No. 23-377

In the Supreme Court of the United States

CHRIS DUTRA & ERIC DEJESUS,

Petitioners,

v.

KIM JACKSON,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly denied qualified immunity, at the summary judgment stage, to officers who tore the shoulder cartilage of a 101-pound Sunday school teacher, given factual disputes over whether the officers used force after the victim was subdued and not resisting.

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BRIEF IN OPPOSITION

The court of appeals' unpublished decision below correctly applied the universally accepted Fourth Amendment principle that "[o]fficers may not continue to use force once an individual is subdued and no longer resisting" (Pet. App. 2a) to petitioners' violent wrenching of Ms. Jackson's arms, which left her with a SLAP tear to the labrum of her shoulder joint. The court found that, while the evidence showed that petitioners "acted reasonably" during the initial parts of their encounter with Ms. Jackson, "[a] question of fact exists as to when Jackson ceased resisting and whether the officers' use of force continued" unlawfully. *Id.* at 3a. Given this factual dispute, the court concluded, summary judgment was inappropriate. *Id.* at 4a.

In the face of this non-controversial reasoning, petitioners' primary argument for certiorari is that this Court should adopt a radical new approach to qualified immunity that *no* court has ever endorsed; that the only circuits to squarely consider have soundly rejected; and that is inconsistent with this Court's own prior rulings. That is, petitioners contend that only this Court's precedent can clearly establish the law for qualified immunity purposes. Because there is no split of authority on this question—and because, if adopted, petitioners' position would transform the already atextual and ahistorical qualified immunity doctrine into an unqualified shield for government abuses—review is unwarranted.

Aside from this invitation to drastically remake qualified immunity law along unprecedented lines, petitioners offer only a naked request for error correction—and a meritless one at that. The petition should be denied.

STATEMENT

A. Factual Background

1. Kim Jackson is a five-foot, 101-pound, Sunday school teacher. C.A. E.R. 329. She has an early childhood education certificate and worked as a teacher's assistant. D. Ct. Dkt. 50-4 at 45-46. Jackson has faced professional challenges because she has complex partial epilepsy, which triggers periodic seizures and causes "language issues." *Id.* at 7, 233.

Jackson is also a parent. She has a son and took care of her deceased cousin's three-year-old daughter, A.M., as a foster parent. She was "around A.M. since the time of her birth," "cared for her," and "attended all the classes on foster parenting." D. Ct. Dkt. 48-3 at 3. Jackson stated that "I loved A.M." and "was doing all I thought I needed to do" to comply with the requirements for temporary custody, to which Jackson was appointed after her cousin passed away. *Ibid.*; C.A. E.R. 201.

On the night of November 1, 2018, Jackson was "helping [her son] with his homework." C.A. E.R. 329. She had already put A.M. to bed. Unbeknownst to her, two employees from Nevada's Child Protective Services (CPS) determined that Jackson's communications had been deficient, and that CPS should retake custody of A.M. as a result. Pet. App. 7a. They enlisted the help of law enforcement (C.A. E.R. 330 (Dutra BWC) at 03:33:25Z),[1] even though a custody transfer is a "civil matter" that does not require police to be present. C.A. E.R. 170, 205. Thus, contrary to petitioners' mischaracterization of this case as being about

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[1] The body-worn camera videos are timestamped in "Zulu time," which is seven hours ahead of the Pacific time zone; the events here thus "actually took place around 9:00pm." Pet. App. 6a.

"kidnapping" (Pet. 7), the "only thing" that officers were told was that CPS "couldn't get ahold of" Jackson because "there was no return phone calls" (C.A. E.R. 43-45).

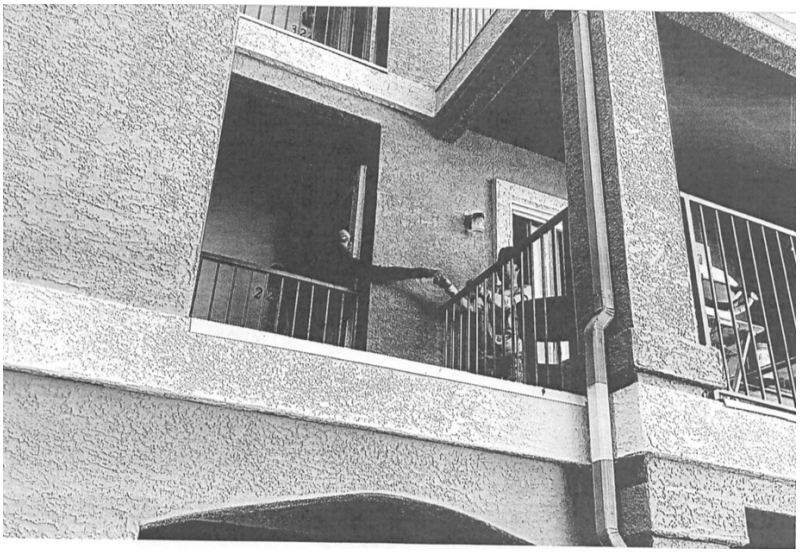
2. Petitioners' statement of the case also misrepresents the nature of the police encounter. See generally Pet. 7-14. As explained below (at 21-24), these misstatements are largely irrelevant to the court of appeals' actual holding, which found the officers' conduct reasonable at the outset of the encounter, and denied qualified immunity only insofar as factual disputes remained regarding "whether the officers' use of force continued after the emergency had ended." Pet. 3. But there are also significant inaccuracies throughout petitioners' presentation of the facts.

