified immunity.") (quotation omitted).

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In sum, the circuits—and this Court's precedents—are split over the authorities that may provide clearly established law for qualified immunity. The Court's repeated reservation of the question since *Harlow* has left doctrine in disarray. Courts and police officers stand confused about where to look for clearly established law. This case is the ideal opportunity to bring clarity to an area of law that is on the minds of front line law enforcement every day.

Police officers will be familiar with, and trained on, this Court's precedents. But this Court has never

imposed on lawyers—let alone police officers—the monumental task of memorizing all persuasive authority from each and every circuit, district court, state court, or agency. Nor should police officers be wrestling with conflicting in-circuit or out-of-circuit caselaw while they are wrestling with suspects. Police officers are law enforcement, not law students. They focus on protecting the public, not scouring the state and federal reporters or the Federal Register. The Court should grant certiorari to resolve the question repeatedly left open since *Harlow* and settle the contradictory approaches in this Court and the circuits. The Court should hold that only its precedents count as clearly established law for qualified immunity.

II. No Precedent From this Court Clearly Established that Petitioners' Conduct Might Be Unlawful.

"'Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Rivas-Villegas*, 595 U.S. at 5 (quoting *White v. Pauly*, 580 U.S. 78-79 (2017)). "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix*, 577 U.S. at 11 (internal quotations omitted). Qualified "immunity protects all but the plainly incompetent or those who knowingly violate the law." *White*, 580 U.S. at 79 (quotations omitted).

"[T]he focus is on whether the officer had fair notice that her conduct was unlawful [and] is judged against the backdrop of the law at the time of the conduct." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018). Existing precedent must have placed the constitutional question beyond debate. *Sheehan*, 575 U.S. at 611.

"The operation of this standard, however, depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). It has been a "longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *White*, 580 U.S. at 79. The inquiry must be conducted "in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (quotations omitted). "The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *al-Kidd*, 563 U.S. at 742.

"Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Mullenix*, 577 U.S. at 12. Whether the application of force qualifies as "excessive" hinges on the specific circumstances of each case. *Rivas-Villegas*, 595 U.S. at 6. Courts must consider " 'the severity of the

crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Id*. (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

The "particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. In the heat of rapidly evolving circumstances, police officers must make split-second decisions with life-or-death stakes. *Id*. at 396-97. "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the Fourth Amendment." *Id*. at 396 (cleaned up).

As a result, "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153. "It is not enough that the rule is suggested by then-existing precedent." *Wesby*, 583 U.S. at 63. The rule must be "settled law" and clearly prohibit the officer's conduct so that the unlawfulness of the conduct follows immediately from the conclusion that the rule is firmly established. *Id*. at 63-64.

There is no precedent from this Court clearly establishing that the depicted conduct of Officers Dutra and Dejesus violates the Fourth Amendment. No "Supreme Court case . . . addresses facts like the ones at issue here." *Rivas-Villegas*, 595 U.S. at 6. The Court has never hinted that it might be excessive force to grab a fleeing child endangerment suspect, take her away

from a second-story railing, "and attempt[] to pull her arm back to put her into handcuffs to restrain her." App.27; *cf.* App.3. None of this Court's precedents "squarely governs" the facts here. *Mullenix*, 577 U.S. at 15.

If anything, this Court's precedents convey the lawfulness of Petitioners' conduct. "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396.

This case resembles *City of Escondido, California v. Emmons* where officers responded to a domestic disturbance at an apartment with children inside. 139 S. Ct. 501-02. Like here, police body cam footage captured the encounter. *Id*. at 501. The officers tried to persuade a woman to open the door so they could conduct a welfare check. *Id.* at 501. A man exited the apartment, closed the door, and tried to get past the officer. *Id*. at 502. The officer stopped the man, quickly took him to the ground, and handcuffed him—all without hitting him or displaying a weapon. *Id*. The man was arrested for resisting and delaying a police officer. *Id*.

