No. 23-_____

In The
Supreme Court of the United States

JEREMY JOHNSON,

Petitioner,

v.

ANDRE D. BOYD,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether circuit court precedent can clearly establish the law for the purpose of qualified immunity analysis, and, if so, under what circumstances can it do so.

II. Whether the Supreme Court should heed the concerns of multiple sitting Fifth Circuit judges and repair the uncertainty and confusion the Fifth Circuit has created through its conflicting and indeterminate precedents relating to split-second use-of-force decisions.

PARTIES TO THE PROCEEDING

Boyd v. McNamara, et al.
Cause No. 20-50945;
United States Court of Appeal for the Fifth Circuit
Plaintiff: Andre Boyd
Defendants: Sheriff Parnell McNamara; Rickey Armstrong; Robert Dillard; McLennan County Jail; Officer Jeremy Johnson

RELATED CASES

- *Andre D. Boyd v. Sheriff Parnell McNamara, et al.*, Cause No. W-19-CA-634-ADA, U.S. District Court for the Western District of Texas, Waco Division. Judgment entered August 21, 2020.
- *Andre D. Boyd v. Sheriff Parnell McNamara, et al.*, No. 20-50945, U.S. Court of Appeals for the Fifth Circuit. Judgment entered July 24, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeremy Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit issued its opinion in *Andre D. Boyd v. Sheriff Parnell McNamara, et al.*, Fifth Circuit Court of Appeals No. 20-50945 on July 24, 2023. This opinion is available at 74 F.4th 662 and is reproduced at Pet. App. 1-24. The District Court's August 21, 2020 opinion in *Andre D. Boyd v. Sheriff Parnell McNamara, et al.*, United States District Court for the Western District of Texas, Waco Division, Cause No. W-19-CA-634-ADA is reproduced at Pet. App. 27-42.

JURISDICTION

The court of appeals entered its judgment and opinion in this case on July 24, 2023.[1] This Court has jurisdiction under 28 U.S.C. §1254(1).

[1] Pet. App. 1-26.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the U.S. Constitution states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

This petition presents the Court with important federal questions concerning the application of qualified immunity.

Although this Court has repeatedly expressed uncertainty about whether circuit court opinions, alone, can clearly establish law for qualified immunity purposes, a sharply divided panel of the Fifth Circuit found three of its own opinions sufficient to clearly establish the law in a split-second use-of-force case. The panel majority did so based only on its own *ipse dixit*, explaining that Fifth Circuit precedent was sufficient to clearly establish the law because other Fifth Circuit panels had previously found other rules of law clearly established by relying only on Fifth Circuit opinions. In so holding, the panel majority disregarded a vigorous dissent which noted this Court's longstanding

uncertainty about this issue and the fact that this Court has repeatedly reserved this very question. The Court should grant review because the instant appeal cleanly presents an important federal question of broad application—whether circuit court precedent alone can clearly establish the law.

This petition also presents important related questions concerning the circumstances under which circuit court precedent could, or could not, clearly establish the law. The panel majority determined that the law regarding split-second excessive force decisions by a corrections official was clearly established based only on three of its prior excessive force opinions which arose outside of a correctional setting. The Court should grant review to determine whether circuit court opinions alone could clearly establish the law when: (1) the lower court opinions arose from a meaningfully different context; and (2) lower court decisions are inconsistent.

The Court should also grant review to correct the Fifth Circuit's error in arrogating to itself authority that belongs only to this Court. The panel majority mistakenly asserted that judicial disagreement about the contours of a right does not automatically render the law unclear if the Fifth Circuit has been clear. This Court held no such thing, but only noted that judicial disagreement does not automatically render the law unclear if **this Court** has been clear.

Finally, the Court should grant review to address the entrenched inconsistencies and uncertainties of

the Fifth Circuit's precedent relating to officers' split-second decisions about using force. This appeal marks the latest in a line of cases in which sitting Fifth Circuit judges have bemoaned the confusing and conflicting state of excessive-force jurisprudence in the Fifth Circuit—which the Circuit itself cannot, or will not, repair. The Fifth Circuit's inconsistency in this area disserves one important purpose of qualified immunity: encouraging officers to enforce the law, even in tense, uncertain, and rapidly changing situations, rather than stand down and jeopardize community safety. The Court should grant review to address this important issue.

STATEMENT OF THE CASE

Andre Boyd asserted a claim for excessive force under 42 U.S.C. §1983 in connection with an altercation Boyd had with a jailer, Officer Jeremy Johnson, while Boyd was a pretrial detainee.[2] Boyd claimed that, on August 28, 2019, he had a verbal altercation with Johnson who then attempted to handcuff Boyd. While Johnson was attempting to apply the handcuffs, Boyd pulled his left arm away, turned his head toward Johnson and yelled at the officer.[3] Johnson then deployed his taser to gain control over Boyd.[4]

[2] Pet. App. 28-29.

[3] Pet. App. 29-30.

[4] Pet. App. 29.