Officers acknowledge that they had no warrants, no charges, and no suspicions that Jackson was engaged in criminal activity. C.A. E.R. 36-37. They testified that they had no reason to believe that she had done anything to harm or neglect A.M. C.A. E.R. 202. As a civil matter, nothing prevented social services from approaching Jackson's door and stating, "Hey, we're CPS. We're here to retake custody." C.A. E.R. 47. Nor did anything prevent the officers from knocking on the door and stating, "CPS is here with us. They have a lawful right to retrieve the foster child, A.M., and we're assisting in that." C.A. E.R. 291-292. Instead, however, officers devised a "plan" to conduct a pretextual "welfare check." C.A. E.R. 292-293.

Officer Dutra knocked on Jackson's apartment door and asked if everything was okay. As is her legal right, she declined to let officers in, later stating that "officers scare me." Dutra BWC at 03:53:14Z. Overall, the officers later testified, Jackson's demeanor was

"polite and courteous" and "cooperative." C.A. E.R. 65, 144-145.

Rather than allowing unknown police officers into her home at night, Jackson instead spoke to them from her outdoor balcony, directly adjacent to, and on the same level as, the outdoor entryway to her apartment. The balcony and entryway are pictured here, in an illustrative photograph taken after the events in question:



C.A. Appellant Br. 8.

Believing that the officers were conducting a welfare check, Jackson questioned, "[w]hy would I feel anything other than alright? I'm at the table with my son helping him with his homework." Dutra BWC at 03:38:30Z. She told Officer Dutra, "you don't have a warrant" and he responded, "you're right, I don't." *Id.* at 03:39:38Z.

Jackson never refused to give A.M. to the officers or to CPS.[2] To the contrary, a CPS official told Jackson to wake A.M. so they could "see" her (C.A. E.R. 87, 90), and Jackson immediately complied. Jackson thus roused the three-year-old child from her sleep and brought her to the balcony to be seen. *Id.* at 89-90. Sergeant Jason Edmonson then said Jackson was "not effectively" communicating with CPS. Dutra BWC 3:41:10Z. Jackson returned the child to the apartment and retrieved her phone to show that she had agreed to meet with CPS the next morning. C.A. E.R. 331 (Edmonson BWC) at 03:42:48Z. Out of nowhere, Sergeant Edmonson stated that it would be "kidnapping" if she did not give the child to CPS (Pet. App. 8a), a statement that was "the first time anyone has said anything about [Jackson] giving [A.M.]" back to the custody of CPS. C.A. E.R. 88.

Jackson went into her apartment and returned to the balcony with A.M. in her arms. Pet. App. 8a. Then, as Officer Dutra later wrote in his police report, "Sgt. Edmonson reached over the railing which was directly in front of the front door *and tried to grab the child from Jackson*" (C.A. E.R. 284 (emphasis added)), yelling "Do not put her over the rail!" (Pet. App. 9a). Jackson maintained her hold on A.M., and—as Edmonson himself later testified—"didn't break the plane of the railing" with the child. C.A. E.R. 229.[3] Ultimately,

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[2] Officer Dutra later admitted to misrepresenting this fact in his police report. C.A. E.R. 63-68.

[3] Petitioners claim that Jackson "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" and that "[t]he 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." Pet. 8. But as their own sergeant's later testimony shows,

Jackson agreed to put A.M. outside of the door if officers would back away. Pet. App. 9a.

3. After CPS retrieved A.M., Jackson called 911, questioning why the officers would not leave. Pet. App. 10a. She voluntarily stepped outside her door, without being asked by officers and despite having "a right to remain inside her apartment" (C.A. E.R. 239)—a fact petitioners omit.

Officer Dutra then told her, "[n]ow you get to stay out here and visit with me now." Pet. App. 10a. Jackson politely responded, "I came out to visit with you." *Ibid.* The officers did not tell Jackson she was "under arrest," "detained," "under investigation," or "not free to leave." C.A. E.R. 124.[4] After about a minute, with no questions asked of her, Jackson announced her intent to return to her home and took a step towards her front door. C.A. E.R. 161.

