No. 23-377

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

For more than four decades, this Court has left unresolved the recurring question about the sources that may supply "clearly established law" for purposes of qualified immunity. Rather than provide clear guidance to police, plaintiffs, and judges, the Court has repeatedly withheld the answer. In the intervening forty-plus years, a split has developed in *this* Court's jurisprudence.

Respondent Kim Jackson contends that this question is not cert-worthy because the Court has sometimes assumed—without deciding—that circuit precedents may be enough. But the Court's ominous assumption has not settled the debate. On the contrary, appellate judges have observed that the Court's overt reservations cast doubt on the status of circuit decisions and all authorities except this Court's.

The Court's mixed signals have created divisions in the lower courts. Circuits have simply assumed this Court's assumption that circuit precedent suffices. Yet they too have developed conflicting approaches that should be settled. The splits across the circuits originate from the uncertainty surrounding the (non)exclusivity of Supreme Court precedent. All splits can be fixed if the Court finally reveals what it has continually hinted: a Supreme Court precedent is required to clearly establish law for qualified immunity.

Jackson does not contend there is any vehicle problem with *this* first question. This case is the perfect opportunity to resolve an "important issue of

federal law that has not been, but should be, settled by this Court" and to resolve the conflicts within the circuits. S. Ct. R. 10(a), (c).

At the least, the Court should grant certiorari and reverse the Ninth Circuit's egregious disregard for this Court's qualified immunity precedents. This Court is not afraid to roll-up its sleeves or, in this case, press the play button to correct—even summarily—a circuit's abstract application of inapplicable precedents.

The body camera footage is worth a thousand words. No precedent from this Court, the Ninth Circuit, or elsewhere suggests that the depicted conduct of Officers Dutra and Dejesus is unconstitutional beyond debate.

Thus, the Court should grant the petition for a writ of certiorari and reverse.

SUPPLEMENTAL STATEMENT OF THE CASE

Jackson's factual recitation is nearly verbatim from her conditional cross-petition in No. 23-514. *Compare* Cross-Pet.3-9, *with* BIO.2-9. For brevity, Petitioners will rest on their initial statement of the case and the corrections to Jackson's many misstatements of fact detailed in their opposition to the conditional cross-petition. Pet.7-14; BIO-Cross.Pet.4-8.

This story can be told in three photos.

Jackson asserts that Petitioners sensationalize A.M.'s physical danger. BIO.5-6 n.3. But Petitioners' description comes straight from the district court's decision (and the video): "If [Jackson] had dropped A.M. while attempting to pass her to Edmonson, the infant would have fallen from the second story to the ground." *Compare* App.8-9, *with* Pet.8.

A.M. only remained safe because of the officers' quick actions.

After she tries to jump over the railing, officers grab Jackson and place her arm behind her back. *Id*.

Jackson sits down.

ARGUMENT

I. This Court and the Circuits are Split Over the Question Left Open Since *Harlow*.

1. Jackson cannot deny that, since *Harlow*, the law has been unsettled about the authorities that may provide clearly established law for qualified immunity. *Compare, e.g.*, *D.C. v. Wesby*, 583 U.S. 48, 66 n.8 (2018) ("We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity."), *with Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1982) ("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.") (quotations omitted).

Jackson also does not refute that there is an existing split in this Court's precedents over the sources of clearly established law. Pet.15-17. Of late, this Court has strongly indicated that only its own precedents may supply clearly established law, *Wesby*, 583 U.S. at 66 n.8, even though it once intimated otherwise, *U.S. v. Lanier*, 520 U.S. 259, 268-69 (1997).

The Court has been contradictory about where it looks for clearly established law because it has not definitively decided whether parties are limited to the United States Reports. *Compare, e.g.*, *Carroll v. Carman*, 574 U.S. 13, 17 (2014) ("Assuming for the sake of argument that a controlling [in-]circuit precedent could constitute clearly established federal law"), *with Wilson v. Layne*, 526 U.S. 603, 617 (1999) (considering "a consensus of cases of persuasive authority"); *compare also Stanton v. Sims*, 571 U.S. 3, 10 (2013) (considering state court and federal district court authority), *with Wilson*, 526 U.S. at 616 (stating state court and federal district court decisions "of course, cannot 'clearly establish'" a Fourth Amendment violation), *and Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (stating federal district court decisions do not "settle constitutional standards"); *compare also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (considering state and federal regulatory guidance), *with Davis v. Scherer*, 468 U.S. 183, 194 & n.12 (1984) (declining to consider regulatory or administrative provisions).

