No. 23-514

In the Supreme Court of the United States

KIM JACKSON,

Cross-Petitioner,

v.

CHRIS DUTRA, JASON EDMONSON & ERIC DEJESUS,

Cross-Respondents.

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

REPLY BRIEF FOR CROSS-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

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As we have explained, the officers' petition in No. 23-377 presents no question warranting this Court's review: There is no circuit split regarding whether "this Court's precedents [are] the only source of clearly established law" (Pet., No. 23-377, at i)—no court of appeals so holds—and this Court, far from simply "assum[ing]" a negative answer (Reply, No. 23-377, at 6), has affirmatively found the law clearly established by "binding * * * Circuit precedent" in the absence of Supreme Court case law (*Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002)). See Opp., No. 23-377, at 10-15. And the officers' second question presented simply asks for error correction, in the face of a measured decision applying a universally accepted Fourth Amendment principle in light of disputed factual questions. See *id.* at 19-24.

Should the Court disagree, however, it should also take up the logically prior question of whether qualified immunity is justified in the first place. As we have explained at length, a growing number of Justices and judges are urging the Court to do just that, voicing unease both with immunity's historical and doctrinal foundations and with the outcomes it encourages. See, *e.g.*, *Baxter* v. *Bracey*, 140 S. Ct. 1862, 1862-1864 (2020) (Thomas, J., dissenting from denial of cert.) ("Because our § 1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition."); *Zadeh* v. *Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part) ("Even in this hyperpartisan age, there is a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence."); Cross-Pet. 10-13 (collecting cases). And there is good cause for this discomfort: Qualified immunity is wrong. See *id.* at 17-34.

In response to this demonstration, the officers tellingly focus their opposition brief on (a) arguing the merits of qualified immunity's validity, and (b) attempting to relitigate the facts. But they have very little to say about the key question at the certiorari stage: whether the continued vitality of qualified immunity is an important question deserving of the Court's review. As we have described, it is.

A. The officers devote the vast majority of their brief to arguing that qualified immunity actually is well founded—including principally via a seemingly novel theory that immunity arises from the Fourth Amendment rather than from Section 1983, based on a 2023 law review article—or that, even if the doctrine is wrong, it should be saved by stare decisis. See Opp. 8-37.

That is all very interesting, but arguments about the merits—particularly, arguments that this Court itself has never evaluated or endorsed—are no grounds to deny review. At the very least, cross-petitioner has presented substantial reason to believe that qualified immunity, in its current form, is in need of correction, and many jurists agree. *See, e.g.*, *Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting) ("There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe."); *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) ("[A] one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment."); *Horvath* v. *City of Leander*, 946 F.3d 787, 801 (5th Cir. 2020) (Ho, J., concurring in part) ("[T]here is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases.").

Whatever the ultimate outcome, the Court should grant certiorari to settle the ongoing debates over qualified immunity.

B. On that question—not whether qualified immunity is wrong, but whether the Court should *decide* whether qualified immunity is wrong—the officers offer little of substance. Cf. Opp. 37-41.

They primarily attempt to downplay the "growing, cross-ideological chorus of jurists" criticizing qualified immunity. *Zadeh*, 928 F.3d at 480 (Willett, J., concurring in part); see Opp. 39-41. But, to put it mildly, the considered views of at least two sitting Supreme Court justices and over a dozen circuit judges (and counting)[1] constitute much more than, as the officers would have it, a "perceived pop culture controversy." Opp. 1.

Indeed, as we explained, that vocal and growing discontentment with qualified immunity among the lower courts is reason enough to grant review. Judicial legitimacy in the public eye is seriously threatened when the decisionmaker simultaneously announces that a constitutional wrong has occurred but no remedy is available, *and* that the doctrine precluding the remedy is legally incorrect, yet the judge has no choice but to apply it. See Cross-Pet. 13-15. *That* is

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[1] The writings cited in the cross-petition of judges criticizing and calling for reexamination of qualified immunity are by no means exclusive. See also, *e.g.*, *Ramirez* v. *Gaudarrama*, 2 F.4th 506, 524 (5th Cir. 2021) (Willett, J., joined by Graves & Higginson, J.J., dissenting from denial of rehearing en banc); *Sampson* v. *County of L.A.*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part); *Johnson* v. *Ortiz*, 2022 WL 1311540, at *3 (11th Cir. 2022) (Jordan, J., concurring); *Cox* v. *Wilson*, 971 F.3d 1159, 1161-1165 (10th Cir. 2020) (Lucero, J., joined by Phillips, J., dissenting from denial of rehearing en banc).

our legitimacy point—not that only "favorable outcomes" (Opp. 31 n.5) are credible or legitimate.