The following events then ensued:

- Without warning, Officer Dutra grabs Jackson as she takes her first steps. C.A. E.R. 332 (Dejesus BWC) at 03:50:06Z.
- Officer Dejesus runs up and also grabs Jackson. Dejesus BWC at 03:50:09Z.
- Jackson "grab[s] a nearby rail to stabilize [her]self." C.A. E.R. 329.

Jackson securely held the child and never put A.M. over the railing. C.A. E.R. 229.

That is, the sensational implication by petitioners that Jackson ever put A.M. in physical danger of falling is plainly false—as Sergeant Edmonson has testified. This extraordinary misrepresentation of the record is alone grounds to deny certiorari.

[4] Officer Dutra later admitted to misrepresenting this fact, too, in his police report. C.A. E.R. 128, 166.

- Officers Dutra and Dejesus throw Jackson to the ground as she pleads, "[p]lease don't hurt me." Dejesus BWC at 03:50:10Z.
- The officers "continue[] to pull Jackson's arms in opposite directions" causing her to scream in pain. Pet. App. 3a. Jackson later explained that her "right arm felt like it was being pulled up toward my neck" and "it hurt so bad, I thought it would break." C.A. E.R. 329.
- Jackson yells out repeatedly, "[y]ou're hurting me!" Dejesus BWC at 03:50:30Z.
- Sergeant Edmonson interjects and states, "[a]t this point, we don't have any charges on her. We have nothing." Edmonson BWC at 03:50:47Z.

Jackson has submitted evidence showing that, as a result of the officers' wrenching of her arms, she suffered a SLAP tear to the labrum of her shoulder joint, requiring surgery to repair. C.A. E.R. 327, 329.

B. Proceedings Below

Jackson brought this suit against Officers Dutra and Dejesus, alleging, as relevant here, unlawful seizure, false arrest, and excessive force. Jackson also sued Sergeant Edmonson, who did not directly cause Jackson's injuries, bringing a supervisory liability claim. See generally D. Ct. Dkt. 1. Defendants moved for summary judgment, asserting qualified immunity.

1. The district court held that defendants had probable cause to seize Jackson for attempted child endangerment and obstruction, and that their force was not excessive. Pet. App. 5a-6a. Despite recognizing that "Dutra * * * said that he did not witness an act of child endangerment" and that "Edmonson said there was nothing to charge against her during the

arrest," the district court nevertheless found "these facts * * * irrelevant to whether an objective officer would have probable cause." Pet. App. 21a.

The district court also determined that there was no excessive force, even though it acknowledged Jackson's testimony that "they pulled her 'arm in a manner that feels like it's going to be broken.'" Pet. App. 27a. The court stated that "Defendants were reasonable to believe that Plaintiff was attempting to flee * * * by jumping from the second-story railing to get back in her apartment because Defendant Dutra was in front of her door." Pet. App. 27a. The court therefore granted summary judgment to the officers.

2. In an unpublished memorandum disposition, the court of appeals affirmed the dismissal of Jackson's unlawful seizure and false arrest claims, concluding that a reasonable police officer could have concluded that there was probable cause to arrest Jackson. Pet. App. 2a.

The court reversed as to Jackson's excessive force claims. It first reasoned that police officers "are permitted to use force * * * in their community caretaking capacity, to address an ongoing emergency." Pet. App. 2a. (citing *Ames* v. *King County*, 846 F.3d 340, 348-49 (9th Cir. 2017)). It therefore concluded that the officers "acted reasonably when they grabbed Jackson to prevent her from climbing over the second-floor railing," and that "[t]heir use of force remained reasonable as Jackson resisted and they attempted to handcuff her and move her away from the railing." Pet. App. 2a.

However, the court also identified the well-established principle that "[o]fficers may not *continue* to use force once an individual is subdued and no longer resisting." Pet. App. 2a (emphasis added) (quoting

multiple circuit precedents for that conclusion). Thus, because "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." Pet. App. 3a.

The court therefore reversed the grant of summary judgment as to this subset of Jackson's claims, explaining that "[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." Pet. App. 3a.

The officers petitioned for rehearing en banc; their petition was denied with no judge requesting a vote of the full court. C.A. Dkt. 50.

3. Officers Dutra and Dejesus petitioned for certiorari, asserting two questions: (1) Whether "this Court's precedents" are "the only source of clearly established law for purposes of qualified immunity" and (2) whether the court of appeals analyzed clearly established law at a proper level of generality. Pet. i-ii. Jackson filed a conditional cross-petition raising a logically prior and dispositive question: Whether qualified immunity should be overturned or recalibrated entirely. See Conditional Cross-Pet., No. 23-514, at i.