Jackson makes no effort to reconcile these conflicts. Instead, Jackson asserts that "this Court itself has long established that . . . circuit precedent *can* supply clearly established law for qualified immunity purposes." BIO.10. But, in *Reichle v. Howards*, the Court expressly left open whether "controlling Court of Appeals' authority could be a dispositive source of clearly established law. . . ." 566 U.S. 658, 665-66 (2012). In *Wesby*, the Court again acknowledged the controversy over circuit precedent still lingered. 583 U.S. at 66 n.8 (parenthetically explaining that *Reichle* "reserve[ed] the question whether court of appeals decisions can be 'a dispositive source of clearly established law' ").

The cases containing Jackson's supposed answers to the question pre-date *Reichle* and *Wesby*. Those cases do not answer it. They simply presumed without deep analysis that circuit precedent might clearly establish law. BIO.10-11 (citing *Hope*, 536 U.S. at 741-42 (assuming without discussion or citation that in-circuit, out-of-circuit, and state and federal administrative regulations or guidance can provide clearly established law); *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (analyzing whether courts are restricted to precedents cited by the parties or the district court and then stating a court may use "knowledge of its own [and other relevant] precedents"); *Wilson*, 526 U.S. at 617 (stating without analysis or citation that parties should "[bring] to our attention any cases of controlling authority in their jurisdiction [or] . . . a consensus of cases of persuasive authority"); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (citing *Wilson*'s unsupported

statement that a consensus of persuasive cases may clearly establish law absent controlling authority).

And, recently, this Court has reiterated that it hasn't endorsed the use of circuit cases or anything else as controlling authority. Rather, this Court has stressed that it has been *assuming without deciding* that circuit authority or other non-Supreme Court sources may constitute clearly established law. *Wesby*, 583 U.S. at 66 n.8; *see also* Pet.17 (collecting cases).

The assumption is shaky after *Rivas-Villegas*'s summary reversal. *See* Pet.17. Jackson tries to sidestep *Rivas-Villegas* by characterizing it as merely holding that the circuit's cited precedent was too far afield. BIO.10 n.5. Yet before examining whether the circuit precedent was distinguishable, the Court first faulted the plaintiff and the Ninth Circuit for failing to "identif[y] any Supreme Court case that addresse[d] facts like the ones at issue [t]here." *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021). Thus, *Rivas-Villegas* is a powerful sign that only this Court's precedents qualify as clearly established law.

Despite *Rivas-Villegas*'s apparent message, the Court has not expressed a definitive "view on [the] question" of "what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity." *Wesby*, 583 U.S. at 66 n.8. The Court has not "repeatedly answered the question raised by the petitioners here" or held that circuit precedents are enough. *Reichle*, 566 U.S. at 665-66; *cf.* BIO.11.

This is an important issue of federal law and nationwide public significance that has not been, but should be, settled by this Court. S. Ct. R. 10(c).

2. The unsettled question about the sources for clearly established law has left the circuits floundering. *See* Pet.18-22 (collecting cases). Because it is easy to see the circuits consult vastly different bodies of decisional law, Jackson tries to narrow the scope of the circuit split to contend "no court [has] adopted petitioners' position that only Supreme Court precedents can clearly establish law. . . ." BIO.14.

However, the lower courts' conflicting reliance on various circuit precedents, district court decisions, state cases, and administrative documents trace directly to the forty years of uncertainty about whether this Court's cases are the only source for clearly established law. It is hardly surprising that circuits have adopted this Court's assumption that they may consider intra-circuit precedent.[1] This Court freely admits that it has not said one way or the other whether this

[1] In a new Eleventh Circuit case, the district court and the court of appeals primarily discussed this Court's precedent to determine if the law was clearly established while noting courts may consider circuit authority. *Johnson v. Nocco*, 91 F.4th 1114, 1116 n.1, 1119-20, 1125 (11th Cir. 2024) ("The [d]istrict [c]ourt's answer to the second question this appeal presents was that Supreme Court precedent clearly established [a Fourth Amendment violation]. We disagree. Supreme Court precedent—in particular, the decisions the [d]istrict [c]ourt relied on—did not clearly establish as a matter of Fourth Amendment law" any violation.).

is permissible. *Wesby*, 583 U.S. at 66 n.8; *Reichle*, 566 U.S. at 665-66; *Rivas-Villegas*, 595 U.S. at 6.