In support of his motion for summary judgment in which he asserted qualified immunity, Johnson submitted a video recording of the incident.[5] The district court and the Fifth Circuit reviewed this video evidence.[6]

The district court found that "the video evidence confirms that there was no violation of [Boyd's] constitutional rights," because the video evidence "shows no undue force was used against [Boyd]," who "reacted strongly to Johnson's attempt to apply hand restraints and turned emphatically toward Johnson."[7] The district court explained that Boyd "admits he was arguing with Johnson and being disruptive," and, when Johnson "attempted to restrain [Boyd, he] jerked away and turned around demonstratively and continued yelling and arguing with Johnson."[8] The district court concluded that Boyd "was tasered due to his aggressive and non-compliant behavior and the amount of force used was objectively reasonable."[9]

A sharply divided panel of the Fifth Circuit reversed the district court's decision.[10] The panel majority held that a jury could find that Boyd posed no threat, noting that Boyd stood with his back to Johnson "for a full four seconds before Johnson deployed his

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[5] Pet. App. 31.

[6] Pet. App. 8, 23-24, 37.

[7] Pet. App. 37.

[8] Pet. App. 37.

[9] Pet. App. 38.

[10] Pet. App. 10-24.

taser."[11] The panel majority then held that three Fifth Circuit cases involving excessive force claims in connection with arrests were sufficient "to put Johnson on notice that his actions, on at least one permissible reading of the evidence, constituted unconstitutionally excessive force."[12]

In response to Johnson's argument that it is not clear whether Fifth Circuit precedents, alone, as opposed to Supreme Court opinions, can clearly establish the law for purposes of qualified immunity, the panel majority cited nineteen of its own precedents in which Fifth Circuit panels had relied exclusively on Fifth Circuit opinions to hold that various rules of law were clearly established.[13]

In response to Johnson's concern about how he could have been on notice that his conduct would violate the law, given that the district court found no constitutional violation, the panel majority contended that "[t]he fact that 'other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear' if this circuit has been clear."[14]

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[11] Pet. App. 8.

[12] Pet. App. 11-14 (relying on *Trammell v. Fruge*, 868 F.3d 332 (5th Cir. 2017); *Hanks v. Rogers*, 853 F.3d 738 (5th Cir. 2017); *Ramirez v. Martinez*, 716 F.3d 369 (5th Cir. 2013)).

[13] Pet. App. 16-19 and n.4.

[14] Pet. App. 20 (partially quoting *Safford Unif. Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 378 (2009)).

Judge Andrew Oldham dissented from the panel majority's holding on Boyd's excessive force claim, explaining that this Court has never authorized circuit courts to rely exclusively on their own precedent to find that a rule was clearly established for qualified immunity purposes.[15] Judge Oldham opined that the Fifth Circuit's split-second excessive force precedent does not provide sufficient notice to officers concerning the legality of their conduct because it is "often-contradictory" and "deeply indeterminate."[16] Judge Oldham concluded by expressing his opinion that "it is unwise to give a panel of three judges the power to set clearly established law and thereby bind every law enforcement officer" throughout the Fifth Circuit, and that "it is particularly unwise when the underlying legal standard is so open-ended and our precedents are so contradictory."[17]

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[15] Pet. App. 21-22.

[16] Pet. App. 22-23.

[17] Pet. App. 24.

REASONS FOR GRANTING THE WRIT

A. The Fifth Circuit Has Decided an Important Federal Question That Has Not Been, But Should Be, Settled by This Court: Whether, and If So, Under What Circumstances, Could Opinions From Circuit Courts of Appeals Clearly Establish the Law For Qualified Immunity Purposes?

The Court should grant review in this matter because this appeal cleanly presents an important federal question that this Court has repeatedly declined to settle—whether any precedent, other than this Court's own decisions, is sufficient to clearly establish the law for the purpose of qualified immunity analysis.

The case at bar illustrates significant division among circuit court judges with respect to the proper analysis of the "clearly established law" prong of qualified immunity analysis. The Court should take this opportunity to answer this important federal question which affects a multitude of litigants and governmental officials throughout the country and which has remained open for many years.

1. This Court Has Never Determined Whether Circuit Court Opinions Can Clearly Establish the Law.

In applying the "clearly established law" prong of qualified immunity analysis,[18] this Court has noted that a rule must be "settled law, meaning that it is "dictated by 'controlling authority' or 'a robust consensus of cases of persuasive authority."[19] However, this Court has neither explained those terms nor determined whether, and if so, under what circumstances, circuit court opinions could clearly establish the law. Instead, this Court has repeatedly expressed uncertainty on this point and reserved this question.[20]

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[18] *E.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (identifying the two prongs of qualified immunity).

[19] *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (quoting *al-Kidd*, 563 U.S. at 741-42).