REASONS FOR DENYING THE PETITION

Review is unwarranted as to either question presented by petitioners. Their first question offers no split of authority (indeed, every circuit applies the approach to which petitioners object); contradicts this Court's precedents; and would drastically expand qualified immunity beyond the scope of any conceivable justification. And their second is a simple request

for error correction, which is wrong in any event. The petition should be denied.

I. REVIEW OF THE FIRST QUESTION PRESENTED IS UNWARRANTED.

Petitioners' first question presented asks this Court to hold that only its own precedents can clearly establish the law for qualified immunity purposes—a conclusion that no court has ever reached, and one that is contrary to the Court's own previous approach. The Court should not entertain this request to immunize even plainly unlawful conduct, solely on the ground that a case involving similar facts happens not to have reached the Court.

A. This Court has applied circuit precedent as a source of clearly established law.

First, this Court itself has long established that, contrary to petitioners' preferred approach, circuit precedent *can* supply clearly established law for qualified immunity purposes. While the Court has suggested it "ha[s] not yet decided what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity" (*District of Columbia* v. *Wesby*, 583 U.S. 48, 66 n.8 (2018)),[5] it in fact *has* found the law clearly established by circuit precedent, and denied qualified immunity on that basis in the absence of on-point Supreme Court authority.

In *Hope* v. *Pelzer*, the Court "readily" denied qualified immunity because "binding Eleventh Circuit precedent" and relevant regulations had clearly

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[5] In *Rivas-Villegas* v. *Cortesluna*, 595 U.S. 1 (2021), the problem was not that "the Court of Appeals relied solely on its precedent," it was that the particular circuit precedent involved "[wa]s materially distinguishable and thus d[id] not govern the facts of this case." *Id.* at 6; cf. Pet. 17.

established the unconstitutionality of the conduct involved. 536 U.S. 730, 741-742 (2002). The Court did not think it necessary to find clearly established law in its own cases, as controlling circuit precedent had clearly established the violation "[r]egardless." *Id.* at 741.

The Court has affirmed this principle in a host of other cases. See, *e.g.*, *Elder* v. *Holloway*, 510 U.S. 510, 516 (1994) (holding that the lower court should look to "its own and other relevant precedents"); *Wilson* v. *Layne*, 526 U.S. 603, 604 (1999) (explaining that lower courts should look to "controlling authority in their jurisdiction" or, alternatively, "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful"); *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 742 (2011) (a "consensus of cases of persuasive authority" can clearly establish the law even "absent controlling authority"). Review is therefore unnecessary, as this Court has repeatedly answered the question raised by the petitioners here.

B. There is no circuit split.

1. As petitioners must concede, no court has ever held that only Supreme Court decisions can create clearly established law. Instead, as one circuit has summarized, "'[o]rdinarily, in order for the law to be clearly established, there must be a Supreme Court *or* [ ] Circuit decision on point, *or* the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'" *Doe* v. *District of Columbia*, 796 F.3d 96, 104 (D.C. Cir. 2015) (quoting *Currier* v. *Doran*, 242 F.3d 905, 923 (10th Cir. 2001)) (emphasis added).

Accordingly, no circuit exclusively relies on Supreme Court precedent in its clearly established law analysis. See, *e.g.*,

- **First Circuit:** *McCue* v. *City of Bangor*, 838 F.3d 55, 64 (1st Cir. 2016) (stating that the agreement of four circuits, not including First Circuit or Supreme Court precedent, was sufficient to clearly establish threshold for excessive force);
- **Second Circuit:** *Jones* v. *Treubig*, 963 F.3d 214, 225 (2d Cir. 2020) (relying on Second Circuit precedent, and no Supreme Court precedent, to find clearly established law);
- **Third Circuit:** *Kedra* v. *Schroeter*, 876 F.3d 424, 450 (3d Cir. 2017) (finding that a single "closely analogous" case from another circuit was sufficient to clearly establish law);
- **Fourth Circuit:** *Booker* v. *South Carolina Dep't of Corr.*, 855 F.3d 533, 544 (4th Cir. 2017) (relying on precedents from the "Second, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits" to clearly establish law, in the absence of Fourth Circuit or Supreme Court precedent);
- **Fifth Circuit:** *Boyd* v. *McNamara*, 74 F.4th 662, 667-669 (5th Cir. 2023) (relying on three Fifth Circuit cases and no Supreme Court cases to clearly establish law)[6];

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[6] In *Ramirez* v. *Escajeda*, 44 F.4th 287, 293 (5th Cir. 2022), the Fifth Circuit observed in dicta that "the Supreme Court has left open" the question presented here, relying on the Court's prior statements to that effect. See page 10, *supra*. But both before and after *Ramirez* (which was not decided on grounds of this dicta in any event), the Fifth Circuit has applied the same rule that governs everywhere else: Circuit precedent is sufficient to clearly establish the law. See, *e.g.*, *Delaughter* v. *Woodall*, 909 F.3d 130,