Even so, appellate court judges continue to express skepticism about whether they may consider circuit authority. They qualify their qualified immunity opinions with caveats about how this Court has not resolved the issue. *See*, *e.g.*, *Ramirez v. Escajeda*, 44 F.4th 287, 293 (5th Cir. 2022) (providing "caveats" that "the plaintiffs' argument requires us to assume that Fifth Circuit precedent alone can clearly establish the law for qualified immunity purposes, something the Supreme Court has left open"); *see also Crittindon v. LeBlanc*, 37 F.4th 177, 199 n.4 (5th Cir. 2022) (Oldham, J., dissenting) ("The Supreme Court has never said that we can hold executive officers liable under § 1983 for violating the commands of *our* precedent (as opposed to theirs). For purposes of the present discussion, I'll assume that our precedent can 'clearly establish' the meaning of the relevant constitutional provisions.") (internal citation omitted).

These disclaimers place an intolerable cloud over decisions, especially when courts find constitutional violations based on circuit precedent.

Jackson contends that *Estate of Clark v. Walker* and *Ullery v. Bradley* "soundly rejected" limiting the analysis to Supreme Court precedent. BIO.14. But *Walker* observed the split in this Court's cases. 865 F.3d 544, 552 (7th Cir. 2017) ("both cases leave this question unanswered. Other Supreme Court cases indicate circuit precedent is adequate for these

purposes.") (citations omitted). *Ullery* also recognized that "*Wesby* may have suggested this is an open question. . . ." 949 F.3d 1282, 1292 (10th Cir. 2020).

Other judges have called on the Court to "confront the widespread inter-circuit confusion on what constitutes 'clearly established law.'" *Cole v. Carson*, 935 F.3d 444, 472 (5th Cir. 2019) (Willett, J., dissenting).

Jackson does not—and cannot—contend that this case is not an ideal vehicle for *this* question. *Cf.* BIO.15 The Court can resolve all these splits at one time by granting this petition and holding that clearly established law exclusively comes from Supreme Court precedent. *See* S. Ct. R. 10(a).[2]

II. Requiring Clearly Established Law to Originate in this Court Fosters Development Consistent with the Fourth Amendment and Section 1983.

1. Jackson asserts that "[p]etitioners' proposed rule would also stymie the development of fundamental civil liberties. . . ." BIO.15. Jackson's arguments are

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[2] Jackson argues that the Court should not grant review because the opinion below is unpublished. BIO.20. But this Court will grant certiorari even when an opinion is not published because appellate courts cannot bury consequential errors in unpublished orders. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994) (Scalia, J.); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1884 (2018); Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 227-28 (2001).

a repackaging of the well-worn complaints about *Pearson v. Callahan*, 555 U.S. 223 (2009) and the courts' discretion to consider the existence of clearly established law before assessing whether there has been a constitutional violation. BIO.16-18 (discussing *Pearson*).

But "the evidence of stagnation is equivocal. . . . *Pearson* has hardly prevented the courts from articulating constitutional doctrine." Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547, 610 (2020).

2. On the other hand, requiring a governing precedent from this Court will return the law to its proper developmental course. As explained in response to Jackson's conditional cross-petition in No. 23-514, qualified immunity is neither atextual nor ahistorical. *Cf.* BIO.18-19. The Fourth Amendment itself contains an inherent immunity that is eerily similar to current doctrine. Section 1983 explicitly incorporates Founding and *Swift*-era *federal* common law through Section 1988. Therefore, because qualified immunity stems from federal common law, a definitive statement from this Court alone is necessary before law is clearly established.

Should the Court grant the conditional cross-petition, the officers' position is consistent across all issues.

III. The Court Can—and Should—Correct the Ninth Circuit's Plainly Wrong Legal Interpretation.

1. Jackson seeks to avoid review of the second question by describing it as mere error correction that this Court rarely conducts. BIO.19. "But 'rarely' does not mean 'never' "; this Court is not above "roll[ing] up [its] sleeves" and "occasionally digging into" cases. *Lombardo v. City of St. Louis, Missouri*, 594 U.S. 464, 469-73 (2021) (Alito, J., dissenting).