[20] *E.g.*, *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021) (expressing uncertainty as to whether circuit court precedent could clearly establish law for the purposes of §1983); *Wesby*, 583 U.S. at 66 n.8 ("We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity.") (citing *Reichle v. Howards*, 566 U. S. 658, 665-66 (2012) (reserving the question whether court of appeals decisions can be "a dispositive source of clearly established law")); *City & County of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 614 (2015) ("even if 'a controlling circuit precedent could constitute clearly established federal law in these circumstances,' it does not do so here") (quoting *Carroll v. Carman*, 574 U.S. 13, 17 (2014) (per curiam)); *see also Kisela v. Hughes*, 548 U.S. ___, 138 S. Ct. 1148, 1153 (2018) (per curiam) (quoting *Sheehan*, 575 U.S. at 614); *Taylor v. Barkes*, 575 U.S. 822, 826 (2015) (per curiam) (quoting *Sheehan*, 575 U.S. at 617).

2. A Sharply Divided Panel Improperly Found Three of Its Own Decisions Sufficient to Clearly Establish the Law.

In the instant appeal, a sharply divided panel of the Fifth Circuit reversed an order granting summary judgment to Johnson, a jailer who asserted qualified immunity in response to Boyd's claim that he was subjected to excessive force as a pretrial detainee.[21] The panel majority found Boyd's reliance on three Fifth Circuit opinions addressing Fourth Amendment excessive force claims in connection with arrests[22] sufficient, alone, to clearly establish the relevant law for the purpose of determining whether Johnson was entitled to qualified immunity from Boyd's Fourteenth Amendment excessive force claim which arose in a correctional setting.[23]

As this Court has "not yet decided what precedents—other than [this Court's] own—qualify as controlling authority for purposes of qualified immunity,"[24] Johnson argued that it is not clear whether circuit court precedents, alone, can clearly establish the law for qualified immunity analysis.[25] The panel majority responded to this argument by stating, "[a] proverbial

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[21] Pet. App. 10-24.

[22] *Supra* at n.12.

[23] Pet. App. 10-20. The district court found that Johnson had not committed any constitutional violation and was, therefore, entitled to qualified immunity. Pet. App. 37-38.

[24] *Wesby*, 583 U.S. at 66 n.8.

[25] Pet. App. 16.

mountain of binding authority is to the contrary."[26] The panel majority then cited nineteen cases in which the Fifth Circuit relied solely upon its own opinions to determine that various rules of law had been clearly established.[27] The majority noted, "[w]e routinely rely on our own cases to determine whether a rule of law has been clearly established."[28] Thus, the panel majority reasoned that Fifth Circuit precedent is sufficient to clearly establish the law because the Fifth Circuit has repeatedly found rules of law to be clearly established based only on its own precedent. The panel majority neither acknowledged nor addressed the fact that this Court has repeatedly expressed uncertainty about whether lower courts' opinions, alone, could clearly establish propositions of law.

Judge Oldham dissented from the panel majority's holding on Boyd's excessive force claim, explaining that this Court has never authorized lower courts to rely exclusively on circuit court precedent to clearly establish the law.[29] Judge Oldham opined that, without a clear instruction from this Court regarding the relevance of circuit precedent, "we cannot expect everyday officers to draw the necessary inferences from our large, ever-growing, and often-contradictory

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[26] Pet. App. 16.

[27] Pet. App. 16-19 [n.4].

[28] Pet. App. 16, 19.

[29] Pet. App. 22 (citing *Wesby*, 583 U.S. at 66 n.8; *Rivas-Villegas*, 595 U.S. at 6; and *Reichle*, 566 U.S. at 665).

precedents."[30] Judge Oldham concluded by expressing his belief that "it is unwise to give a panel of three judges the power to set clearly established law and thereby bind every law enforcement officer in three States, governing every conceivable emergency situation in every community" across the circuit.[31]

Judge Oldham's dissent reflects a broader divide within the circuit, in which multiple Fifth Circuit judges have relied upon this Court's statements in *Wesby*, *Rivas-Villegas*, *Reichle*, and/or *Carroll*, to challenge judges' reliance on circuit court opinions alone to find law clearly established.[32]

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[30] Pet. App. 22 (citing *al-Kidd*, 563 U.S. at 741 (regarding the need for a high level of clarity about the underlying law, such that every reasonable official would understand the type of conduct which would violate it); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (emphasizing the need for fair warning to officers); and *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (explaining that "qualified immunity protects 'all but the plainly incompetent or those who *knowingly* violate the law' ") (emphasis Judge Oldham's)).

[31] Pet. App. 24.

[32] *E.g.*, *Cole v. Carson*, 935 F.3d 444, 460 n.4 (5th Cir. 2019) (en banc) (Jones, J., dissenting, joined by Smith, Ho, Duncan, Oldham, JJ., and Owen [now Richman], C.J.) (relying on *Wesby*, 583 U.S. at 66 n.8, *Carroll*, 574 U.S. at 17, and *Reichle*, 566 U.S. at 665-66 to challenge a panel's finding of clearly established law based only on unpublished Fifth Circuit cases); *Ramirez v. Escajeda*, 44 F.4th 287, 292-93 (5th Cir. 2022) (Jones, Stewart, Duncan, JJ.) (citing *Rivas-Villegas* and refusing to assume that Fifth Circuit precedent alone can clearly establish the law); *see also*, *e.g.*, *Smith v. Linthicum*, No. 21-20232, 2022 WL 7284285, *5 n.5 (5th Cir. Oct. 12, 2022), (King and Engelhardt, JJ., recognizing that "the Supreme Court has explicitly left open the question of whether Circuit law alone can clearly establish the law for

The Court should grant review to settle the fundamental question of whether precedent from lower courts can clearly establish rules of law for qualified immunity purposes.