- **Sixth Circuit:** *Coley* v. *Lucas Cnty.*, 799 F.3d 530, 540-541 (6th Cir. 2015) (relying on Sixth Circuit cases and no Supreme Court cases to hold that defendants were not entitled to qualified immunity);
- **Seventh Circuit:** *Smith* v. *Finkley*, 10 F.4th 725, 742-743 (7th Cir. 2021) (concluding that officers violated clearly established Seventh Circuit law and citing no Supreme Court cases)
- **Eighth Circuit:** *Wilson* v. *Lamp*, 901 F.3d 981, 990-991 (8th Cir. 2018) (relying solely on Eighth Circuit cases to find right clearly established);
- **Ninth Circuit:** *Meredith* v. *Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003) (citing Ninth Circuit cases, and no Supreme Court precedent, as evidence of clearly established Fourth Amendment law);
- **Tenth Circuit:** *Ullery* v. *Bradley*, 949 F.3d 1282, 1291-98 (10th Cir. 2020) (relying on precedents from the "Second, Third, Sixth, Seventh, Eighth, and Ninth Circuits," in the absence of Tenth Circuit or Supreme Court authority on point);
- **Eleventh Circuit:** *Hadley* v. *Gutierrez*, 526 F.3d 1324, 1333-1334 (11th Cir. 2008) (relying on only Eleventh Circuit cases to hold that the defendant had violated clearly established law);
- **D.C. Circuit:** *Harbury* v. *Deutch*, 244 F.3d 956, 959-960 (D.C. Cir. 2001) (citing Second, Fifth,

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140 (5th Cir. 2018) (finding clearly established law based solely on Fifth Circuit precedent); *Boyd*, 74 F.4th at 667-669 (same).

Sixth, Seventh, and Ninth Circuit cases, and no Supreme Court cases, to deny qualified immunity).

2. Not only has no court adopted petitioners' position that only Supreme Court precedents can clearly establish the law, the only two circuits to squarely address the question have soundly rejected it.

In *Ullery* v. *Bradley*, the Tenth Circuit expressly rejected the defendants' argument that "only Supreme Court precedents are relevant in deciding whether a right is clearly established," explaining both that no court has adopted that rule and that, "[i]n recent years, the Supreme Court has reaffirmed that 'qualified immunity is lost when plaintiffs point *either* to cases of controlling authority in their jurisdiction at the time of the incident *or* to a consensus of cases of persuasive authority.'" 949 F. 3d at 1292 (quoting *al-Kidd*, 563 U.S. at 742) (emphasis added). Moreover, the court reasoned, "[l]imiting the source of clearly established law to only Supreme Court precedents also is unwarranted and impractical": "Such a restriction would transform qualified immunity into an absolute bar to constitutional claims in most cases—thereby skewing the intended balance of holding public officials accountable while allowing them to perform their duties reasonably without fear of personal liability and harassing litigation." *Ibid.*

The Seventh Circuit rejected the identical contention in *Estate of Clark* v. *Walker*, 865 F.3d 544, 552 (7th Cir. 2017), where the defendant had "argue[d] that it is 'doubtful' whether circuit precedent can clearly establish law for purposes of qualified immunity." That court, too, disagreed in no uncertain terms, explaining that "Supreme Court cases indicate circuit precedent is adequate for these purposes" (*ibid.* (citing

Wilson, 526 U.S. at 617)), and that "we have exercised this authority for decades" (*ibid.*). See also *ibid.* ("We see no reason to depart from these precedents.").

3. Thus lacking any conflict in authority on the actual question presented—"Are this Court's precedents the only source of clearly established law for purposes of qualified immunity?" (Pet. i)—petitioners point to statements from various circuits regarding the extent to which persuasive authority, state court authority, district court authority, and administrative policy can cement clearly established law. *Id.* at 18-23. But regardless of the merits of these more nuanced issues, they are simply not presented on this record: The court of appeals did not rely on persuasive authority, state court authority, district court authority, or administrative policy in this case; it relied solely on its own binding precedents to find the law clearly established, which it is undoubtedly permitted to do. Pet. App. 2a-4a.

This case is therefore not an appropriate vehicle to evaluate the outer limits of the clearly established law inquiry, including how strong a consensus of persuasive authority might suffice. As much as petitioners may wish otherwise, such questions are not presented here, where the law was clearly established by binding circuit precedent. On that issue—the only one actually implicated by this case—the courts are in uniform agreement. Certiorari is therefore unwarranted.

C. Substantive constitutional law would stagnate if this Court's precedents became the sole source of clearly established law.