As with Jackson, the man sued for wrongful arrest and excessive force. *Id*. The district court granted summary judgment to the officers, noting "video shows that the officers acted professionally and respectfully in their encounter at the apartment." *Id*. Again as here, the Ninth Circuit affirmed the wrongful arrest claim

but reversed on the excessive force claim by relying on its own precedents at a high level of generality without analysis. *Id*. at 502-04.

In a per curiam opinion, this Court reversed and remanded. It "asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances." *Id*. at 503. The Court demanded an analysis of "whether clearly established law barred Officer Craig from stopping and taking down Marty Emmons in this manner as Emmons exited the apartment." *Id*. at 504. Discovering no governing precedent, the Court granted certiorari, reversed and vacated in part, and remanded.

The Court should do the same here. This Court's precedents do not—and did not—prohibit Officers Dutra and Dejesus from saving and subduing Jackson from absconding over a second story railing in this scenario and in this way. They were not, and could not have been, on notice from this Court's cases that their actions might violate the Fourth Amendment. Thus, the Court should grant certiorari and reverse.

III. The Ninth Circuit Once Again Interpreted Its Own Precedents at an Impermissibly High Level of Generality.

Rather than examine this Court's precedents, the Ninth Circuit cited only its own cases and interpreted them far too abstractly to deny qualified immunity. "This Court has repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established

law at a high level of generality." *Kisela*, 138 S. Ct. at 1152 (quoting *Sheehan*, 575 U.S. at 613 (quoting *al-Kidd*, 563 U.S. at 742); *Brosseau*, 543 U.S. at 198-199); *see also Emmons*, 139 S. Ct. at 503; *Rivas-Villegas*, 595 U.S. at 6-8.

Despite this Court's oft-repeated warnings, the Ninth Circuit has done it yet again. When withholding qualified immunity from Officers Dutra and Dejesus, the court recited two generic Fourth Amendment propositions that the use of force "must meet the overarching standard of 'reasonableness'" and "[o]fficers may not continue to use force once an individual is subdued and no longer resisting." App.2 (citations omitted).

The Ninth Circuit simply string-cited four circuit precedents with terse parenthetical explanations. "The Court of Appeals made no effort to explain how that case law prohibited Officer[s Dutra's and Dejesus's] actions in this case." *Emmons*, 139 S. Ct. at 503-04. Instead, the Ninth Circuit relied on factually distinguishable cases and therefore defined the clearly established right at a level of generality amounting to the Fourth Amendment truism that Jackson had a "right to be free from excessive force." *Id*. at 503. "That is a problem under [this Court's] precedents." *Id*. at 504.

First, the Ninth Circuit cited *Hyde v. City of Willcox*, 23 F.4th 863 (9th Cir. 2022). App.3-4. To start, *Hyde* was published in 2022, more than three years after Jackson's arrest in 2018. Officers Dutra and Dejesus cannot be expected to foretell future precedent. The

Ninth Circuit wrongly failed to judge them "against the backdrop of the law at the time of the conduct." *Kisela*, 138 S. Ct. at 1152.

Hyde does not "squarely govern" in any event. *Id.* at 1153. In *Hyde*, the Ninth Circuit held that force against a mentally ill man became unreasonable when an officer "used his Taser on Hyde's thigh again for about five seconds" and another officer "used her arms to force Hyde's head into a restraint hold, while four other officers fastened Hyde into the restraint chair" *after* "Hyde had his hands handcuffed behind his back and his legs shackled," "appeared fatigued," and "remained on his knees, and seven officers surrounded him." 23 F.4th at 871. The Ninth Circuit considers a suspect restrained or subdued when handcuffed or pinned down. *Id*. at 872. The jailhouse video was not in the record although the court acknowledged it "should not scrutinize an officer's every minor move in a frantic and chaotic situation as if we were examining the Zapruder film in slow-motion." *Id*. at 872-73.

Here, the body cam videos are in the record and the Ninth Circuit picked them apart as if looking at the grainy footage of Big Foot or the Loch Ness Monster. The court tried to pinpoint the second when the officers' actions might have mutated into unreasonableness. App.3. But *Hyde* is not a "[p]recedent involving similar facts [that] can help move a case beyond the otherwise hazy border between excessive and acceptable force and thereby provide an officer notice that a specific use of force is unlawful." *Kisela*, 138 S. Ct. at 1153 (internal quotations omitted).