If so, the Court should also grant review to explain the circumstances under which lower courts' opinions could, or could not, provide the necessary clarity and notice to governmental officials about the legality of their conduct.[33] In the circumstances presented by this appeal, the Court should determine:

(1) the types of factual distinctions which would preclude circuit court opinions from clearly establishing the law with respect to split-second use-of-force decisions; and

(2) whether judicial disagreement among circuit courts or within a circuit court prevents circuit court opinions from clearly establishing the law.

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qualified immunity purposes," citing *Rivas-Villegas*, 595 U.S. at 6, but stating that the Fifth Circuit has a practice of assigning its own decisions such legal weight); *id*. at *7 n.3, (Duncan, J., dissenting from panel's finding that one Fifth Circuit case was sufficient to clearly establish the law, citing *Rivas-Villegas*, 595 U.S. at 6).

[33] *E.g.*, *Reichle*, 566 U.S. at 664 ("To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right.") (citations omitted, cleaned up); *Davis v. Scherer*, 468 U.S. 183, 195 (1984) ("officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability").

3. Certain Types of Factual Distinctions Should Preclude Circuit Court Opinions From Clearly Establishing the Law in Split-Second Use-of-Force Cases.

The Court should grant review to identify the types of factual distinctions which would preclude circuit court opinions from providing officers with sufficient notice about the legality of a split-second decision to use force.

The case at bar illustrates this issue. Although the lawsuit involves an excessive force claim by a pretrial detainee against a jailer, the panel majority found the applicable law clearly established based only on three of its own opinions which did not involve a correctional setting.[34] It is doubtful that use-of-force cases arising outside of correctional settings could provide corrections officers with sufficient notice about the legality of a jailer's split-second decision to use force against an inmate, given: (1) the fact that the applicable constitutional standard is "not capable of precise definition";[35] (2) special concerns about safety and the need to maintain order within correctional facilities;[36] and (3) the need to identify clearly established law at a high level

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[34] *Supra* at n.12.

[35] *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); *see also Lombardo v. City of St. Louis*, 594 U.S. ___, 141 S. Ct. 2239, 2241 (2021) (per curiam) (noting the fact-specific nature of the standard and stating that courts "'cannot apply this standard mechanically'") (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015)).

[36] *Kingsley*, 576 U.S. at 399-400; *Graham*, 490 U.S. at 397; *Bell*, 441 U.S. at 540.

of particularity when analyzing qualified immunity for excessive force claims.[37]

In assessing claims of excessive force in a correctional setting, courts must determine whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them.[38] Courts "cannot apply this standard mechanically" but must give "careful attention to the facts and circumstances of each particular case."[39] Courts must take into account the "'legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained.'"[40]

This Court recognizes that running a correctional facility is an inordinately difficult undertaking and that maintaining safety and order at jails "'requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face.'"[41] Correctional officers daily face significant concerns about safety and order within their facilities and, therefore, "must be able to take

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[37] *E.g.*, *Mullenix v. Luna*, 577 U.S. 7, 12-13 (2015) (per curiam) (and cases cited therein).

[38] *Lombardo*, 141 S. Ct. at 2241 (citing *Graham*, 490 U.S. at 397).

[39] *Id*. (citing *Kingsley*, 576 U.S. at 397 and *Graham*, 490 U.S. at 396).

[40] *Kingsley*, 576 U.S. at 397 (quoting *Bell*, 441 U.S. at 540).

[41] *Kingsley*, 576 U.S. at 399 (quoting *Florence v. Bd. of Chosen Freeholders of County of Burlington*, 566 U.S. 318, 326 (2012)); *see also Turner v. Safley*, 482 U.S. 78, 84-85 (1987) ("The difficulties of operating a detention center must not be underestimated by the courts.").

steps to maintain security and order at the institution" where an individual is detained.[42] Indeed, ten years ago, this Court recognized that "[i]nmates commit more than 10,000 assaults on correctional staff every year and many more among themselves."[43] This Court has long counseled lower courts that considerations of maintaining security and order within correctional facilities "are peculiarly within the province and professional expertise of corrections officials."[44] Knowing that "[o]fficers facing disturbances 'are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving,'" this Court directs that lower courts "**must** take account of the legitimate interests in managing a jail, acknowledging as part of the objective reasonableness analysis that deference to policies and practices needed to maintain order and institutional security is appropriate."[45]

Given the nature of excessive force analysis, Judge Oldham opined that it is "particularly unwise" to give a panel of three judges the power to set clearly established law "when the underlying legal standard is so open-ended and our precedents are so contradictory."[46] Indeed, noting that its objective reasonableness test for excessive force claims "'is not capable of precise definition or mechanical application,'" this Court has held

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[42] *Bell*, 441 U.S. at 540.