The officers also offer a pair of insubstantial vehicle objections. See Opp. 37-39. First, when an argument requires overruling precedent, waiver rules sensibly do not require a litigant to "fully develop[]" that argument (*id.* at 38) before a court that "ha[s] no authority to overrule" the existing law. *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007). Nor could it possibly matter that "this case only presents the application of qualified immunity to excessive force" cases. Opp. 38. Every qualified immunity case is limited to the substantive area of constitutional or statutory law involved in the underlying claims; that does not stop the doctrine from being implicated, or from making this case a suitable vehicle for reassessing it.

C. Finally, the officers continue to contest what actually happened, as a factual matter, on the evening of November 1, 2018, even going so far as to assert that their "actions cannot conceivably be considered a constitutional violation under any possible standard." Opp. 38; see also *id.* at 4-7; Cert. Reply, No. 23-377, at 2-4 (inserting still photos from the body-camera footage, for the first time, to dispute factual points).

Setting aside the specific inaccuracies and misleading statements in their narrative,[2] that the

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[2] For example, Ms. Jackson's supposed "extensive criminal history" (Opp. 5) is itself subject to vigorous factual dispute, and at most consists of a handful of arrests for minor offenses (see Pet. App. 38a-39a). More to the point, the officers who assaulted Ms. Jackson were unaware of any prior criminal history that might exist, rendering it irrelevant to the qualified immunity analysis. C.A. E.R. 39 (Dutra deposition, admitting that he "had no knowledge of anyone ever arresting [Ms. Jackson]" at the time of

officers continue to dispute the facts in this summary-judgment appeal is reason enough to deny their underlying petition for certiorari. It is well established that, when a government defendant takes an interlocutory appeal of an order denying qualified immunity at the summary judgment stage, that appeal is jurisdictionally limited to the "purely legal question" of whether his or her conduct—viewed in the light most favorable to the non-moving party—"violated clearly established law." *Johnson* v. *Jones*, 515 U.S. 304, 318-319 (1995). By contrast, the question "whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial" is not appealable. *Id.* at 307; see also *Ortiz* v. *Jordan*, 562 U.S. 180, 188 (2011).[3]

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the incident, or "of any crime that she had been convicted of"); *id.* at 205-207 (similar, from Sergeant Edmondson's deposition); see, *e.g.*, *White* v. *Pauly*, 580 U.S. 73, 76-77 (2017) ("Because this case concerns the defense of qualified immunity * * * the Court considers only the facts that were knowable to the defendant officers.").

Similarly, as we have already explained, the officers themselves have admitted that Ms. Jackson "didn't break the plane of the railing" with A.M. (C.A. E.R. 229 (Edmondson deposition testimony)), even when Sergeant Edmondson "reached over the railing * * * and tried to grab the child from Jackson" (C.A. E.R. 284 (Dutra police report)). As a result, the child was never in danger of falling. Cf. Opp. 6; compare also *id.* at 7 (stating, with respect to the officers' use of force, only that "Jackson continued to struggle until she finally sat on the ground"), with Pet. App. 3a (court of appeals opinion) ("[T]he officers continued to pull Jackson's arms in opposite directions even after they had moved her away from the railing," raising a "question of fact" as to "whether the officers use of force continued after the emergency had ended").

[3] The only exception is where the lower court's factual conclusions are "blatantly contradicted" by video evidence (*Scott* v. *Harris*, 550 U.S. 372, 380 (2007))—and while the officers invoke *Scott*

The officers are therefore jurisdictionally barred from contesting the court of appeals' conclusion that they "continued to pull Jackson's arms in opposite directions even after they had moved her away from the railing," and that, therefore "[a] question of fact exists as to * * * whether the officers' use of force continued after the emergency had ended." Pet. App. 3a. That they attempt to do so in opposing the cross-petition is yet more reason why their underlying petition should be denied.

(Reply, No. 23-377, at 13-14; Opp. 38), they make no serious effort to demonstrate that the court of appeals' factual conclusion that a dispute of material fact exists fits within this narrow exception. It does not.

CONCLUSION

The Court should deny the petition in No. 23-377. But if the Court grants in No. 23-377, it should grant the conditional cross-petition as well.

Respectfully submitted.

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