No. 23-541

In the
Supreme Court of the United States

DEPUTY CHAD JENKINS AND
DEPUTY MICHAEL DONNELLON,
Petitioners,

v.

JOHN JORDAN,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Respondent does not seriously contest the central legal issues presented by the petition. He does not argue *City of Houston v. Hill*, 482 U.S. 451 (1987), somehow categorically bars the existence of arguable probable cause to arrest a bystander who both loudly interferes in an ongoing traffic investigation and fails to disperse in response to a lawful order. He does not challenge that *Maryland v. Pringle*, 540 U.S. 366 (2003), requires courts to look at historical facts judged from the point of view of a reasonable officer, rather than looking to theoretical surmises of the plaintiff regarding the officer's intent. And Jordan offers no warrant for the Tenth Circuit's decision to rely on cases and arguments he did not advance before the district court.

Instead, most of Jordan's response is aimed at trying to gin up factual problems. He then attempts to use them to justify the Tenth Circuit's otherwise cursory handling of *Hill*'s critical footnote 11, as well as create a factual fog around the officers' initial use of force. But the record – brief and clear as it is – won't allow it. The district court relied not only on the same audio, but almost exclusively on Jordan's *own* evidence. As for the Tenth Circuit's supposed "intensely fact-bound application of well-established legal standards," BIO.6, it is no application at all. The Tenth Circuit's repeated declarations of the existence of factual disputes are at once non-specific and irrelevant because they do not undercut the facts upon which the district court relied. Neither the Tenth Circuit nor Jordan explain how the partial audio recording, which contradicts no facts relied upon by

the district court, nevertheless warrants reversal of that court's grant of qualified immunity. Indeed, the Tenth Circuit assumed Jordan's conduct fell within the ambit of the obstruction statute and Jordan did not argue otherwise. Pet.App.7, n.2. Rather, the Tenth Circuit simply adopted Jordan's unsubstantiated argumentative theory about the officers' hidden motives to cut a swathe through both the case law and the record.

This case thus presents an ideal opportunity to clarify the Court's standard as to what constitutes clearly established law. As for Jordan's subsidiary issue, it is premature and unnecessary to address it in this case.

I. The Decision Below Is Wrong

Jordan's response makes little effort to demonstrate the law, as interpreted and applied by the Tenth Circuit, was in fact "well-established." BIO.6. Here, there was no argument Jordan's conduct fell outside the ambit of Colorado's obstruction statute. Pet.App.7, n.2. Nevertheless, the Tenth Circuit turned *Hill* – a First Amendment decision that turned on the parties' stipulations as to the limited scope the municipal ordinance at issue, 482 U.S. at 461-612, ns. 9 &10 – into an absolute bar to the existence of probable cause under Colorado's obstruction statute, even though that statute has never similarly been declared unconstitutional. *See Michigan v. DeFillippo,* 443 U.S. 31, 38 (1979) ("Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible

exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.").

The court did this even though *Hill* itself expressly noted that conduct, such as a person standing "near a police officer and persistently attempt to engage the officer in conversation while the officer is directing traffic at a busy intersection," "might constitutionally be punished under a properly tailored statute, such as a disorderly conduct statute that makes it unlawful to fail to disperse in response to a valid police order or to create a traffic hazard." 482 U.S. at 462, n.11. Thus, on its face, *Hill*'s applicability was not "sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating" any rights created by it. *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014).

The Tenth Circuit's application of *Hill* to this case is plainly contrary to this Court's repeated admonitions against relying on factbound or qualified precedent when assessing whether the law is clearly established *See*, *e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 237 (2009); *Stanton v. Sims*, 571 U.S. 3, 7-8 (2013). Nor was the Tenth Circuit's cross-doctrinal application of *Hill* consistent with the court's own prior decisions. *See Mocek v. City of Albuquerque*, 813 F.3d 912, 927 (10th Cir. 2015) (finding this Court's Fourteenth Amendment decision in *Kolender v. Lawson*, 461 U.S. 352 (1983) was "not on point because it nowhere considered a Fourth Amendment claim").