[43] *Florence*, 566 U.S. at 333.

[44] *Bell*, 441 U.S. at 540 n.23.

[45] *Kingsley*, 576 U.S. at 399-400 (quoting *Graham*, 490 U.S. at 397) (emphasis added).

[46] Pet. App. 24.

that its own excessive force opinions do not provide fair warning to officers about the constitutionality of a given use of force.[47]

Circuit court opinions which address excessive force claims under the Fourth Amendment in connection with arrests do not analyze the unique dangers and special safety concerns present in a detention facility. Therefore, such opinions do not address one of the factors necessary to a finding of excessive force under the Fourteenth Amendment for conduct in a detention facility and cannot clearly establish the law for claims arising in that unique setting.[48]

4. Governmental Officials Cannot Receive Sufficient Clarity or Notice About the Legality of Their Conduct When Lower Court Judges Disagree About How to Apply a Fact-Specific Rule of Law.

This Court has repeatedly stressed that qualified immunity gives public officials breathing room to make mistakes and that, properly applied, it protects "all but the plainly incompetent or those who knowingly

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[47] *Brosseau*, 543 U.S. at 199 (quoting *Graham*, 490 U.S. at 396 and citing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

[48] *See*, *e.g.*, *Young v. Kent County Sheriff's Dep't*, No. 21-1222, 2022 WL 94990, *7 (6th Cir. Jan. 10, 2022) (Murphy, J., dissenting) (explaining that, in light of this Court's holdings in *Rivas-Villegas*, 595 U.S. at 6, *Kisela*, 138 S. Ct. at 1153, and *Mullenix*, 577 U.S. at 13, the distinction between use-of-force cases involving arrests and those involving an attempt to maintain security at a jail is material).

violate the law."[49] Governmental officials cannot be said to have been plainly incompetent or to have knowingly violated the law when judges, including circuit court judges, disagree about application of that rule of law.

The panel majority in the instant appeal rejected the argument that a jailer could not have received sufficient notice about the illegality of his conduct if judges had found such conduct constitutional.[50] Misapplying a statement from this Court, the majority opined "[t]he fact that 'other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear' if **this circuit** has been clear."[51] In *Safford*, this Court explained that judicial disagreement about the contours of a right does not necessarily render the law unclear if **this Court** has been clear—not if **a circuit court** has been clear.[52] Indeed, this Court granted qualified immunity in *Safford* because circuits courts' varied holdings on the underlying rule of law demonstrated that this Court had not been sufficiently clear in its prior statement of law.[53]

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[49] *E.g.*, *City of Tahlequah, Oklahoma v. Bond*, 595 U.S. 9, 12 (2021) (per curiam); *Mullenix*, 577 U.S. at 12; *Malley*, 475 U.S. at 341.

[50] Pet. App. 20.

[51] Pet. App. 20 (partially quoting *Safford*, 557 U.S. at 378) (emphasis added).

[52] *Safford*, 557 U.S. at 378.

[53] *Id*.

The Court should grant review to correct the Fifth Circuit's misapplication of this Court's statement in *Safford* and to determine whether judicial disagreement among circuit courts or within a circuit court prevents a rule of law from being clearly established.

a. Judicial Disagreement Among Circuit Courts Renders the Law Unclear.

This Court has recognized that governmental officials can look to precedent from courts outside of their own jurisdictions to determine the legality of their actions.[54] This makes sense because the meaning of constitutional provisions cannot vary depending upon one's location within the country. How, then, could every reasonable official be on notice that his conduct would violate the law when circuit courts' opinions differ about the application of that law? To the contrary, this Court recognizes that public officials are entitled to immunity when circuit courts, or circuit court judges, disagree about constitutional questions.[55]

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[54] *E.g.*, *Mullenix*, 577 U.S. at 17 (analyzing a case from a sister circuit which suggested that an officer's threat assessment was reasonable); *Pearson v. Callahan*, 555 U.S. 223, 244-45 (2009) (finding no violation of clearly established law because out-of-circuit opinions supported the official's understanding of the law).

[55] *E.g.*, *Taylor*, 575 U.S. at 826 (rejecting a circuit court's reliance on two of its own opinions which contradicted holdings from other circuit courts); *Carroll*, 574 U.S. at 19-20 (finding that a proposition of law was not "beyond debate" because the only circuit court opinion on which the appellate court relied conflicted with cases from other circuits); *Wilson v. Layne*, 526 U.S. 603, 618

In the context of the instant appeal, the law was not clearly established because Johnson's conduct conformed to holdings from the Fourth and Eighth Circuits which found officers' force reasonable in light of the special concerns applicable in the correctional setting.[56]

b. Judicial Disagreement Within a Circuit Court Renders the Law Unclear.