To be sure, Jackson is right "[t]his Court has been crystal clear in its command to lower courts not to define clearly established law at a high level of generality." BIO.19 (citation omitted). Circuits don't always listen. This Court has not shied away from constantly admonishing "courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (collecting cases).

Given the doctrine's national significance, this Court routinely corrects the lower courts' erroneous grants *and* denials of qualified immunity—including summarily.[3] Doing it again here and correcting the

[3] *See*, *e.g.*, *Rivas-Villegas*, 595 U.S. 1; *City of Tahlequah, Oklahoma v. Bond*, 595 U.S. 9 (2021); *Lombardo*, 594 U.S. 464; *Taylor v. Riojas*, 592 U.S. 7 (2020); *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500 (2019); *Wesby*, 583 U.S. 48; *Kisela*, 138 S. Ct. 1148; *White v. Pauly*, 580 U.S. 73 (2017); *Hernandez v. Mesa*, 582 U.S. 548 (2017); *Taylor v. Barkes*, 575 U.S. 822 (2015); *San Francisco v. Sheehan*, 575 U.S. 600 (2015); *Mullenix v. Luna*, 577 U.S. 7 (2015); *Carroll*, 574 U.S. 13; *Plumhoff v. Rickard*, 572 U.S. 765 (2014); *Wood v. Moss*, 572 U.S. 744 (2014); *Stanton v. Sims*, 571 U.S. 3

Ninth Circuit's abstract application of its inapplicable precedents is an easy fix.

2. Jackson does not suggest that any precedent from this Court put the officers on notice beyond debate that their conduct might be unconstitutional. Pet.26-27. Instead, she doubles-down on the Ninth Circuit's improper 30,000-foot characterization of the Fourth Amendment right at issue.

Jackson contends the officers were warned that they could not grab Jackson's limbs to stop her from jumping from a second-story balcony from the generic proposition "officers may not continue to use force once an individual is subdued and no longer resisting," combined with cases about tasers, police dogs, and neck restraints. BIO.21-24.[4]

But neither the abstract principle nor the cited cases clearly established when Jackson allegedly became subdued or the moment when officers could no longer use the level of force they *actually* used.

When events are recorded, this Court will watch the videotape. *Scott v. Harris*, 550 U.S. 372, 378-79 (2007); *Rivas-Villegas*, 595 U.S. at 7. The body camera

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(2013); *Reichle*, 566 U.S. 658; *Ryburn v. Huff*, 565 U.S. 469 (2012); *Filarsky v. Delia*, 566 U.S. 377 (2012); *Messerschmidt v. Millender*, 565 U.S. 535 (2012).

[4] Jackson restates the esoteric principle that officers cannot use "violent" or "*significant* force after an individual stops resisting." BIO.22-23 (emphasis added). "[T]he body camera footage conclusively shows that [the officers'] force was not excessive." App.5-6.

footage shows Jackson continuing to struggle as the officers moved her from the railing, yet the officers never hit, choked, tased, or deployed a K-9 while she calmed down and eventually sat on the ground. App.24, 27.

The video reveals this is not a case with an "obvious" constitutional violation. *Hope*, 536 U.S. at 741. And the footage illustrates that the Ninth Circuit's chosen cases do not "squarely govern" the situation the officers, in fact, faced. *Mullenix*, 577 U.S. at 13.

Nothing in the cited cases defined the "hazy border" when the officers' force stopped being acceptable and became "excessive," *Kisela*, 138 S. Ct. at 1153, even though the Ninth Circuit dissected the replay like the "Zapruder film in slow-motion." *Hyde v. City of Willcox*, 23 F.4th 863, 872-73 (9th Cir. 2022).[5]

The appellate court did not strike "the proper balance" or find the "sweet spot" of specificity. *Cf.* BIO.21. The differences "leap from the [screen]." *Sheehan*, 575 U.S. at 614.

If the Court "rolls up its sleeves" and plays the video, it will see that the Ninth Circuit failed to apply the correct legal standard and once more interpreted its distinguishable precedents at an impermissibly high level of generality. *Bond*, 595 U.S. at 12.

[5] Jackson ignores that *Hyde* was issued three years later. Pet.28.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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