Jordan only minimally addresses whether *Hill* can clearly establish the law in a Fourth Amendment excessive force case. Jordan does not address this

Court's decisions in *Davis v. Scherer*, 468 U.S. 183, 197 (1984) or *Elder v. Holloway*, 510 U.S. 510, 512 (1994), even though the Tenth Circuit construed the latter in derogation of the former. Nor does he offer a justification of the Tenth Circuit's reading of *Guffey v. Wyatt*, 18 F.3d 869 (10th Cir. 1999), a case that does not remotely close the gap the Tenth Circuit claims it does. Here, the Tenth Circuit, not unlike the Ninth Circuit in *Ashcroft v. al-Kidd*, "seems to have cherry-picked the aspects of [its own] opinions that gave colorable support to the proposition that the unconstitutionality of the action here was clearly established." 563 U.S. 731, 743 (2011); *see also City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021).

Jordan's defense of the Tenth Circuit is limited to reiterating the court's acknowledgment of the existence of footnote 11 in *Hill*, coupled with the court's repeated statements about non-specific factual disputes. BIO.6 & n. 4; 10. As was the case with the Tenth Circuit, Jordan's response makes no attempt to demonstrate *how* the audio recording contradicts the relevant facts that were undisputed below, most of which were supported by *Jordan's own* deposition testimony, *his own* declaration, and *his own* stipulations at summary judgment. For example, the audio, which contains only a portion of the interaction between the officers and Jordan,[1] does not and cannot contradict the following facts:

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[1] Jordan asserts the audio "preserves the dispute between Jordan and the officers" and cites the district court's statement that the audio "accurately reflects the content of the encounter[.]" BIO.1, n.1; *quoting* Pet.App. 27, n.2. The district court's footnote, however, makes clear this statement was about the accuracy of

- Officer Donnellon attempted to interview witnesses on scene and was impeded by Jordan's shouting. C.A.App.63 (Officer Jenkins' written report); 67 ¶¶ 2-3 (Jordan's partial dispute of the report); Pet.App.43-45 (addressing the degree of evidentiary dispute).
- Jordan shouted instructions regarding the questioning of multiple witnesses on the scene, not just his nephew. C.A.App.77-78 (audio at 2:36 to 2:54 & 3:56 to 4:00 in which Jordan references "witnesses" and what "they're saying" and "their statements").[2]
- Officer Jenkins ordered Jordan to leave the scene, but Jordan did not comply and verbally refused to leave. C.A.App.56 (Jordan deposition); 74, ¶23 (stipulation); 78-79 (audio at 4:03 to 4:11).

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the transcription of the audio. No conclusion was drawn by the district court as to the comprehensiveness of the audio recording. To the contrary, in his declaration Jordan acknowledged he did not begin recording immediately. C.A.App.95, ¶4 (began recording 3 to 5 minutes after arrival).

[2] Jordan appears to attempt to create doubt over whether witnesses other than his nephew were present at the scene. BIO.8 & n.5. If so, this is inconsistent with, among other things, his own recorded statements. Jordan is also incorrect that the officers did not distinguish on appeal between interviewing Jordan's nephew and other witnesses. The district court drew this distinction when it discussed the officers' ability to conduct their "interviews." Pet.App.43-44. The officers did likewise in their brief, Resp. Br. 2 & 13, and then pressed it at oral argument. Oral Arg. at 23:45-25:24, https://www.ca10.uscourts.gov/sites/ca10/files/oralarguments/22-1154.mp3.

- Officer Jenkins ordered Jordan multiple times to put his hands behind his back, the first of which Jordan asserts he did not hear and therefore did not obey. C.A.App.68, ¶5; 74, ¶¶23-24 (stipulations); 79 (audio at 4:11 to 4:49).
- The first order to Jordan to place his hands behind his back came before the first "[sounds of scuffle]" on the audio. C.A.App. 79 (audio at 4:11 to 4:16).
- Jordan conceded he heard the *second* order to put his hands behind his back and still did not immediately comply. C.A.App.56 (Jordan deposition testimony that he "kind of turned" in response to second order); 96, ¶7 (Jordan's declaration indicating he "could not comply" with an order when he was holding his phone to his ear).
- At or after the *second* order, Officer Jenkins "grabbed [Jordan's] arm," which Jordan attempted to avoid. C.A.App.68-69, ¶¶5-6 (stipulations); 96, ¶ (Jordan's declaration that Officer Jenkins "was trying to knock the phone out of my hand and I was trying to put the phone in my left-hand shirt pocket").