The panel majority's misapplication of this Court's statement in *Safford* also merits review because it is

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(1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."); *see also al-Kidd*, 563 U.S. at 743 (finding that the official was neither plainly incompetent, nor knowingly violating the law, in part because eight circuit court judges found the conduct constitutional).

[56] *E.g.*, *Beale v. Madigan*, 668 Fed. App'x 448, 449 (4th Cir. 2016) (per curiam) (applying *Kingsley*, 576 U.S. at 397, to find that corrections officer did not use excessive force when they tased a handcuffed pretrial detainee for more than twenty-five seconds after the detainee engaged in a verbal confrontation with a jailer and refused to sit); *see also Beale v. Madigan*, No. 5:11-CT-3244-F, 2014 WL 12513870 at *1 (E.D.N.C. Aug. 27, 2014) (providing the detainee's contentions about the context and force used); *Hollingsworth v. City of St. Ann*, 800 F.3d 985, 988, 990-91 (8th Cir. 2015) (corrections officer did not violate clearly established law when he repeatedly tased a pretrial detainee who refused to change into a detention center jumpsuit and who swore at the officer); *see also Parrish v. Dingman*, 912 F.3d 464, 468-69 (8th Cir. 2019) (applying *Kingsley*, 576 U.S. at 399-400 to find that a jailer did not use excessive force when he forced a pretrial detainee into a wall and brought him to the ground for handcuffing after the detainee stepped forward toward an open cell door while holding a mattress).

inaccurate—the Fifth Circuit has been far from clear in its holdings concerning officers' split-second decisions about using force, including their opinions relating specifically to tasing.

With good cause Judge Oldham queried how "everyday officers" could draw the necessary inferences about the legality of their conduct from the Fifth Circuit's often-contradictory precedents.[57] Judge Oldham wondered how an officer is supposed to choose, "in a dangerous split-second moment" whether to follow two Fifth Circuit opinions which found tasing acceptable—even when the suspect appeared to have surrendered or the suspect was unresponsive and hanging from a basketball hoop with a rope around his neck—or to follow a Fifth Circuit opinion which found tasing excessive when a man who merely arrived at a location where police were executing an arrest warrant for a different person refused to put his hands behind his back and pulled his arm away from an officer.[58]

Other cases further demonstrate widespread judicial disagreement within Fifth Circuit in split-second use-of-force cases, including cases involving tasing or cases arising in a correctional setting. For instance, nine months before the panel issued its opinion in the instant case, another Fifth Circuit panel decided a case in which an officer repeatedly tased a suspect who

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[57] Pet. App. 22.

[58] Pet. App. 22-23 (citing *Salazar v. Molina*, 37 F.4th 278 (5th Cir. 2022); *Ramirez*, 44 F.4th at 287; and *Ramirez*, 716 F.3d at 369).

claims that he stopped running, turned his head slightly toward the officer, and raised his hands in the air as if to surrender.[59] The Fifth Circuit affirmed the officer's entitlement to qualified immunity based only on the clearly established law prong.[60] The *Henderson* panel rejected the plaintiff's reliance on *Trammell* and *Hanks*,[61] explaining that, because these cases arose under different circumstances, the plaintiff relied on them only for general statements of law, and "such general statements are insufficient to produce clearly established law."[62]

In *Cloud*, a Fifth Circuit panel found that an officer did not use excessive force when he twice tased a suspect who turned toward the officer while the officer was trying to handcuff the suspect.[63] The panel rejected the suspect's contention that he only turned around to read the officer's lips, explaining that "we measure excessive force by the objective circumstances, not by the subjective intentions of the arrestee."[64] The panel also concluded that the officer was justified in tasing the suspect again within seconds of his first tase

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[59] *Henderson v. Harris County, Tex.*, 51 F.4th 125, 129 (5th Cir. 2022) (per curiam).

[60] *Id*. at 135.

[61] *Trammell*, 868 F.3d at 343; *Hanks*, 853 F.3d at 745-46. These are two of the three Fifth Circuit opinions which the panel majority in the instant appeal found sufficient to clearly establish the law. Pet. App. 12-13.

[62] *Henderson*, 51 F.4th at 134 (citation omitted).

[63] *Cloud v. Stone*, 993 F.3d 379, 385-87 (5th Cir. 2021).

[64] *Id*. at 386.

because the initial tase had no effect and the situation remained tense, uncertain, and rapidly evolving.[65]

In *Tennyson*, an excessive force case arising in a correctional setting, the Fifth Circuit recognized a corrections officer's entitlement to qualified immunity when the officer dislocated an inmate's shoulder when attempting to handcuff the inmate.[66] The inmate claimed that he and eight other inmates were called out of their cells for rapping and/or talking loudly and were told to face the wall.[67] The inmate contended that, as he was facing the wall, he told a corrections officer that she had the wrong people and that she was engaging in a discriminatory investigation based on the inmates' race.[68] According to the inmate, "before he completed his remarks, another . . . officer approached him from behind 'grabbing and twisting his arm with his body against the wall, then slammed him to the floor.' "[69] The Fifth Circuit found that the officer's use of force was not unreasonable.[70]

In *Waddleton*, the Fifth Circuit approved corrections officers' use of force when, in response to an angry inmate's sudden movement in which he turned toward

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[65] *Id*.