Petitioners' proposed rule would also stymie the development of fundamental civil liberties as a substantive matter, further exacerbating a problem that

already exists under current law. After *Pearson* v. *Callahan*, 555 U.S. 223 (2009), judges can now choose to stay silent on whether defendants actually violated constitutional law, instead deciding only whether a hypothetical constitutional violation was clearly established as unlawful. And research shows that increasing numbers of judges are doing just that. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 37-38 (2015) (finding a post-*Pearson* decrease in the willingness of circuit courts to decide constitutional questions).

When courts "leapfrog the underlying constitutional merits" in difficult cases, they deprive the public of "matter-of-fact guidance about what the Constitution requires." *Zadeh* v. *Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part); see also *Thompson* v. *Clark*, 2018 WL 3128975, at *8 (E.D.N.Y. June 26, 2018) ("The failure to address whether or not an act was constitutional prevents the creation of 'clearly established' law needed to guide law enforcement and courts on narrow issues not yet decided by the Supreme Court."). The lack of constitutional decision-making "stunt[s] the development of constitutional rights" "[a]t a time in which it is vital for constitutional law to keep pace with changes in technology, social norms, and political practices." Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 Mich. L. Rev. 1219, 1248, 1250 (2015).

Perversely, the post-*Pearson* approach traps Americans suffering constitutional wrongs in a "Catch-22," requiring them to "produce precedent even as fewer courts are producing precedent." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part). This allows constitutional violations

go unpunished merely because the circuit courts have yet to address an issue.

Restricting clearly established law to only Supreme Court precedent would make the problem even worse. This Court decides only a handful of cases per Term that adjudicate the merits of individual constitutional rights for which qualified immunity might be invoked, in contrast to the hundreds or even thousands of such cases decided by the circuits every year.[7] The Court simply does not answer most of the constitutional questions that regularly arise in the lower courts.

Limiting clearly established law to only Supreme Court precedent thus leaves plaintiffs without much law to rely on at all—particularly given the Court's emphasis on close factual similarity in use-of-force cases. See, *e.g.*, *Mullenix* v. *Luna*, 577 U.S. 7, 12 (2015) (per curiam). Petitioners' proposed restriction would turn qualified immunity into "an absolute bar to

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[7] By our count, this Court decided 18 such cases over the past three full Terms (OT 2020, 2021, and 2022), out of a total of 189 merits dispositions: *National Pork Producers Council* v. *Ross*, 598 U.S. 356 (2023); *Students for Fair Admissions*, *Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023); *Counterman* v. *Colorado,* 600 U.S. 66 (2023); *303 Creative, LLC* v. *Elenis*, 600 U.S. 570 (2023); *N.Y. State Rifle & Pistol Ass'n* v. *Bruen*, 597 U.S. 1 (2022); *Houston Cmty. Coll. Sys.* v. *Wilson*, 595 U.S. 468 (2022); *Dobbs* v. *Jackson Women's Health Organization*, 597 U.S. 215 (2022); *City of Austin* v. *Reagan Nat'l Advertising of Austin, LLC*, 596 U.S. 61 (2022); *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507 (2022); *Carson* v. *Makin*, 596 U.S. 767 (2022); *Shurtleff* v. *City of Boston*, 596 U.S. 243 (2022); *Mahanoy Area Sch. Dist.* v. *B.L.*, 141 S. Ct. 2038 (2021); *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868 (2021); *Lange* v. *California*, 141 S. Ct. 2011 (2021); *Torres* v. *Madrid*, 592 U.S. 306 (2021); *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139 (2021); *Caniglia* v. *Strom*, 593 U.S. 194 (2021); and *Taylor* v. *Riojas*, 592 U.S. 7 (2020).

constitutional claims in most cases—thereby skewing the intended balance of holding public officials accountable while allowing them to perform their duties reasonably without fear of personal liability and harassing litigation." *Ullery*, 949 F.3d at 1292. Petitioners' rule is therefore "unwarranted and impractical given the current state of the doctrine." *Ibid.*

D. The Court should not expand the textually and historically unjustified qualified immunity doctrine.

Finally, in our conditional cross-petition, we have explained at length that qualified immunity is unlawful and unwarranted as a matter of text, history, and policy: The text of Section 1983 does not provide for any immunities, and the original enacted text—lost as an accident of history rather than a considered amendment—expressly abrogated them; qualified immunity was originally adopted based on historical understandings about common-law immunities that are debated at best; and the current doctrine reflects naked judicial policymaking and, in any event, does not even serve the policy values on which it is premised. See generally Conditional Cross-Pet., No. 23-514.

As we explained, that is all reason why, should the Court grant certiorari in this case, it should also grant the conditional cross-petition to overturn or seriously reevaluate qualified immunity as a logically prior matter. Conditional Cross-Pet., No. 23-514, at 17-34. But it is also reason to deny this petition: If qualified immunity is fundamentally unjustified as a departure from text, history, and sound policy, the Court certainly should not grant certiorari to *expand* the atextual, ahistorical, and unwarranted immunity currently available under the doctrine.