Other details were disputed at the district court. But these were not. They were sufficient, moreover, to grant the officers qualified immunity based on the law as it then existed. *See City of Escondido v. Emmons*, 139 S. Ct. 500, 502 & 503 (2019); *Hinton v. City of Elwood*, 997 F.2d 774, 781 (10th Cir. 1993); *see also*

Mocek, 813 F.3d 912, 924 (10th Cir. 2015) ("[T]he information available to [the officer] indicated that [the plaintiff] had distracted multiple TSA agents, persistently disobeyed their orders, already caused a 'disturbance' (according to the agents on the scene), and potentially threatened security procedures at a location where order was paramount. Under these circumstances, a reasonable officer would have had reason to believe, or at least investigate further, that [plaintiff] had committed … disorderly conduct.").

Instead of squarely addressing these facts and lining them up against footnote 11 in *Hill*, the Tenth Circuit simply adopted what Jordan repeatedly called his "theory of the case," C.A.App.86; Op. Br. 4, 14; 17 n.7; Reply Br. 4, 10 – namely his subjective view of the officer's unexpressed motives. Based on this theory, the Tenth Circuit concluded *Hill*'s footnote did not apply because the audio did not contradict Jordan's version of events, which was that the officers arrested him for "merely criticizing" them. Pet.App.10 & 18, n.7. In doing this, the Tenth Circuit not only transgressed the limits of *Scott v. Harris*, 550 U.S. 372, 380 (2007), *see* Part III, below, but it nullified the standard in *Pringle*. *Pringle* requires courts to look at objective historical facts judged from the point of view of a reasonable officer. 540 U.S. 366 (2003).

Under the Tenth Circuit's approach here, a plaintiff's theory of a case regarding an officer's motive now trumps undisputed evidence in qualified immunity cases unless the theory is contradicted by an audio recording. But theories of a case are not evidence. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990); *see also Bones v. Honeywell Int'l, Inc.*,

366 F.3d 869, 875 (10th Cir. 2004); *Higgins v. Martin Marietta Corp.*, 752 F.2d 492, 496 (10th Cir. 1985). Even if there had been evidence of the officers' intent, that intent is irrelevant to the affirmative defense of qualified immunity. *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998) ("[A] defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense."). This Court should grant review and reverse the Tenth Circuit's contrary judgment.

II. The Questions Presented Are Critically Important And Warrant Review In The Absence Of A Circuit Split

The issue of qualified immunity is one of the exceptional circumstances where the Court will grant review merely to reverse an erroneous decision of a court of appeals. "Because of the importance of qualified immunity 'to society as a whole,' the Court *often* corrects lower courts when they wrongly subject individual officers to liability." *City & Cty. of S.F. v. Sheehan*, 575 U.S. 600, 611 n.3 (2015) (emphasis added) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). There was, for example, no circuit split indicated in the petitions granted in *al-Kidd*, No. 10-98, 563 U.S. 731 (2011) or *Emmons*, No. 17-1660, 139 S. Ct. 500 (2019). Nor was it indicated on the issue of whether the law was clearly established in the petitions in *Sheehan*, No. 17-1660, 575 U.S. 600 (2015) and *Wesby*, No. 15-1485, 583 U.S. 48 (2018).

Review is warranted, in part, because the central legal issue – the existence of clearly

established applicable precedent – is impeded, not advanced, by conflicts between the circuits. *See al-Kidd*, 563 U.S. 731, 742 (2011) (in the absence of controlling authority, requiring a "robust consensus of cases of persuasive authority") (quotation omitted). Moreover, the less precedent on point, the greater the error of a court of appeals in reversing a grant of qualified immunity.

III. This Case Presents A Clean Vehicle

Jordan does not and cannot dispute the questions presented are enormously consequential and recur frequently. Indeed, the underlying issue of how to construe clearly established law arises in every case where the issue of qualified immunity is raised. The Tenth Circuit's rule, moreover, places officers in an untenable position requiring them to guess at the governing law with no redeeming policy benefit to justify it. There is thus neither legal nor practical warrant for the Tenth Circuit's anomalous interpretation of relevant precedent.