[66] *Tennyson v. Villarreal*, 801 Fed. App'x 295, 296 (5th Cir. 2020) (per curiam).

[67] *Tennyson v. Harris County, Tex.*, No. 4:18-CV-0119, 2019 WL 2161562, *1 (S.D. Tex. May 17, 2019).

[68] *Id*.

[69] *Id*. (cleaned up).

[70] *Tennyson*, 801 Fed. App'x at 296.

two officers, the officers used a take-down technique to bring the already-handcuffed inmate to the ground.[71] The court explained that "the officers reasonably perceived [the inmate's] sudden action as a threat requiring the use of force, even if the movement was caused by a loss of balance."[72]

In *Fairchild*, the Fifth Circuit found that it was not clearly established that using pepper spray on a pretrial detainee multiple times and throwing her to the ground were excessive uses of force when the detainee refused directions to stop tapping her hairbrush on her cell door.[73]

These cases mark a significant departure from the panel majority's reasoning in the instant appeal.[74] The Court should grant review to address whether such widespread judicial disagreement among circuit courts and within circuit court decisions precludes a circuit court from finding the relevant rule of law clearly established based only on a few of that circuit court's opinions.

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[71] *Waddleton v. Rodriguez*, 750 Fed. App'x 248, 251, 254 (5th Cir. 2018) (per curiam).

[72] *Id*. at 254.

[73] *Fairchild v. Coryell County, Tex.*, 40 F.4th 359, 364, 367 (5th Cir. 2022).

[74] Pet. App. 9-14.

B. The Court Should Repair the Uncertainty the Fifth Circuit Has Created Through Its Conflicting and Deeply Indeterminate Opinions Addressing Split-Second Use-of-Force Decisions.

The Court should heed the concerns of multiple sitting Fifth Circuit judges and grant review to repair the confusion the Fifth Circuit has created through its conflicting and indeterminate decisions about qualified immunity in cases involving officers' split-second decisions to use force.

In the instant appeal, Judge Oldham expressed concerns about the Fifth Circuit's excessive force precedent, opining that the Circuit's inconsistent decisions about tasing do not provide sufficient guidance to officers about whether they can constitutionally use that level of force in a given situation.[75] Judge Oldham is "increasingly concerned" that the Fifth Circuit's "excessive-force cases are governed by Justice Stewart's unsatisfying standard of 'I know it when I see it.'"[76] Characterizing the Fifth Circuit's excessive force precedent as "deeply indeterminate," Judge Oldham stated, "when we are bound only by conflicting circuit precedent, it is unclear to me if and how we are bound at all."[77] Judge Oldham believes that the Fifth Circuit's exclusive reliance on its own excessive force precedent

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[75] Pet. App. 22-23.

[76] Pet. App. 23 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

[77] Pet. App. 23.

contributes to the Circuit's "predictably unpredictable interpretations of the 'hazy border between excessive and acceptable force.' "[78]

Judge Oldham's worries in the instant appeal echo other judges' concerns about the confusing and conflicting state of excessive-force jurisprudence in the Fifth Circuit—which the Circuit itself cannot, or will not, repair.

For example, in connection with the Fifth Circuit's denial of en banc review in *Crane*, six Fifth Circuit judges, including two judges who served on the panel in the instant appeal, disagreed with the *Crane* panel's qualified immunity analysis and expressed frustration about the Fifth Circuit's unwillingness, as a body, to issue consistent opinions in split-second use-of-force cases.[79] Judge Oldham and his co-dissenters described the Fifth Circuit's refusal to review the *Crane* opinion en banc as "revelatory of a general reluctance (at best) or refusal (at worst) to devote the full court's resources to qualified-immunity cases" and characterized this as "imprudent."[80] Judge James Ho characterized the Fifth

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[78] Pet. App. 24 (quoting *Brosseau*, 543 U.S. at 201 and citing this Court's recognition in *Scott v. Harris*, 550 U.S. 372, 383-84 (2007) that "there is 'no obvious way to quantify' risks to decide whether force is reasonable").

[79] *Crane v. City of Arlington, Tex.*, 60 F.4th 976, 977-79 (5th Cir. 2023) (per curiam). In July of 2023, this Court requested a response to the petitions for writ of certiorari in the *Crane* case, and these petitions are currently set for conference on October 27, 2023.