For all these reasons, petitioners' first question presented does not warrant this Court's review.

II. THE SECOND QUESTION PRESENTED IS A MERITLESS REQUEST FOR ERROR CORRECTION.

Petitioners' second question presented asks this Court to assess whether the court of appeals applied clearly established law to the facts of this case at too high a level of abstraction. Pet. ii. This is a naked request for error correction. And even if this Court were in the habit of correcting supposed application errors in unpublished, non-precedential circuit decisions, the court of appeals in fact applied clearly established law at the appropriate level of generality here.

A. Error correction is inappropriate here.

This Court's Rules state that the Court does not grant certiorari to engage in error correction. S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). In the context of qualified immunity, Justices have explained why: "Every year, the courts of appeals decide hundreds if not thousands of cases in which it is debatable whether the evidence in a summary judgment record is just enough or not quite enough to carry the case to trial. If we began to review these decisions we would be swamped, and as a rule we do not do so." *Taylor* v. *Riojas*, 592 U.S. 7, 11 (2020) (Alito, J., concurring).

The question whether a court has applied precedent at the correct level of generality does not relate to any genuine debate among the circuits. This Court has been crystal clear in its command to lower courts "not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742. All of the

circuits apply that law. See, *e.g.*, *Padilla* v. *Yoo*, 678 F.3d 748, 759 (9th Cir. 2012) (applying this Court's prohibition on defining clearly established law at a high level of generality).[8] Thus, Petitioners' question is not an invitation to settle a disputed question of law, but rather a request for specific error correction as to whether the court of appeals characterized the facts of this case at the right level of granularity. In other words, the court of appeals "applied all the correct legal standards," and petitioners "simply disagree[] with the [lower court's] application of [that] test[] to the facts in [this] particular record." *Taylor*, 592 U.S. at 11 (Alito, J., concurring). That does not justify this Court's intervention.

Moreover, Petitioners' request for error correction is especially unfounded in this case, because the opinion below is unpublished. A decision in this case "adds virtually nothing to the law going forward" because the lower court's opinion is not precedential. *Taylor*, 592 U.S. at 11 (Alito, J., concurring). Thus, even assuming some error in the court of appeals' decision (there is none, see *infra* pages 21-24), "qualified immunity would not be available in any similar future case," "even without [this Court's] intervention." *Taylor*, 592 U.S. at 11 (Alito, J., concurring). Nothing in this case warrants the Court's review.

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[8] Compare, *e.g.*, *Daugherty* v. *Sheer*, 891 F.3d 386, 390 (D.C. Cir. 2018) (same); *King* v. *Riley*, 76 F.4th 259, 265-266 (4th Cir. 2023) (same); *Ramirez* v. *Escajeda*, 44 F.4th 287, 292 (5th Cir. 2022) (same); *Chambers* v. *Pennycook*, 641 F.3d 898, 908 (8th Cir. 2011) (same).

B. The court of appeals applied clearly established law at the correct level of generality.

Even setting aside the petition's lack of any important legal question for the Court to settle, the court of appeals did not err in the first place. To the contrary, the court of appeals properly applied clearly established law to the facts of this case.

Just as this Court has required courts to avoid defining clearly established law at too high a level of abstraction, the Court has also been clear that it "is not necessary, of course, that 'the very action in question has previously been held unlawful.'" *Ziglar* v. *Abbasi*, 582 U.S. 120, 151 (2017); accord, *e.g.*, *Wesby*, 583 U.S. at 64 ("[T]here does not have to be 'a case directly on point,'" so long as "existing precedent * * * place[s] the lawfulness of the particular [conduct] 'beyond debate.'") (quoting *al-Kidd*, 563 U.S. at 741). This requirement that precedent fit in a sweet spot between too high a level of abstraction and too stringent a requirement for identical facts is important because defining clearly established law too narrowly would force judges to deny litigants relief in virtually all cases, even where a "reasonable official would have understood that what he is doing violates" the law—the ultimate touchstone of the doctrine. *al-Kidd*, 563 U.S. at 741 (quotation marks omitted; alteration incorporated).