Unlike *Hyde*, there was no intermediate force or taser used against Jackson. Jackson's hands were never cuffed by Officers Dutra or Dejesus, her legs were never shackled, she never appeared fatigued, she was never on her knees during the encounter, and there were never seven officers surrounding her while Officers Dutra and Dejesus tried to apply handcuffs. No intermediate force was applied to Jackson after she was subdued. *Hyde* does not govern.

Next, the Ninth Circuit cited *Jones v. Las Vegas Metropolitan Police Department*, 873 F.3d 1123 (9th Cir. 2017). App.3. *Jones* involved a suspect's death following repeated and continuous taser use. 873 F.3d at 1127. The Court held it was excessive force for officers to use tasers repeatedly and simultaneously on a surrounded, prone suspect with no weapon who was not threatening or resisting. *Id*. at 1131-32.

Jackson was never prone without resistance. No taser was used repeatedly, continuously, simultaneously, or otherwise before or after she relented. "Whatever the merits of the decision in [*Jones*], the differences between that case and the case before us leap from the page." *Sheehan*, 575 U.S. at 614.

Third, the Ninth Circuit cited *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003). App.3. It fares no better. There, a mentally ill man fell into a coma and died after officers subdued and restrained him. 343 F.3d at 1053-54. The Ninth Circuit held that officers used excessive force after they knocked down the man and handcuffed him. *Id*.

at 1058-59. "Once on the ground, prone and handcuffed, Drummond did not resist the arresting officers. Nevertheless, two officers, at least one of whom was substantially larger than he was, pressed their weight against his torso and neck, crushing him against the ground." *Id*. at 1059. The officers did not relieve pressure when the man said he could not breathe. *Id*.

None of those facts are present. Jackson was never prone or compliant. The officers did not lean their weight onto her neck to prevent her from breathing after she was handcuffed. Officers Dutra and Dejesus stopped using force when more officers arrived, which was before Jackson was handcuffed. So *Drummond* is a poor fit. *Sheehan*, 575 U.S. at 615. Its materially distinguishable facts do not govern this case. *Rivas-Villegas*, 595 U.S. at 6.

Lastly, the Ninth Circuit cited *Watkins v. City of Oakland, California*, 145 F.3d 1087 (9th Cir. 1998). App.3. *Watkins* involved a police dog's continuous biting of a suspect. 145 F.3d at 1090. The Ninth Circuit held that police dogs are a weapon and it could constitute excessive force to allow excessively long canine biting with improper encouragement when an arrestee was "recoiling from pain" and "obviously helpless" before handcuffing. *Id*. at 1090, 1093.

No police dog was used against Jackson. There was no excessive biting or improper encouragement. Force was not used on Jackson when she was "obviously helpless" or "recoiling" from weapon use. The

Ninth Circuit's "reliance on [*Watkins*] does not pass the straight-face test." *Kisela*, 138 S. Ct. at 1154.

The Ninth Circuit did not cite a single case where it (or this Court) clearly established that officers commit a Fourth Amendment violation in circumstances like Officers Dutra and Dejesus found themselves in with Jackson. The Ninth Circuit just relied on its "Court of Appeals progeny, which—as noted above—lay out excessive-force principles at only a general level." *White*, 580 U.S. at 79. None of the cited cases bear any resemblance to the situation they confronted. *Mullenix*, 577 U.S. at 13. "[I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness." *Kisela*, 138 S. Ct. at 1153.

The Ninth Circuit's habitual definition of clearly established law at the highest theoretical level inflicts societal costs. *Harlow*, 457 U.S. at 814. "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office" as well as "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Id*.

Thus, this Court should grant certiorari and reverse to again admonish the Ninth Circuit that it cannot deny qualified immunity to police officers in

excessive force cases by defining clearly established law at an excessively high level of generality.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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