[80] *Crane*, 60 F.4th at 978 (Oldham, J., joined by Jones, Smith, Duncan, and Wilson, JJ., dissenting from denial of rehearing en

Circuit's split-second excessive force opinions as "confusing to citizens and police officers in our circuit" but voted against rehearing en banc because he saw no hope of advancing the rule of law within the Circuit.[81] According to the dissenting judges and Judge Ho, "we sow the seeds of uncertainty in our [excessive force] precedents—which grow into a briar patch of conflicting rules, ensnaring district courts and litigants alike."[82] At least one district judge in the Fifth Circuit has forthrightly agreed that the Circuit's conflicting excessive force opinions create difficulty for trial courts.[83]

In *Winzer*, Judge Edith Clement criticized a panel opinion, "written from the comfort of courthouse chambers" which ignored the deference judges owe to officers' split-second decisions about the need for force, explaining that the opinion improperly encourages

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banc). Chief Judge Richman joined Judges Jones, Smith, Duncan, Oldham, and Wilson voting in favor of rehearing en banc but did not file or join an opinion.

[81] *Id*. at 978 (Ho, J., concurring in denial of rehearing en banc, but agreeing with the dissenting judges that the panel should have granted qualified immunity).

[82] *Id*. at 978-79.

[83] *Shanks v. City of Arlington*, No. 4:22-CV-00573-P, 2022 WL 17835509, *2 (N.D. Tex. Dec. 21, 2022) (noting that the Fifth Circuit's application of the qualified immunity test "is often a morass of unpredictability"); *Salinas v. Loud*, No. 4:22-CV-0837-P, 2022 WL 17669724, *6 (N.D. Tex. Dec. 14, 2022) ("sailing through the notoriously murky and choppy precedent from the Fifth Circuit in qualified immunity cases is a daunting and confusing task for any district court").

timidity from law enforcement officers.[84] Judge Clement noted that qualified immunity should prevent officers from having "to parse nuances in case law from various courts and jurisdictions to discover the bounds of their conduct" and expressed the hope that the panel majority's "errors will be corrected before we face their effects."[85] In another ten to six vote, the Fifth Circuit denied rehearing en banc in *Winzer*.[86] Dissenting from the denial of en banc review, Judge Ho, joined by Judges Smith, Clement, and Engelhardt, expressed "deep concerns" that the Fifth Circuit's spit-second excessive force opinions send a dangerous message to law enforcement officers—"[s]ee something, do nothing."[87] This troubling message contravenes this Court's guidance,[88] and that of six sitting Fifth Circuit judges, concerning how officers should respond to emergent situations.[89]

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[84] *Winzer v. Kaufman County*, 916 F.3d 464, 482 (5th Cir. 2019) (per curiam) (Clement, J., dissenting in part).

[85] *Id*. at 480, 483.

[86] *Winzer v. Kaufman County*, 940 F.3d 900 (5th Cir. 2019) (per curiam).

[87] *Id*. at 902-03 (Ho., J., joined by Smith, Clement, and Engelhardt, JJ., dissenting from denial of rehearing en banc).

[88] *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (noting that "officials should not err always on the side of caution because they fear being sued") (citation omitted).

[89] "In the wide gap between acceptable and excessive uses of force, however, immunity serves its important purpose of encouraging officers to enforce the law, in 'tense, uncertain and rapidly evolving' split-second situations, rather than stand down and jeopardize community safety." *Cole*, 935 F.3d at 465 (Jones, J.,

To the extent that the Fifth Circuit continues to disregard this Court's repeated admonishments about the particular importance of defining clearly established law at a high level of specificity when analyzing split-second decisions in excessive force cases[90] and continues to issue contradictory and unpredictable opinions in this area, judges, law enforcement officers, and citizens alike are left uncertain about constitutionally appropriate reactions, and officers are motivated to act with hesitancy and timidity. This neither follows this Court's guidance nor furthers the important public purposes qualified immunity serves. The Court should take this opportunity to repair the confusion created by the Fifth Circuit's "deeply indeterminate corpus of circuit precedent."[91]

CONCLUSION

The Court should grant this petition to address the significant federal question of whether, and if so, to what extent, opinions from circuit courts of appeals can clearly establish law for the purpose of qualified immunity analysis.

Given the nature of excessive force analysis, which is not capable of precise definition, the special

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dissenting, joined by Smith, Ho, Duncan, Oldham, JJ., and Owen [now Richman], C.J.) (citation omitted in original).

[90] *E.g.*, *Mullenix*, 577 U.S. at 12-13; *Brosseau*, 543 U.S. at 198.

[91] Pet. App. 23.

considerations at play in split-second use-of-force cases arising in a correctional setting, and the inconsistency of circuit courts' decisions in cases involving officers' split-second decisions about using force, this Court should hold that circuit court precedent alone does not create clearly established law for the purposes of qualified immunity in this area.

Finally, the Court should grant this petition to address the Fifth Circuit's inconsistent and deeply indeterminate precedent regarding entitlement to qualified immunity for split-second use-of-force decisions because the status quo: (1) discourages vigorous law enforcement responses in support of community and officer safety; and (2) creates uncertainty for judges, officers, and citizens throughout the Circuit.

Respectfully submitted,

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