1. Here, the appellate court's decision struck the proper balance. Indeed, the court applied a context-specific rule that is established by reams of precedent, both from within the circuit and from elsewhere: that "[o]fficers may not continue to use force once an individual is subdued and no longer resisting." Pet. App. 2a; accord, *e.g. Hyde* v. *City of Willcox*, 23 F.4th 863,

873 (9th Cir. 2022) ("It is clearly established that officers cannot use intermediate force when a suspect is restrained, has stopped resisting, and does not pose a threat."); *Drummond ex rel. Drummond* v. *City of Anaheim*, 343 F.3d 1052, 1061 (9th Cir. 2003) ("In a situation in which an arrestee surrenders and is rendered helpless, any reasonable officer would know that a continued use of force or a refusal without cause to alleviate its harmful effects constitutes excessive force.") (quoting *LaLonde* v. *County of Riverside*, 204 F.3d 947, 961 (2000)) (alterations incorporated); *Jones* v. *Las Vegas Metro. Police Dep't*, 873 F.3d 1123, 1132 (9th Cir. 2017) (continuous tasing "generally can't be used on a prone subject who exhibits no resistance"); *Watkins* v. *City of Oakland*, 145 F.3d 1087, 1090 (9th Cir. 1998) (allowing police dog to continue attacking "obviously helpless" suspect constituted excessive force).

This rule—that individuals must be free of violent force once subdued—is uniform across the circuits. See, *e.g.*, *Carroll* v. *Ellington*, 800 F.3d 154, 177 (5th Cir. 2015) ("[O]nce a suspect has been handcuffed and subdued, and is no longer resisting, an officer's subsequent use of force is excessive.") (collecting cases); *Wilkins* v. *City of Tulsa*, 33 F.4th 1265, 1277 (10th Cir. 2022) ("Our precedent clearly established [as of 2017] that force against a subdued suspect who does not pose a threat violates the Fourth Amendment") (collecting cases); *Hadley* v. *Gutierrez*, 526 F.3d 1324, 1330 (11th Cir. 2008) ("Our cases hold that gratuitous use of force when a criminal suspect is not resisting arrest constitutes excessive force"); *Coley* v. *Lucas Cnty.*, 799 F.3d 530, 540 (6th Cir. 2015) ("Under the Fourteenth, Fourth, or Eighth Amendments, assaults on subdued, restrained and nonresisting detainees, arrestees, or convicted prisoners are impermissible.");

Miranda-Rivera v. *Toledo-Davila*, 813 F.3d 64, 70 (1st Cir. 2016) ("A reasonable officer would have known that it was unconstitutional to apply force * * * where the arrestee was already physically restrained and did not pose a great physical threat to the officers."); *Abbott* v. *Sangamon Cnty.*, 705 F.3d 706, 732 (7th Cir. 2013) (finding the rule that "police officers cannot continue to use force once a suspect is subdued" to be "well-established") (collecting cases).

2. Moreover, the rule against the use of significant force after an individual stops resisting holds true regardless of the type of force used. Cf. Pet. 12 (quibbling that the court of appeals cited cases involving "tasers, police dogs, and neck restraints"). That is because, as a substantive matter, the excessiveness of force turns primarily on "the relationship between the need for the use of force and the amount of force used" (*Lombardo* v. *City of St. Louis*, 594 U.S. 464, 467 (2021) (quotation marks omitted))—and when a suspect is restrained and non-resisting, there is *no* need for violent force, making *any* violent force unreasonable, regardless of form.

The courts have therefore not hesitated to apply the same rule across a wide variety of types of force.[9] Indeed, as a general matter, the "[l]awfulness of force . . . does not depend on the precise instrument used to apply it,' and '[q]ualified immunity will not protect

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[9] *See, e.g.*, *Phelps* v. *Coy*, 286 F.3d 295, 302 (6th Cir. 2002) (applying rule where officer tackled handcuffed misdemeanor arrestee); *Holmes* v. *Village of Hoffman Estates*, 511 F.3d 673, 686 (7th Cir. 2007) (applying rule where officer slammed head of non-resisting suspect against car roof); *Henderson* v. *Munn*, 439 F.3d 497, 503-504 (8th Cir. 2006) (applying rule where officer hit suspect's leg and pepper sprayed suspect's face after suspect alleged "he was not resisting").

officers who apply excessive and unreasonable force merely because their means of applying it are novel.'" *Boyd* v. *McNamara*, 74 F.4th at 669 (quoting *Newman* v. *Guedry*, 703 F.3d 757, 763-764 (5th Cir. 2012)); accord, *e.g.*, *Jones* v. *Treubig*, 963 F.3d 214, 225 (2d Cir. 2020) (holding that a pepper-spray case clearly established the law with respect to a taser incident, because "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury.") (quotation marks omitted).

* * *

In sum, the court of appeals here applied a widely accepted, non-controversial rule to make a modest, fact-specific conclusion: While the officers' initial use of force to restrain Ms. Jackson was "reasonabl[e]" under the circumstances, "[a] question of fact exists as to * * * whether the officers' use of force continued after the emergency had ended," precluding summary judgment. Pet. App. 3a. Nothing about that conclusion is remotely worthy of this Court's review. Certiorari should be denied.

CONCLUSION

The Court should deny certiorari.

Respectfully submitted.

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