Nor is there any merit to Jordan's efforts to conjure up a vehicle problem. As explained, his repeated refrain that the Tenth Circuit properly found relevant disputed factual issues based on the audio recording is demonstrably wrong. *See* Part I, above. In *Scott*, 550 U.S. at 380, the Court held "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Here, however, the audio recording is not only incomplete, it does not

contradict the undisputed facts put before the district court.

The fact that the audio recording does not capture other facts relied upon by the district court is literally an argument from (incomplete) silence and not a basis to undercut undisputed evidence. *See Helvie v. Jenkins*, 66 F.4th 1227, 1236 (10th Cir. 2023) (plaintiff's statements "made both during his own deposition and in a sworn affidavit that Deputy Jenkins never said anything about the gun while the deputy was pulling [the plaintiff] from his truck" is "not sufficient to create a triable issue as to the credibility of Deputy Jenkins's incident report and subsequent sworn testimony as to when he saw the gun"). Again, Jordan's "theory of the case" regarding the officers' motives is not evidence, nor is his supposition supported by any. This case thus presents an ideal vehicle to review the questions presented.

IV. The Questions Presented Do Not Fairly Include The Subsidiary Issue Identified By Jordan

Pivoting, Jordan asserts the availability of qualified immunity as an affirmative defense to Section 1983 claims is a subsidiary issue to the questions presented under Sup. Ct. R. 14.1(a). BIO.11. He argues the text of Section 1983 passed by Congress in 1871 expressly excluded state law immunities, such as qualified immunity. BIO.12-14, *relying on* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201 (2023) *and Rogers v. Jarrett*, 63 F.4th 971, 979-81 (5th Cir. 2023) (Willett, J., concurring).

Jordan, however, omits that Judge Willett, in a recent dissenting opinion acknowledged that "[n]ot all scholars are convinced" by Professor Reinart's assessment. *Villarreal v. City of Laredo*, No. 20-40359, 2024 U.S. App. LEXIS 1533, *64 n.14 (5th Cir. Jan. 23, 2024) (Willett, J., dissenting) (*citing* William Baude*, Codifiers' Errors and 42 U.S.C. § 1983*, VOLOKH CONSPIRACY (June 12, 2023), https://reason.com/volokh/2023/06/12/codifers-errors-and-42-u-s-c-1983/). This is in part because Section 1983 was reenacted in the Revised Statutes of 1874 without the language at issue. V*illarreal*, 2024 U.S. App. LEXIS 1533 at *64 n.14; *cf. Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 624 (1979) (Powell, J., concurring).

Thus, even setting aside Jordan's acknowledgment of a potential ambiguity in the original statutory text, BIO.13, n.6, it is not at all clear the original text prevails over the statute as reenacted, albeit through a codification. *See United States v. Sischo*, 262 U.S. 165, 168-169 (1923); *Villarreal*, 2024 U.S. App. LEXIS 1533 at *64 n.14. Far from being a "cat … now out of the bag," BIO.14, this is precisely the sort of scholarly exploration that would benefit from greater percolation–both within the academy and among circuit courts.

If the Court were inclined to reexamine a nearly 60-year-old line of cases based on such a slender and newly sprouted reed, the Court would then have to decide where to cut off its reexamination. The Court, for example, would still need to determine whether there are alternative constitutional grounds for a functionally similar rule to the one derived from the current statutory text. *See United States v. Lanier*,

520 U.S. 259, 270-71 (1997). Jordan offers no line of demarcation. He merely posits his subsidiary issue is "purely legal" and pertains to the validity of this Court's "prior precedent." BIO.11&13. But that hardly provides a meaningful cutoff.

By contrast, in *Siegert v. Gilley*, 500 U.S. 226, 232 (1991), the Court considered an issue not raised in the questions presented – namely whether the plaintiff had "asserted a violation of a constitutional right at all" – because the new issue was a "necessary concomitant" to the issue of whether the constitutional right at issue was clearly established. *Accord id.* at 237, n.1 (Marshall, J., dissenting). That logical necessity is not present here. The Court need only address the questions set out in the petition. Any underlying statutory or constitutional issues are best reserved for cases where they are raised before the court of appeals. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998).

CONCLUSION

The petition should be granted.

Respectfully submitted.

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